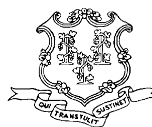
CONNECTICUT LAW JOURNAL



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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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JOHN DOE #2 ET AL. *v.* ROBERT RACKLIFFE (SC 20420)

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

Syllabus

The seven plaintiffs filed six separate actions in 2014 or 2015, seeking to recover damages from the defendant pediatrician for personal injuries they sustained as a result of the defendant's alleged sexual abuse when they were his minor patients in the 1970s and 1980s. The plaintiffs

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

alleged that the defendant's practice of digitally penetrating their anuses during their annual physical examinations constituted both intentional sexual assault and medical negligence, and certain plaintiffs also alleged intentional and negligent infliction of emotional distress. The defendant moved for summary judgment as to the counts of the complaints sounding in negligence on the ground that those claims were barred by the two to three year limitation period contained in the statute (§ 52-584) pertaining to negligence and malpractice actions. The trial court granted the defendant's motions for summary judgment as to the negligence counts, concluding that, because they alleged causes of action arising out of medical conduct, § 52-584 applied rather than the extended statute of limitations (§ 52-577d) applicable to actions for damages to minors caused by sexual assault, abuse or exploitation, which permits such actions to be brought within thirty years from the date the person attains the age of twenty-one. After withdrawing the remaining counts alleging sexual assault and intentional infliction of emotional distress, the plaintiffs appealed. *Held* that the extended limitation period set forth in § 52-577d did not apply to the plaintiffs' claims for injuries arising from medical negligence and negligent infliction of emotional distress, unaccompanied by an originating act of intentional misconduct, and, therefore, the plaintiffs' negligence claims were governed by the limitation period set forth in § 52-584; in light of the language and legislative history of § 52-577d, this court concluded that the limitation period set forth in § 52-577d, which was part of a legislative initiative to address the rights of crime victims, does not apply to negligence claims that do not arise out of harm caused by the intentional sexual abuse, exploitation, or assault of a minor.

Argued February 20—officially released December 15, 2020**

Procedural History

Six actions to recover damages for, inter alia, the defendant's alleged sexual assault of the minor plaintiffs, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Superior Court in the judicial district of New Britain, where the court, *Young, J.*, granted in part the defendant's motion for summary judgment as to the named plaintiff; thereafter, the court, *Young, J.*, granted the plaintiffs' motions to substitute William J. Forbes, executor of the estate of Robert Rackliffe, as the defendant;

** December 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

subsequently, the court, *Young, J.*, granted the substitute defendant's motions for summary judgment as to certain counts of the complaints, and the plaintiffs withdrew the remaining counts of the complaints; thereafter, the court, *Morgan, J.*, granted the plaintiffs' motions to consolidate the cases, and the court, *Young, J.*, rendered judgments for the substitute defendant, from which the plaintiffs appealed. *Affirmed.*

A. Ryan McGuigan, with whom were *Thomas A. Plotkin* and, on the brief, *Joseph B. Burns* and *Nathan C. Favreau*, for the appellants (plaintiffs).

Logan A. Carducci, with whom were *Laura Pascale Zaino*, *William J. Sweeney, Jr.*, and, on the brief, *Richard C. Tynan*, for the appellee (substitute defendant).

Opinion

ECKER, J. The sole issue in this appeal[1] is whether the extended statute of limitations in General Statutes § 52-577d[2] applies to negligence claims for personal injuries brought against the alleged perpetrator of a sexual assault. The seven plaintiffs[3] in these six consolidated cases appeal from the decision of the trial court rendering summary judgment in favor of the defendant, William J. Forbes, as executor of the estate of Robert Rackliffe,[4] on the ground that the plaintiffs' negligence

[1] The plaintiffs appealed from the judgments of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] We note that the legislature has recently amended § 52-577d. See Public Acts 2019, P.A. 19-16, § 13 (replacing "minor" with "person under twenty-one years of age" and "age of majority" with "age of twenty-one"). Hereinafter, unless otherwise indicated, all references to § 52-577d are to the 2019 revision of the statute.

[3] The plaintiffs in these six consolidated cases are seven individuals who were pediatric patients of the original defendant, Robert Rackliffe; see footnote 4 of this opinion; when they were minor children.

[4] On November 29, 2016, following Rackliffe's death, the trial court granted the motion to substitute William J. Forbes, the executor of Rackliffe's estate, as the defendant. Prior to the substitution, the trial court had granted partial summary judgment, as to the negligence claims, in favor of Rackliffe in

claims were time barred. The plaintiffs, each of whom were minors at the time of the alleged assaults, contend that the trial court improperly applied the general negligence statute of limitations in General Statutes § 52-584 to their claims alleging medical negligence and negligent infliction of emotional distress instead of the extended limitation period set forth in § 52-577d. We disagree and, accordingly, affirm the judgments of the trial court.

The record reveals the following pertinent facts and procedural history. The plaintiffs were minor patients of Rackliffe, a pediatrician practicing in New Britain, from the early 1970s to the 1980s. The plaintiffs allege that, during their annual physical examinations, Rackliffe digitally penetrated each plaintiff's anus. Several of the male plaintiffs additionally allege that Rackliffe fondled their genitals. Each plaintiff claims that he or she has suffered physical and emotional injuries as a result of Rackliffe's actions.

All seven plaintiffs allege that Rackliffe's conduct constituted both intentional sexual assault and medical negligence. In the medical negligence counts, the plaintiffs each allege that Rackliffe knew or, in the exercise of reasonable care, should have known that his actions violated the standard of care applicable to a pediatrician. Attached to each complaint were a certificate of good faith and an accompanying opinion letter of a similar health care provider pursuant to General Statutes § 52-190a (a). Several plaintiffs also included claims alleging intentional infliction of emotional dis-

John Doe #2 v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (December 14, 2015). After the substitution, the court rendered judgments in favor of Forbes in *John Doe #2*, as well as in the remaining five cases. For ease of reference, we refer in this opinion to Rackliffe and Forbes collectively as the defendant.

tress and negligent infliction of emotional distress.[5] In all six actions, the defendant sought summary judgment as to the counts sounding in negligence.[6]

The defendant argued in his motions for summary judgment that the counts sounding in negligence were time barred by § 52-584 because the actions were commenced more than three years after the alleged injurious acts occurred. In three separate memoranda of deci-

[5] The counts contained in each of the complaints are as follows. The two plaintiffs in *James Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5017357-S (September 28, 2018), and the plaintiff in *John Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017333-S (September 28, 2018), each alleged intentional sexual assault and medical negligence. In *John Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (September 28, 2018), *Jane Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016759-S (September 28, 2018), *Jane Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017021-S (September 28, 2018), and *Jane Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017022-S (September 28, 2018), the plaintiffs each alleged intentional sexual assault, intentional infliction of emotional distress, medical negligence and negligent infliction of emotional distress.

[6] In *James Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5017357-S (September 28, 2018), the defendant filed a motion for summary judgment as to the second and fourth counts, respectively alleging medical negligence with respect to each of the two plaintiffs. In *John Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (September 28, 2018), the defendant filed a motion for summary judgment as to the third and fourth counts, respectively alleging negligence and negligent infliction of emotional distress. In *John Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017333-S (September 28, 2018), the defendant incorrectly named counts three and four of the plaintiff's complaint in the motion for summary judgment, but the trial court treated the defendant's motion as seeking summary judgment as to count two, which alleged medical negligence. In *Jane Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016759-S (September 28, 2018), *Jane Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017021-S (September 28, 2018), and *Jane Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017022-S (September 28, 2018), the defendant sought summary judgment as to counts three and four, which in all three complaints respectively alleged medical negligence and negligent infliction of emotional distress.

sion, the trial court granted summary judgment as to all of the negligence counts.[7] The court reasoned that those counts alleged a cause of action arising out of medical conduct, not sexual assault, abuse or exploitation, as required by § 52-577d. The court rejected the plaintiffs' reliance on this court's decision in *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 147 A.3d 104 (2016), as well as certain decisions of the Superior Court, holding that § 52-577d applies to claims that third parties negligently failed to take precautions to protect children from sexual abuse, exploitation or assault perpetrated by an intentional wrongdoer. The court distinguished those cases on the ground that, unlike the negligence claims in the present case, the claims of negligence in the third-party negligence cases arose out of injuries caused by acts of intentional sexual misconduct.

After the trial court granted partial summary judgment in all six actions, the plaintiffs withdrew the counts alleging sexual assault and intentional infliction of emotional distress. The trial court subsequently granted the plaintiffs' motions to consolidate the cases for purposes of appeal. This appeal followed.

The question whether § 52-577d applies to claims sounding in negligence brought against an alleged perpetrator of child sexual assault presents a question of statutory interpretation subject to plenary review. See, e.g., *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 382, 194 A.3d 759 (2018); *Barrett* v. *Montesano*, 269 Conn. 787, 792, 849 A.2d 839 (2004). In construing the relevant statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks

[7] The court issued the three memoranda of decision over the course of two years. Although there are minor differences in the three decisions, the court's analysis in all three decisions is consistent. For ease of discussion, we set forth a composite summary of the reasoning in those decisions.

omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008).

We begin, of course, with the text of the statutes in light of the relevant statutory framework. See General Statues § 1-2z. If the text and pertinent statutory context lead to a clear and unambiguous meaning, then our interpretive task is finished. See General Statues § 1-2z ("[i]f, after examining such text and considering [its] relationship [to the broader statutory scheme of which it is a part] the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered"). "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Tarnowsky* v. *Socci*, 271 Conn. 284, 287 n.3, 856 A.2d 408 (2004).

A review of the relevant statutes of limitations, and the way those statutes interrelate, supplies useful background. General Statutes § 52-577, sometimes referred to as our "general tort statute of limitations,"[8] provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Section 52-584, which governs negligence claims in particular, provides in relevant part: "No action to recover damages for injury to the person . . . caused by negligence . . . or by malpractice of a physician . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

These two statutes together establish the basic scheme applicable to the vast majority of tort cases in Connecticut. The three year limitation period in § 52-

[8] *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 212, 541 A.2d 472 (1988).

577 applies to all tort actions except (1) negligence claims, which are governed by § 52-584, and (2) tort claims governed by a specialized statute of limitations.[9] See *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 333 n.20 ("[t]his court previously has held that '[t]he [three year] limitation of § 52-577 is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of § 52-577 and enumerated in § 52-584 or another section' "). Put simply, the general rule in Connecticut is that intentional torts, unless subject to a specialized statute of limitations, are governed by the three year statute of limitations in § 52-577; see, e.g., *Watts* v. *Chittenden*, 301 Conn. 575, 582–83, 22 A.3d 1214 (2011); whereas torts based in negligence generally are subject to the two year statute of limitations in § 52-584.

This brings us to § 52-577d, a specialized statute of limitations that creates an extended limitation period for personal injury claims arising from sexual misconduct involving victims under the age of majority. Cf. footnote 2 of this opinion. Specifically, § 52-577d provides: "Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years from the date such person attains the age of majority." The question in the present case is whether this statutory exception encompasses negligence claims that do not arise out of harm caused by the intentional sexual abuse, sexual exploitation or sexual assault of a minor.

[9] Section 52-577d, the statute at issue in the present case, is an example of such a specialized statute of limitations. Other examples include the statutes governing actions for defamation; see General Statutes § 52-597 ("[n]o action for libel or slander shall be brought but within two years from the date of the act complained of"); and for product liability. See General Statutes § 52-577a (establishing three year statute of limitations and ten year statute of repose for claims within scope of Connecticut Product Liability Act).

Although we have never previously addressed this precise question, we do not write on an altogether clean slate with regard to the application of § 52-577d to claims of negligence. In *Boy Scouts of America Corp.*, we considered whether the extended limitation period in § 52-577d applied to a negligence claim brought in 2012 by a former troop member who alleged that the Boy Scouts organization had failed to take adequate precautions to prevent an adult troop leader from sexually abusing the plaintiff in the 1970s, when the plaintiff was a minor. *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 308–309, 311. The defendant contended that the negligence claim was time barred because § 52-577d "applies only to *intentional* torts, i.e., to claims against the perpetrator of a sexual assault on a minor, while § 52-584 continues to apply to claims against parties whose negligent conduct is alleged to have caused injury to the plaintiff when he was a minor." (Emphasis in original.) Id., 331. We rejected that claim and concluded that the legislature intended the extended limitation period to encompass negligence claims against parties whose carelessness enables an intentional wrongdoer to perpetrate the sexual abuse, exploitation or assault of a minor. Id., 333–40.

The plaintiffs in the present case argue that our holding in *Boy Scouts of America Corp.* is dispositive of their claims and requires reversal. Their logic is a model of simplicity: their claims are not time barred because they sound in negligence, and *Boy Scouts of America Corp.* held that negligence claims fall within the scope of § 52-577d. The superficial appeal of this argument disappears, however, when we focus on an essential distinction between the cases. The issue in *Boy Scouts of America Corp.* was whether the extended statute of limitations in § 52-577d applied to claims of negligence against third parties *arising out of an underlying act of intentional sexual misconduct*, namely, the troop leader's sexual abuse of the minor plaintiff. Id., 331.

Indeed, the causal nexus connecting the allegations of negligence to injuries resulting from an originating act of intentional misconduct was the pivotal point in our reasoning. We held that the reach of the statute was determined by reference to its purpose in "providing a recovery for a particular type of injury, namely, 'personal injury to a minor, including emotional distress, *caused by sexual abuse, sexual exploitation or sexual assault* . . . .' " (Emphasis altered.) Id., 334. This point highlights what distinguishes the issue decided in *Boy Scouts of America Corp.* from the legal claim made by the plaintiffs in the present case because the plaintiffs in this case have asserted negligence claims involving injuries that do *not* result from intentional sexual misconduct.

The statutory language, although ambiguous,[10] goes a long way toward answering the question presented in this case. As we just noted, the statute applies only to an "action to recover damages for personal injury to a minor, including emotional distress, *caused by sexual abuse, sexual exploitation or sexual assault* . . . ." (Emphasis added.) General Statutes § 52-577d. The sine qua non for application of the statute is the requirement of harm caused by an originating act of sexual abuse, exploitation or assault. The operative terms employed by the legislature to identify the required cause of the injuries—sexual abuse, sexual exploitation and sexual assault—are normally associated with intentional and deliberate wrongdoing; we do not commonly consider sexual abuse, exploitation or assault to be the result of mere accident or carelessness.[11] Indeed, a person engaging in such conduct almost invariably will seek

[10] See *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 333 ("we conclude that the reference to § 52-577 in § 52-577d does not compel the interpretation urged by the defendant but, instead, merely creates ambiguity as to whether the legislature intended § 52-577d to apply to claims that would otherwise be subject to § 52-584").

[11] We note that the sole issue presented is one of statutory construction, i.e., whether the legislature intended § 52-577d to encompass negligence

to achieve his purposes using force, threats, trickery, coercion, deceit, or other wrongful means bespeaking active malfeasance. Dictionary definitions[12] and legal treatises[13] uniformly define sexual abuse, exploitation and assault to mean intentional, usually criminal, con-

claims for personal injuries that do not result from intentional sexual misconduct. We do not address whether Connecticut recognizes the tort of negligent sexual abuse, exploitation or assault, but only whether the plaintiffs' medical negligence claims are subject to the extended statute of limitations provided in § 52-577d.

[12] For definitions of "sexual assault" and "assault," see, for example, Black's Law Dictionary (11th Ed. 2019) pp. 141–42 (defining "assault" as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact" and "sexual assault" as including "[o]ffensive sexual contact" and "[s]exual intercourse with another person who does not consent"), Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/sexual%20assault (last visited December 11, 2020) (defining "sexual assault" as "illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent"), 1 Oxford English Dictionary (2d Ed. 1998) p. 701 (defining "assault" as "[a]n onset or rush upon any one with hostile intent"), Random House Dictionary of the English Language (2d Ed. 1987) p. 124 (defining "assault" as "a sudden, violent attack; onslaught . . . rape"), Webster's Third New International Dictionary (2002) p. 130 (including "rape" as one synonym of "assault"), and American Heritage College Dictionary (4th Ed. 2007) p. 85 (same).

For definitions of "sexual abuse," see, for example, Black's Law Dictionary (11th Ed. 2019) p. 1652 (defining "sexual abuse" as "rape"), and Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/legal/sexual%20abuse (last visited December 11, 2020) (defining "sexual abuse" as "the infliction of sexual contact upon a person by forcible compulsion").

Black's Law Dictionary defines "sexual exploitation" as "[t]he use of a person, [especially] a child, in prostitution, pornography, or other sexually manipulative activity." Black's Law Dictionary (11th Ed. 2019) p. 1652.

[13] For definitions of assault, see, for example, 6 Am. Jur. 2d 8–9, Assault and Battery § 1 (2008) ("An assault is a demonstration of an unlawful intent by one person to inflict immediate injury or offensive contact on the person of another then present. It is frequently defined as an intentional attempt by a person, by force or violence, to do an injury to the person of another, or as any attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it, an immediate intention coupled with a present ability to commit a battery." (Footnote omitted.)), 6 Am. Jur. 2d, supra, § 15, p. 19 ("[e]ven when a statutory definition of assault or assault and battery does not contain the word 'intent' or 'intentional,' the requirement

duct. Case law from Connecticut and elsewhere arising in a wide variety of civil law contexts likewise reflects a strong tendency to treat these acts as wilful and intentional. See, e.g., *Henderson* v. *Woolley*, 230 Conn. 472, 482, 644 A.2d 1303 (1994) (holding that parental immunity doctrine does not bar personal injury claims brought by child against her parent alleging sexual abuse, exploitation and assault because doctrine was not intended to extend to intentional misconduct); *United Services Automobile Assn.* v. *Marburg*, 46 Conn. App. 99, 102, 104, 111, 698 A.2d 914 (1997) (affirming judgment declaring that insurer had no duty to indemnify insured for damages arising from sexual abuse of minor because coverage was excluded for "expected or intended" injuries, and noting that "[m]any cases from other jurisdictions have held, under a doctrine of presumption of intent, that acts of sexual molestation of minors are so heinous that intent to cause harm is presumed as a matter of law" (internal quotation marks omitted)); *Paneson* v. *Zubillaga*, 753 So. 2d 127, 129 (Fla. App.) (addressing doctor's unlawful and unpermitted sexual touching of patient as intentional tort), review denied, 773 So. 2d 59 (Fla. 2000); *Heacock* v. *Cook*, 60 So. 3d 624, 628 (La. App. 2010) (sexual exploitation of patient is intentional tort); *Fearing* v. *Bucher*, 328 Or. 367, 373, 977 P.2d 1163 (1999) (treating sexual assault as intentional tort for purposes of application of doctrine of respondeat superior); *South Carolina Medical Malpractice Liability Ins. Joint Underwriting Assn.* v. *Ferry*, 291 S.C. 460, 464, 354 S.E.2d 378 (1987) (dentist's

of intent to inflict an injury has frequently been established as an essential element of the crime by judicial construction"), and 1 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2006) § 3.4, p. 320 (defining "assault" as "an act intended to cause a battery upon another person, or to put another person in apprehension of an immediate battery (a bodily contact, either harmful or offensive), and that succeeds in causing an apprehension of such battery in the other or a third person" (footnote omitted)).

For a definition of "sexual abuse," see, e.g., 6 Am. Jur. 2d, supra, § 8, p. 14 ("[a]n act of sexual abuse is a battery").

professional liability coverage did not apply to claim for sexual assault, which is intentional tort); *Graves* v. *North Eastern Services, Inc.*, 345 P.3d 619, 629 (Utah 2015) (treating sexual assault as intentional tort for purposes of determining whether apportionment rules apply); *Horace Mann Ins. Co.* v. *Leeber*, 180 W. Va. 375, 378–81, 376 S.E.2d 581 (1988) (treating claim of "sexual misconduct" as allegation of intentional tort and recognizing split of authority as to duty to defend and to provide coverage to insured for damages allegedly caused by sexual misconduct when policy excludes coverage for "intentional injury"); *J. K.* v. *Peters*, 337 Wis. 2d 504, 513, 808 N.W.2d 141 (App. 2011) (characterizing sexual assault and abuse of child as intentional torts).

A careful review of the legislative history confirms the view that the extended statute of limitations in § 52-577d was intended to require an originating act of intentional sexual abuse, exploitation or assault. Section 52-577d originally was enacted as part of No. 86-401 of the 1986 Public Acts (P.A. 86-401), An Act Concerning Victims Rights. As its title suggests, P.A. 86-401 focused on the rights of crime victims. See 29 S. Proc., Pt. 11, 1986 Sess., p. 3781, remarks of Senator Richard B. Johnston. In addition to extending the statute of limitations for actions seeking damages for injuries caused by sexual abuse, exploitation or assault of a minor;[14] see P.A. 86-401, § 6; the act implemented changes to the Office of Victim Services and gave victims the right to be notified of scheduled plea agreements and to present statements to the court prior to the court's acceptance

[14] As subsequently amended in a technical amendment by No. 86-403, § 104, of the 1986 Public Acts, § 6 of P.A. 86-401 provided: "Notwithstanding the provisions of section 52-577 of the general statutes, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person no later than two years from the date such person attains the age of majority, except that no such action may be brought more than seven years from the date of the act complained of."

of the pleas resulting from those agreements. See P.A. 86-401, § 2. The act also required the Criminal Injuries Compensation Board to provide victims with a list of their rights, as well as available assistance programs. See P.A. 86-401, § 1. No predicate criminal prosecution or conviction is required to qualify a claim for the extended limitation period provided by § 52-577d,[15] but the overriding purpose of the statute plainly was to enable crime victims additional time to bring civil actions for physical and emotional injuries arising from brutal, predatory sexual crimes perpetrated against them when they were children.

In examining whether § 52-577d was intended to reach injuries caused without any originating act of intentional sexual abuse, exploitation or assault, we consider it significant that the extension of the statute of limitations for civil actions was part of a legislative initiative designed to address the rights of crime victims. The particular references contained in the legislative history to horrific criminal acts indicate that the legislature's focus was on harm resulting from intentional sexual misconduct. Representative Richard D. Tulisano, one of the proponents of the bill, stated that

[15] The legislature was aware that not all sexual misconduct resulted in criminal convictions, and the relevant statutory scheme was amended in 2002 to abolish altogether the statute of limitations for personal injury actions brought by the victim of first degree or aggravated first degree sexual assault. See Public Acts 2002, No. 02-138, § 3 (P.A. 02-138), codified at General Statutes § 52-577e ("[n]otwithstanding the provisions of sections 52-577 and 52-577d, an action to recover damages for personal injury caused by sexual assault may be brought at any time after the date of the act complained of if the party legally at fault for such injury has been convicted of a violation of section 53a-70 or 53a-70a"). This statutory refinement does not, however, support the plaintiffs' argument in the present case. The distinction between §§ 52-577d and 52-577e is that the latter addresses sexual misconduct that results in a criminal conviction, whereas the former concerns all other sexual misconduct. There is no reason to believe that the passage of P.A. 02-138 signaled an intention to include within the scope of § 52-577e the injurious consequences of noncriminal sexual misconduct.

the extended limitation period would apply in civil cases "in which a minor who has been victimized by sexual assault could bring an action against the offender . . . ." 29 H.R. Proc., Pt. 12, 1986 Sess., p. 4388. In response to those who opposed the extension of the statute of limitations, Representative Tulisano reminded those present: "We're talking about young individuals who are raped, who are sexually exploited, who are sexually assaulted." 29 H.R. Proc., Pt. 17, 1986 Sess., p. 6335. The remarks of other legislators reflected a similar understanding. Representative Naomi K. Cohen, who spoke in favor of the extension, recalled one of her constituents "who was raped in her home, as a [sixteen] year old, not by a relative but by someone else. Her parents and her sister were tied up in other rooms and had the opportunity to listen to the act. Without this amendment, the statute of limitations on her rights to file suit would have expired before she and her family, after a number of years of psychological counseling and psychiatric therapy were able to deal with this problem." Id., p. 6341. Representative John J. Woodcock III remarked that the bill would give "people who have been *brutally victimized* . . . a right and a remedy . . . ." (Emphasis added.) Id., p. 6340. We have not found any references to negligent sexual misconduct in the legislative history.

The legislative history contains additional evidence that the legislation was aimed at intentional rather than negligent sexual misconduct. The issue of liability insurance coverage was raised several times, with some legislators expressing concern that the extended limitation period might cause the insurance rates of some businesses, including daycare providers, to rise. See, e.g., id., pp. 6330–31, 6337–38, remarks of Representative William L. Wollenberg. Representative Woodcock addressed those concerns: "I have never seen an insurance policy that covers behavior for sexual abuse, sex-

ual exploitation or sexual assault. These are [wilful], [wanton] and reckless acts. This type of behavior is never defended by the insurance company. It does not fall within the coverage parameters of insurance." Id., p. 6339. Representative Michael D. Rybak also raised the prospect that passage of the bill might cause insurance companies to alter language in insurance policies to preclude coverage for sexual abuse, exploitation or assault. Id., p. 6356. Representative Tulisano responded that the very nature of the conduct at issue ruled out insurance coverage. "[T]his is [wilful] and [wanton]. *It's an intentional act that we're talking about here under this particular proposal.* So the individual would in fact be responsible personally." (Emphasis added.) Id., p. 6357. This aspect of the legislative history reinforces the view that the statute was intended to address causes of action for personal injuries arising from intentional sexual misconduct. The legislature was aware that insurers do not provide coverage for intentional torts, including sexual abuse, exploitation and assault, and discussed extensively the problems that victims would likely encounter in the event that the perpetrator lacked sufficient assets to support a recovery.[16]

[16] Lawmakers were aware that, in some instances, victims relying on the extended limitation period may obtain little or even no monetary relief. See 29 H.R. Proc., Pt. 17, 1986 Sess., pp. 6336–37, 6345–46. Proponents of the legislation emphasized, however, that the benefit afforded to victims goes beyond the ability to recover money damages. An important purpose of the extension of the limitation period is to afford victims the satisfaction of holding the intentional wrongdoer legally responsible, thus enabling victims to move forward with their lives. See id. Accordingly, we disagree with the plaintiffs that our construction of § 52-577d runs contrary to the public policy underlying our tort system of shifting loss from victims to wrongdoers. Compensating victims financially undoubtedly counts among the primary purposes of our tort law. See, e.g., *Doe* v. *Cochran*, 332 Conn. 325, 363, 210 A.3d 469 (2019). And, as the legislators made clear in the floor debate of P.A. 86-401, the overarching purpose of the statute is to make victims whole, a process that will include monetary recovery, if possible. But this logic does not require us to conclude here that the legislature intended the statute to apply to injuries caused by purely negligent sexual misconduct. To the contrary, the legislature recognized that financial compensation may not occur in every case involving the sexual abuse, exploitation or assault of a minor.

The legislative history surrounding the passage of P.A. 86-401 demonstrates that the legislature intended to provide an extended limitation period so that victims could hold wrongdoers accountable and, when possible, recover money damages for personal injuries arising from intentional acts of sexual abuse, exploitation or assault. Although the legislature exhibited an intention to encompass, within the scope of the statute, negligence claims against third-party defendants whose carelessness amounted to a breach of a duty to protect a minor against harm arising from sexual misconduct, there is no indication anywhere in the legislative history that the extended limitation period was intended to apply in the absence of an act of intentional sexual abuse, exploitation or assault. This legislative history supports our conclusion that the extended limitation period set forth in § 52-577d does not apply to the plaintiffs' claims for injuries arising from medical negligence and negligent infliction of emotional distress, unaccompanied by an originating act of intentional misconduct. The negligence claims asserted by the plaintiffs are governed by the limitation period set forth in § 52-584.

The judgments are affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON (SC 20272)

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

Syllabus

Convicted of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree in connection with a break-in at a courthouse in Norwalk, the defendant appealed to the Appellate Court. The defendant had entered the office of two assistant state's attorneys located in the courthouse

by breaking a window. One of those attorneys was scheduled to begin jury selection for a criminal trial against the defendant two days after the break-in occurred. Immediately after the break-in, various case files were discovered in a state of disarray in a common area located outside of the attorneys' office, and the police found a bag containing bottles of kerosene nearby. On appeal to the Appellate Court, the defendant claimed, inter alia, that the evidence was insufficient to allow a reasonable inference that the defendant believed that the case files for his criminal case that were found in disarray contained "evidence," as that term was used in the broader definition of "physical evidence," as defined by statute (§ 53a-146 (8)). The Appellate Court reversed the trial court's judgment, albeit on the alternative ground that there was insufficient evidence for the jury to have reasonably concluded that the defendant intended to tamper with any case files or their contents. The Appellate Court expressly recognized that this issue was distinct from the defendant's sufficiency argument relating to the scope of items subject to the prohibition contained in the statute (§ 53a-155) under which the defendant was charged in connection with his alleged attempt to tamper with physical evidence. On the granting of certification, the state appealed to this court. *Held* that the Appellate Court improperly addressed, sua sponte, an issue of evidentiary sufficiency that was distinct from the defendant's claim, without calling for supplemental briefing as required by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.* (311 Conn. 123): the defendant never raised the particular claim of evidentiary sufficiency the Appellate Court addressed, and, because the sufficiency of the evidence on the question of identity was not challenged, the state had no occasion to brief the issue of whether it had established a connection between the defendant's conduct and the case files found in disarray; moreover, because the sufficiency claim raised by the defendant challenged only whether the jury could have reasonably inferred that his case files contained physical evidence covered by § 53a-155, the state was never called on to apply a sufficiency standard to the distinct issue that the Appellate Court resolved, that is, whether the defendant had intended to alter, remove, conceal or destroy the case files; accordingly, because the Appellate Court failed to afford the parties an opportunity to brief or argue the issue that ultimately proved to be dispositive in that court's analysis, its reversal of the trial court's judgment of conviction was improper.

Argued September 9—officially released December 18, 2020*

Procedural History

Substitute information charging the defendant with the crimes of burglary in the third degree, attempt to

* December 18, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

commit tampering with physical evidence, and attempt to commit arson in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *White, J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Sheldon*, *Bright* and *Mihalakos*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal; thereafter, the state, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Richard Colangelo*, chief state's attorney, *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellant (state).

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

Opinion

KAHN, J. The state, on the granting of certification, appeals from the judgment of the Appellate Court, which reversed the judgment of the trial court convicting the defendant, Joseph A. Stephenson, of the crimes of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree in connection with a break-in at the Superior Court for the judicial district of Stamford-Norwalk, geographical area number twenty, which is located in Norwalk. See *State* v. *Stephenson*, 187 Conn. App. 20, 39, 201 A.3d 427 (2019). The state claims, inter alia, that the Appellate Court improperly addressed an issue of evidentiary sufficiency sua sponte without calling for supplemental briefing as required by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014)

(*Blumberg*). We agree and, accordingly, reverse the judgment of the Appellate Court.

The following facts and procedural history are relevant to our resolution of the present appeal. A silent alarm at the courthouse was triggered at around 11 p.m. on Sunday, March 3, 2013, when the defendant entered the state's attorney's office by breaking a window on the building's eastern side.[1] Although the police were able to respond in about ninety seconds, the defendant successfully evaded capture by running out of a door on the building's southern side. Footage from surveillance cameras introduced by the state at trial show that the defendant was inside of the building for slightly more than three minutes. In the investigation that followed, the police determined that the broken window belonged to an office shared by two assistant state's attorneys. One of those attorneys was scheduled to commence jury selection for a criminal trial against the defendant on certain felony charges only two days after the break-in occurred. No other cases were scheduled to begin jury selection that week. Immediately after the break-in, various case files were discovered in an apparent state of disarray at the northern end of a central, common area located outside of that room. Specifically, several files were found sitting askew on top of a desk with two open drawers; still other files were scattered on the floor below in an area adjacent to a horizontal filing cabinet containing similar files. Photographs admitted as full exhibits clearly show labels on these files reading "TUL" and "SUM." Finally, in a short hallway at the opposite end of that same common area, the police found a black bag containing six bottles of industrial strength kerosene with their UPC labels cut off. The bag and

[1] Although the defendant advanced an alibi defense at trial, he did not challenge the sufficiency of the state's evidence with respect to identity either before the Appellate Court; see *State* v. *Stephenson*, supra, 187 Conn. App. 30, 34; or this court.

its contents were swabbed, and a report subsequently generated by the Connecticut Forensic Science Laboratory included the defendant's genetic profile as a contributor to a mixture of DNA discovered as a result.

Various other components of the state's case against the defendant warrant only a brief summary. The day after the break-in, the defendant called the public defender's office at the Norwalk courthouse to ask whether the courthouse was open and whether he was required to come in that day. The state also submitted evidence showing that the defendant drove a 2002 Land Rover Freelander with an aftermarket push bumper, a roof rack, and a broken taillight, and that surveillance videos from the area showed a similar vehicle driving by the courthouse repeatedly in the hours leading up to the break-in. Finally, the state submitted recordings of various telephone calls the defendant made after he had been taken into custody as a result of his conviction on the criminal charges previously pending against him in Norwalk. During one such telephone call, the defendant asked his brother, Christopher Stephenson, to get rid of "bottles of things" for a heater, speculated about how the police located the vehicle, and attempted to arrange an alibi.

The defendant was tried before a jury on charges of burglary in the third degree in violation of General Statutes § 53a-103, attempt to commit tampering with physical evidence in violation of General Statutes § 53a-49 (a) (2) and General Statutes (Rev. to 2013) § 53a-155 (a) (1), and attempt to commit arson in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B). The jury returned a verdict finding the defendant guilty of each of these offenses, and the trial court subsequently rendered a judgment in accordance with that verdict.

The defendant appealed from that judgment to the Appellate Court, raising several distinct claims of error.[2] In the final three pages of his principal brief to that court, the defendant raised the following single, relatively narrow claim relating to the sufficiency of the state's proof with respect to the charge that he attempted to tamper with physical evidence: "The state failed to show that any materials in the state's attorney's case file for the defendant's criminal case constituted 'evidence' as defined by [General Statutes] § 53a-146 (8); *the evidence was insufficient to allow a reasonable inference that the defendant believed the file contained evidence*." (Emphasis added.) This claim challenged the judgment of conviction by arguing that, even if the defendant did rummage through the case files that evening, certain evidentiary deficiencies left the jury to "speculate" that he had acted with an intent to tamper with a particular type of document—namely, that within the ambit of § 53a-155 (a) (1).[3] Put differently, the defendant contended that the state had failed to submit adequate proof to allow reasonable inferences about the precise nature of the items contained within his case files. The state responded to this argument by briefing issues of statutory construction relating to the meaning of §§ 53a-146 (8) and 53a-155.

[2] On appeal to the Appellate Court, the bulk of the defendant's principal brief pertained to an unrelated evidentiary claim. The defendant also raised two separate sufficiency claims relating to the charge of attempt to commit arson in the second degree. Although the defendant renews these claims of error in the present appeal as alternative grounds for affirmance, their existence is irrelevant to the question of whether the Appellate Court's decision violated the precepts of *Blumberg*.

[3] General Statutes (Rev. to 2013) § 53a-155 (a) provides: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding."

The Appellate Court ultimately reversed the trial court's judgment on a different ground, based on its conclusion that there was insufficient evidence for the jury to have reasonably concluded that the defendant intended to tamper with any case files or their contents at all. See *State* v. *Stephenson*, supra, 187 Conn. App. 39. Specifically, the Appellate Court framed the dispositive question before it as whether the evidence "was insufficient to prove that [the defendant] . . . acted with the intent to tamper with physical evidence within the courthouse *because the state failed to establish any connection between his proven conduct within the courthouse and any of the files or materials with which he is claimed to have had the intent to tamper*." (Emphasis added.) Id., 34. The Appellate Court answered that question in the affirmative, concluding that the "single fact" that there was "a disorganized pile of files on the floor" was "insufficient for the jury to infer that the defendant ever touched any case files in the state's attorney's office . . . let alone pulled case files out of any file cabinet or off any desk, shelf or table, or that he went through such files for any purpose, much less that he took any steps to alter, remove, conceal or destroy the files or their contents as or after he went through them."[4] Id., 35–36. In reaching its decision, the Appellate Court expressly recognized that the issue was distinct from the defendant's sufficiency argument relating to the scope of items subject to the prohibition contained in § 53a-155. Id., 30 n.4.

In *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 128, this court concluded, "with respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised, that the reviewing

[4] In reaching this conclusion, the Appellate Court relied in part on the absence of evidence that would have shown a completed offense. See *State* v. *Stephenson*, supra, 187 Conn. App. 38 ("[n]o evidence was presented that any case file was altered, destroyed, concealed or removed in any way").

court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided." The state claims that the Appellate Court's decision in the present case violated this mandate by raising a different claim of evidentiary sufficiency sua sponte, without calling for supplemental briefing from the parties. For the reasons that follow, we agree.

We note at the outset that, although this court applies an abuse of discretion standard to the question of whether the Appellate Court properly addressed an issue that was never raised by the parties; see *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 58, 225 A.3d 953 (2020); we engage in plenary review as to the predicate question of whether a particular claim of error was, in fact, raised during the course of a prior appeal. See, e.g., *State* v. *Connor*, 321 Conn. 350, 363, 138 A.3d 265 (2016).

Our review in the present case indicates that the defendant never raised the particular claim of evidentiary sufficiency addressed by the Appellate Court. First, the defendant's own recitation of the facts in his principal brief to the Appellate Court affirmatively stated the following: "[T]he jury reasonably could have found the following facts concerning a break-in at the Norwalk courthouse. . . . While inside, the perpetrator removed files from a file cabinet, which were found scattered on the floor near the state's attorney's secretary's desk." Because the sufficiency of the evidence on the question of identity was not challenged; see *State* v. *Stephenson*, supra, 187 Conn. App. 30, 34; the state simply had no occasion to brief the question of whether it had established a "connection" between the defendant's "proven conduct" and the case files found scat-

tered on the floor. Second, because the sufficiency claim raised by the defendant challenged only whether the jury could have reasonably inferred that his case files contained physical evidence protected by § 53a-155, the state was never called upon to apply a sufficiency standard to the distinct question, raised by the Appellate Court, of whether the defendant had, in the first instance, intended to "alter, remove, conceal or destroy" the case files at all.

It is, of course, beyond question that the Appellate Court possesses discretion to raise issues pertaining to the sufficiency of evidence sua sponte. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 128. It is equally well established, however, that it may do so only after providing the parties with a meaningful opportunity to address the question through supplemental briefing. See, e.g., *State* v. *Dort*, 315 Conn. 151, 161, 106 A.3d 277 (2014) ("[i]f the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue" (internal quotation marks omitted)); *Haynes* v. *Middletown*, 306 Conn. 471, 474, 50 A.3d 880 (2012) (same). Because the Appellate Court failed to afford the parties an opportunity to brief or argue the issue that ultimately proved to be dispositive in its analysis, its reversal of the trial court's judgment of conviction was improper.

We find the defendant's arguments to the contrary in the present appeal to be unpersuasive. First, the defendant posits that the Appellate Court was not required to call for supplemental briefing because it merely adopted a separate line of legal reasoning. See *Finkle* v. *Carroll*, 315 Conn. 821, 837 n.14, 110 A.3d 387 (2015) (concluding that supplemental briefing was not required under *Blumberg* for "an amplification and logical extension of the defendants' argument"). The evi-

dentiary deficiency analyzed in the Appellate Court's decision was conceptually distinct from the one pursued by the defendant in his brief to that court. Specifically, the Appellate Court concluded that the state's proof was insufficient for the jury to have reasonably concluded that the defendant's conduct was connected to the files scattered at the northern end of the office or that, even if he did physically disturb those files, he had ultimately intended to tamper with them within the meaning of § 53a-155. See *State* v. *Stephenson*, supra, 187 Conn. App. 39. The defendant, however, only claimed that the evidence admitted at trial was insufficient for the jury to make reasonable inferences about the *contents* of his case files. Although both of these issues relate, at the broadest level, to the question of whether the defendant intended to tamper with physical evidence, the claims address distinct evidentiary deficiencies. Cf. *State* v. *Connor*, supra, 321 Conn. 368.

Second, the defendant argues that the Appellate Court was not required to call for supplemental briefing because the dispositive claim was preserved at trial. Our case law reveals that this argument must fail. See *Sequenzia* v. *Guerrieri Masonry, Inc.*, 298 Conn. 816, 821–22, 9 A.3d 322 (2010) ("[A]lthough the defendant raised the instructional impropriety claim in the trial court . . . it concedes that it did not raise this claim in its brief to the Appellate Court. The defendant contends, however, that the Appellate Court has the discretion to decide a case on any basis, regardless of whether that claim was raised by the parties. We conclude that the defendant misconstrues the limits of the Appellate Court's authority. If the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue. . . . Here, it is undisputed that the Appellate Court did not order supplemental briefing or argument on the instructional impropriety claim, which deprived the

plaintiff of the opportunity to be heard on this issue before that court." (Citations omitted; emphasis omitted; internal quotation marks omitted.)), overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014); *State* v. *Dalzell*, 282 Conn. 709, 715–17, 924 A.2d 809 (2007) (concluding that Appellate Court improperly addressed preserved claim not raised on appeal without ordering supplemental briefing), overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014);[5] cf. *In re Joseph W.*, 301 Conn. 245, 255, 21 A.3d 723 (2011) (ordering supplemental briefing where preserved claim was not raised on appeal).

We emphasize that "[o]ur system [is] an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 164. When the Appellate Court exercises its discretion to deviate from that general principle, it must afford the parties an opportunity to be heard. See *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205, 658 A.2d 559 (1995) ("[a] fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved"). Its failure to do so in the present case necessitates remand. See, e.g., *Diaz* v. *Commissioner of Correction*, supra, 335 Conn. 60–61 (concluding that Appellate

[5] In *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 162 n.34, we overruled *Sequenzia* and *Dalzell* only to the extent that those cases stood for the proposition that supplemental briefing is "the sole condition for [a] reviewing court to raise a new issue sua sponte pursuant to its supervisory power . . . ." Such a conclusion cannot, however, be read to imply that supplemental briefing is not required at all.

Court improperly raised and decided issue without providing parties with opportunity to be heard and remanding case for further proceedings notwithstanding fact that issue had been fully briefed on appeal); *Haynes* v. *Middletown*, supra, 306 Conn. 474–75 (same); see also *State* v. *Connor*, supra, 321 Conn. 368, 374–75 (concluding that Appellate Court improperly raised and decided issue without providing parties with opportunity to be heard and remanding case for consideration of claims actually raised because defendant failed to advance any argument in response to state's colorable claim of prejudice).[6] We, therefore, remand the present case to the Appellate Court in order to address the claims raised by the defendant in his initial appeal. If, during that proceeding, the Appellate Court chooses to exercise its discretion to reach the sufficiency issue raised in its previous decision, it must do so in a manner consistent with this court's decision in *Blumberg*.

The judgment of the Appellate Court is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

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[6] The defendant claims that his continued incarceration would be unjust and asks us to exercise our supervisory authority to order his release pending the resolution of his appeal. The use of that power is, however, limited to the most extraordinary cases. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014). The defendant has provided no reason to distinguish the present case from other criminal appeals in which an uninvited error committed by either the Appellate Court or the trial court necessitates further proceedings.

STATE OF CONNECTICUT *v.* ANGEL M.*
(SC 20106)

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

Syllabus

The defendant was convicted of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and risk of injury to a child in connection with his alleged sexual abuse of V, the twelve year old victim. The defendant had become romantically involved with M, V's mother, when V was approximately three to four years old. After M and the defendant had a child, A, together, the defendant moved into a house with M, V and A, whom the defendant also allegedly abused sexually at a later point. At trial, the defendant testified that he had never touched V or A in a sexually inappropriate manner and claimed that V and A fabricated their allegations of sexual abuse in retaliation for the defendant's act of hitting M and having withdrawn all financial support for the family after moving out of the house. At his sentencing hearing, the defendant engaged in a colloquy with the court during which he continued to deny his guilt. The court indicated to the defendant during the colloquy that taking responsibility for his misconduct and apologizing would help V and A but that it was the defendant's right to continue to deny his guilt in the event that he appealed his conviction. The court stated further that it would "not punish [him] for" continuing to deny his guilt but that he would "not get any extra credit." After the court sentenced the defendant to a significant period of imprisonment followed by a significant period of probation, he appealed to the Appellate Court, claiming, inter alia, that the trial court had violated his right to due process by improperly augmenting his sentence for his refusal to apologize to V and A after he had been found guilty of the crimes charged in connection with his sexual assault of V. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that a sentencing court properly may consider a defendant's lack of remorse in fashioning

* 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.

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

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

an appropriate sentence and also may consider a defendant's denial of culpability in evaluating his or her prospects for rehabilitation. On the granting of certification, the defendant appealed to this court. *Held* that the defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the trial court had not punished him for invoking his right against self-incrimination and for refusing to apologize to V and A: the defendant's claim was belied by the trial court's sentencing remarks, in particular, the court's explicit, on-the-record assurance that it would not increase the defendant's sentence if he chose to exercise his constitutional right against self-incrimination, and nothing the court stated before announcing the defendant's sentence called into question its explicit assurance that the defendant would not be penalized for invoking that right; moreover, this court rejected the defendant's claim that a court should not be permitted to grant leniency to a defendant who accepts responsibility merely because the same leniency would be unavailable to a defendant who does not accept responsibility; furthermore, although the defendant's sentence was severe, he was effectively sentenced to approximately one half of the maximum period of imprisonment to which he was exposed for the three offenses of which he was found guilty, and, therefore, his sentence did not give rise to an inference that the court punished him for refusing to apologize to V and A.

(*Two justices concurring separately in one opinion*)

Argued September 19, 2019—officially released December 31, 2020***

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford, where the court, *Mullarkey*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Keller*, *Mullins* and *Elgo*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*** December 31, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Anne F. Mahoney*, state's attorney, for the appellee (state).

Opinion

PALMER, J. Following a jury trial, the defendant, Angel M., was convicted of sexually assaulting the twelve year old daughter of his romantic partner and sentenced to a total effective prison term of thirty-three years. The defendant appealed to the Appellate Court, claiming, among other things, that the trial court had violated his right to due process at sentencing by penalizing him for refusing to apologize for his criminal misconduct. See *State* v. *Angel M.*, 180 Conn. App. 250, 253, 286, 183 A.3d 636 (2018). According to the defendant, who maintained his innocence both at trial and at the time of sentencing, the trial court's enhancement of his sentence for that reason was fundamentally unfair because it contravened his constitutional right against self-incrimination insofar as any such apology necessarily would have required him to admit guilt. See id., 286–88. The Appellate Court rejected the defendant's claim, concluding that the record did not support his contention that the trial court had increased his sentence because of his unwillingness to issue an apology to the victims; see id., 290–91; and we granted the defendant's petition for certification to appeal. See *State* v. *Angel M.*, 328 Conn. 931, 182 A.3d 1192 (2018). We agree with the Appellate Court and, accordingly, affirm its judgment.

The Appellate Court opinion sets forth the following relevant facts and procedural history. "M is the mother of the victim. M became romantically involved with the defendant when the victim was approximately three or

four years old. M had two children, G and the victim, from a previous relationship. The defendant was a father figure to the victim, and she was considered his stepdaughter.

"Approximately one year after the defendant and M began dating, they had a child together named A. At some point in 2000, the defendant moved in with M. They lived together with the three children, the victim, G, and A, in an apartment in [the city of] Hartford until they purchased a house in 2008.

"In 2006 or 2007, when the victim was approximately twelve years old,[1] she arrived home after school and went into her mother's bedroom to play a game on the family's computer. While she was playing on the computer, the defendant came up behind her and began kissing her neck. The victim froze. Then the defendant picked her up and threw her on the bed. He locked the bedroom door and 'did something near the side of the bed' before lifting up the victim's shirt and licking her breasts. The defendant proceeded to lick the victim's vagina before taking off his pants and attempting to put his penis in her vagina. The victim closed her legs, and the defendant got off of her.[2]

[1] "The victim did not remember exactly how old she was when the sexual abuse occurred, but she testified that she would have been twelve or thirteen because she was in middle school when it happened. She also testified that the abuse took place while the family was living in the apartment in Hartford, during the spring or summer, rather than the house that the defendant and M purchased in 2008." *State* v. *Angel M.*, supra, 180 Conn. App. 254 n.1.

[2] "In addition to the victim's testimony regarding the sexual abuse, the jury heard testimony from three constancy of accusation witnesses. The first was K, the victim's childhood friend. She testified that when they were in fifth or sixth grade, the victim told her that the defendant had molested her. She also testified that the victim provided more details about the molestation when they were freshmen in high school. K's father was the second constancy witness. Although he could not remember an exact date, he recalled the victim telling him that the defendant had molested her. The third witness, G, the victim's brother, testified that the victim had told him via a text message that she had been 'touched.' He testified that he received the text message at some point in 2010 while he was in Europe.

"Several years after that incident, on the evening of December 18, 2011, the defendant and M were involved in an incident outside of a restaurant in Newington. That evening, M had gone to the restaurant without the defendant. She was socializing with a female friend and another man. The defendant, who had been waiting impatiently for her to come home, decided to go to the restaurant to find her. When he arrived, he saw M socializing with a man he did not recognize. He became angry. He confronted M in the parking lot, and an argument ensued. The defendant struck M multiple times. The police arrived shortly thereafter and arrested the defendant. In January, 2012, a protective order was issued as a result of the incident. Thereafter, the defendant stopped providing financial assistance to M, and he moved out of the house and into his own apartment.

"Shortly after the defendant moved out of the house, A ceased all communication with him. The lack of communication between A and the defendant concerned M. As a result, M asked the victim to talk to A in order to figure out why A was ignoring the defendant. On February 7, 2012, the victim started a conversation with A via text messages concerning the change in [A's] relationship with the defendant. In those communications, A told the victim that the defendant had molested her. The victim also revealed that the defendant had molested her, and the victim encouraged A to tell their mother.

"Shortly after this conversation, the victim told M that A had been abused by the defendant. Upon learning

"The victim also testified that the defendant would kiss her neck 'and stuff' every time that she would go on the computer and that on one occasion she woke up and saw the defendant in her bedroom pulling his hands out of his pants. In this case, however, the state only charged the defendant on the basis of the single incident in her mother's bedroom that involved cunnilingus and attempted vaginal penetration." *State* v. *Angel M.*, supra, 180 Conn. App. 254 n.2.

about the abuse, M contacted A's therapist, Mary Mercado, who reported the abuse to the Department of Children and Families (department). The department referred the case to the Hartford Police Department, and Detective Frank Verrengia investigated the case. The victim and A both participated in forensic interviews in March, 2012. The victim disclosed her abuse during [a] forensic interview on March 8, 2012. Following an investigation, the police arrested the defendant on April 18, 2013. The case involving A, however, was administratively closed in May, 2013."[3] (Footnotes in original.) *State* v. *Angel M.*, supra, 180 Conn. App. 253–55.

"The state charged the defendant with one count of sexual assault in the first degree [in violation of General Statutes § 53a-70 (a) (2)], one count of attempt to commit sexual assault in the first degree [in violation of § 53a-70 (a) (2) and General Statutes § 53a-49], and one count of risk of injury to a child [in violation of General Statutes § 53-21 (a) (2)]." Id., 256. At trial, the defendant testified in his own defense that he had never touched

[3] At trial, the state was permitted to introduce A's testimony as prior misconduct evidence. She "testified that the defendant began abusing her [in or around 2011] when she was eleven years old, approximately four or five years after the sexual abuse of the victim. The first incident occurred while the defendant still was living in the family's house in Hartford. A was talking to the defendant in his bedroom when he started to tongue kiss her. The defendant removed her shirt and continued kissing her, but she was able to push him off of her. She put her shirt back on and left the bedroom. The second incident occurred approximately one week later. This time, the defendant attempted to remove A's shirt and touch her breasts at the family home. A was able to get away from him because her sister-in-law arrived at the house and interrupted him. The third incident occurred after the defendant had moved out of the family home to his own apartment. Again, the defendant started by tongue kissing her, and, then, he removed her shirt. The defendant was trying to touch her vagina and breasts, despite A's attempts to push him off of her. During this incident, the defendant attempted to get undressed while he continued touching A, until she suggested that they go to the movies in order to get out of the house." (Footnote omitted.) *State* v. *Angel M.*, supra, 180 Conn. App. 256–57; see id., 257 n.3.

the victim or A in a sexually inappropriate manner. His "theory of defense was that the victim and [A] both fabricated the allegations of sexual abuse. Specifically, he claimed that they made these false allegations in retaliation for his having hit [M] during the restaurant incident, and for withdrawing all financial support from the family after moving out of the house. The jury found the defendant guilty on all counts." Id.

"At the sentencing hearing, the state did not provide a specific recommendation for a sentence. The state simply requested a 'significant sentence' for the defendant, while making clear that there was a mandatory minimum for the charged offenses. The state also noted that the defendant's 'unwillingness to participate in any sex offender treatment programs or to acknowledge any criminal behavior . . . puts him at a much higher risk' to reoffend.

"The defendant was afforded an opportunity to address the court and [to] present additional mitigating evidence. The court heard from several individuals in support of the defendant's good character. One such individual was the defendant's current romantic partner, who has a teenage daughter, with whom the defendant had been residing during the proceedings.

"Before being sentenced, the defendant engaged in the following colloquy with the court:

" '[The Defendant]: The jurors found me guilty. I am innocent of these charges presented against me, and I want to appeal this case.

" 'The Court: Well, I appreciate your position, but, in a case like this, the lifetime effects on the victims can be lessened if the person who committed these acts, particularly in a familial relationship, whether father or stepfather, takes responsibility. I know you wish to appeal, and that does create a dilemma.

" '[The Court Interpreter]: Your Honor, may that be repeated for the interpreter?

" 'The Court: Well, apologizing, admitting what he did, taking responsibility will help the victims enormously; at least that has been my experience over four decades in this business. However, it puts a crimp in your ability to appeal. Do you understand that?

" '[The Defendant]: I did understand. But how would I say sorry for something that I did not do. These are just allegations? I love my daughter; I worked really hard for them. This was hard for me. And I work hard to support this family, two, three jobs to have our home and to lose everything because of these allegations. It's not fair.

" 'The Court: Well, that's your decision, sir. If you wish to continue to deny it, that's your absolute right. *The court will not punish you for that*; however, *you do not get any extra credit*. Do you have anything else you wish to say?

" '[The Defendant]: No. That's it for now.' " (Emphasis in original.) Id., 286–88.

"Thereafter, the court addressed the defendant and explained that 'sentencings have to do with [the] four following considerations: rehabilitation, deterrence, protection of society, and punishment.' The court acknowledged that the defendant had a positive presentence investigation report [(PSI) and outstanding working history] and that several people spoke on his behalf. The court considered the defendant's demeanor during the trial and his successful completion of a family violence education program." Id., 288. The court also recognized "the dilemma of the appeal[s] process" as it related to the defendant's willingness to accept responsibility for his crimes but noted that, "in this type of case, it is most helpful to the victims to have an

admission or an apology." The court also stated that it is "particularly important for them to be restored to [a] calm, collected, healthy mental state."

Notably, the court expressed concern that the defendant was then living with another woman and her teenaged daughter. The court then observed that "the defendant has violated the trust in a household" and was "a predator," and that, "although [the defendant] was not charged with . . . crimes against his [biological] daughter [A], she did testify [as to his sexual abuse of her] under oath . . . and was quite credible." The court then concluded: "These two young ladies have been devastated by your actions, sir. . . . [T]his type of offense, this type of deviancy occurs in men in all strata of society . . . . I have had many . . . of these cases. The fact that one violates the trust of a young girl, who's put her trust in you, is just about the worst crime we have short of murder."

"After noting that it had 'taken all these things into account and . . . tried to balance the seriousness of this offense,' the court sentenced the defendant to a total effective sentence of forty-five years [of] imprisonment, execution suspended after thirty-three years, to be followed by twenty-five years of probation."[4] *State* v. *Angel M.*, supra, 180 Conn. App. 288.

On appeal to the Appellate Court, the defendant claimed that the trial court improperly augmented his sentence because he refused to apologize to the victims[5]

[4] More specifically, the trial court sentenced the defendant to twenty-five years on count one for sexual assault in the first degree, twenty years on count two for attempt to commit sexual assault in the first degree, to run concurrently with count one, and twenty years on count three for risk of injury to a child, execution suspended after eight years, followed by twenty-five years of probation, to run consecutively to count one.

[5] Although the charges against the defendant pertained only to the sexual assault perpetrated on the victim, M's daughter, we refer to the victim and A collectively as the victims.

following his conviction.[6] See id., 286. The Appellate Court rejected this contention, noting, first, that the claim was unpreserved but nonetheless reviewable 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), because the record was adequate for review and the claim was one of constitutional magnitude. *State* v. *Angel M.*, supra, 180 Conn. App. 288. With respect to the legal principles governing the defendant's claim, the Appellate Court recognized that, "[a]lthough a court may deny leniency to an accused who . . . elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election." (Internal quotation marks omitted.) Id., 289, quoting *State* v. *Elson*, 311 Conn. 726, 762, 91 A.3d 862 (2014); see also *Mitchell* v. *United States*, 526 U.S. 314, 316–17, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (sentencing court, in determining facts that bear on severity of sentence, may not, consistent with fifth amendment privilege against self-incrimination, draw adverse inference from defendant's silence at sentencing). The Appellate Court further stated, however, that a sentencing court properly may consider a defendant's lack of remorse in fashioning an appropriate sentence and that, under *State* v. *Huey*, 199 Conn. 121, 128, 505 A.2d 1242 (1986), a court at sentencing also may consider a defendant's denial of culpability in evaluating his or her prospects for rehabilitation. *State* v. *Angel M.*, supra, 289–90.

[6] In the Appellate Court, the defendant also claimed that (1) the trial court abused its discretion in permitting the state to present uncharged misconduct evidence concerning the defendant's sexual abuse of A, and (2) the senior assistant state's attorney engaged in several improprieties during cross-examination and closing argument that deprived the defendant of his constitutional right to a fair trial. See *State* v. *Angel M.*, supra, 180 Conn. App. 256, 264. These claims, which the Appellate Court rejected; see id., 264, 286; are not the subject of this appeal.

Applying these principles to the present case, the Appellate Court then opined that, although the trial court placed particular emphasis on "the defendant's failure to accept responsibility and his failure to apologize to the victims"; id., 290; all of the sentencing factors considered by the court were proper. See id. As the Appellate Court also noted, the trial court "expressly stated that it would not punish the defendant for exercising his 'absolute right' to not admit guilt and [to] appeal his judgment of conviction, but it would not give him any 'extra credit.' The [trial] court's statements comport with the principle that a court may deny leniency to a defendant for exercising a constitutional right, but it may not punish him or her for exercising such a right. . . . The defendant . . . provided no reason . . . to doubt the trial court's representation that it was not going to punish [him] for exercising his 'absolute right.' " (Citation omitted.) Id., 290–91. Although the Appellate Court's determination that the trial court did not penalize the defendant for invoking his privilege against self-incrimination would have sufficed to resolve the defendant's claim in the state's favor, the court went on to say that, "[b]ecause [it] conclude[d] that [its] decision [was] controlled by [this court's] decision in *State* v. *Huey*, supra, 199 Conn. 121, [it was] not persuaded by the defendant's citation to cases from other jurisdictions for the proposition that a court may not consider a defendant's silence at sentencing as an indication of a lack of remorse."[7] *State* v. *Angel M.*, supra, 180 Conn. App. 290 n.13.

[7] In *Huey*, the defendant, Kent K. Huey, was charged with sexual assault in the first degree and burglary in the first degree after he surreptitiously entered a neighbor's apartment and sexual assaulted her at knifepoint. *State* v. *Huey*, supra, 199 Conn. 123. Following plea negotiations, Huey entered a guilty plea to sexual assault in the third degree. Id. Even though that offense does not require proof of penetration, the state informed the trial court at the time of sentencing that, if there had been a trial, the victim would have testified that Huey had penetrated her sexually. Id., 124. Huey admitted to sexually assaulting the victim but denied that penetration had occurred. Id., 125. Before imposing sentence, the court, crediting the victim's

We thereafter granted the defendant's petition for certification to appeal, limited to the following two issues: (1) "Did the Appellate Court properly conclude that the trial court did not penalize the defendant for maintaining his innocence at sentencing?" And (2) "[s]hould this court overrule *State* v. *Huey*, [supra, 199 Conn. 121], because consideration of a defendant's refusal to admit guilt for any purpose at sentencing is a violation of the defendant's [constitutional] right against self-incrimination?" *State* v. *Angel M.*, supra, 328 Conn. 931.

On appeal to this court, the defendant maintains that the Appellate Court incorrectly concluded that the trial court had not punished him for invoking his right against self-incrimination and refusing to apologize to the victims. In support of this claim, the defendant contends that the Appellate Court failed to consider that the trial court imposed the maximum sentence for each offense, even though the PSI report recommended a "moderate sentence"[8] and estimated the defendant's

version of the assault, expressed the view that Huey's denial of penetration reflected adversely on his prospects for rehabilitation. Id. Thereafter, Huey appealed to the Appellate Court, claiming, inter alia, that "the sentencing judge forced him to admit guilt to a crime with which he was not charged and then punished him for the assertion of his . . . right against self-incrimination when he persisted in his denial of penetration." Id., 128. The Appellate Court rejected Huey's claim; id.; and we granted his petition for certification to appeal, limited to that issue. Id., 122. We agreed with the Appellate Court that Huey could not prevail on his claim, explaining that Huey "did not assert his . . . privilege [against self-incrimination] but rather, while represented by counsel, voluntarily responded to the court's inquiries. . . . [T]he sentencing judge did not attempt to force an admission; he merely gave [Huey] an opportunity to present his version of the incident. Having heard it, he did not have to believe it." (Citations omitted.) Id, 128–29. Thus, Huey was not "punished for persisting in his denial [that] penetration [had occurred]. Rather, the sentencing judge, after observing him, simply factored [Huey's] denial, as an indication of his lack of readiness for rehabilitation, into that complex formula from which he labored to derive a just sentence." Id., 129.

[8] As the defendant asserts, the sentence imposed by the trial court for each of the defendant's three offenses; see footnote 4 of this opinion; was the maximum term of imprisonment allowable for the offense: sexual assault

risk of reoffending as very small, and the defendant had no prior criminal record. Moreover, before imposing sentence, the court repeatedly referred to the defendant's refusal to apologize to the victims. In the defendant's view, these factors demonstrate that the trial court did, in fact, punish the defendant for invoking his constitutional right against self-incrimination, notwithstanding the court's express representation to the contrary. The defendant further contends that, insofar as *State* v. *Huey*, supra, 199 Conn. 121, concludes that a court may consider an accused's silence at sentencing as reflecting a lack of remorse or diminished prospects for rehabilitation, we should disavow that holding as incompatible with the accused's privilege against self-incrimination.

We reject the defendant's claim because it is belied by the trial court's sentencing remarks—in particular, the court's explicit, on-the-record assurance that it would not increase the defendant's sentence for exercising his constitutional right against self-incrimination.[9] In light of this conclusion, we leave for another day the question of whether the federal constitution

in the first degree, a class A felony, carries a maximum sentence of twenty-five years imprisonment; see General Statutes §§ 53a-35a (4) and 53a-70 (a) (2) and (b) (2); attempt to commit sexual assault in the first degree, a class B felony, carries a maximum sentence of twenty years imprisonment; see General Statutes §§ 53a-35a (6), 53a-51 and 53a-70 (a) (2) and (b) (2); and risk of injury to a child, also a class B felony, likewise carries a maximum sentence of twenty years imprisonment. See General Statutes §§ 53a-35a (6) and 53-21 (a). The trial court, however, suspended execution of twelve years of the twenty year sentence imposed for the defendant's conviction of risk of injury to a child. See footnote 4 of this opinion. In addition, the court ordered that the sentence for the conviction of attempt to commit sexual assault in the first degree run concurrently with the sentence for the conviction of sexual assault in the first degree. Thus, the maximum sentence that that defendant could have received was sixty-five years; the defendant received a total effective sentence of thirty-three years.

[9] For the reasons set forth by the Appellate Court, we agree that the defendant's claim, although unpreserved, is reviewable under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781. See *State* v. *Angel M.*, supra, 180 Conn. App. 288.

bars a sentencing court from considering, for any punitive purpose, a defendant's denial of guilt or refusal to accept responsibility for the crimes of which he has been found guilty.[10] Consequently, we need not address the second certified question.[11]

It is well settled that "a trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters. On appeal, we will disturb a trial court's sentencing decision only if that discretion clearly has been abused." *State* v. *Kelly*, 256 Conn. 23, 80–81, 770 A.2d 908 (2001). In exercising its discretion, the trial court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446, 92 S.

[10] Notably, the United States Supreme Court has expressly reserved the question of whether a court may consider a defendant's invocation of the fifth amendment right to remain silent at sentencing as reflecting adversely on the defendant's remorse and acceptance of responsibility. See *Mitchell* v. *United States*, supra, 526 U.S. 330.

[11] Although we do not reach that second question, we again note that the Appellate Court, in rejecting the defendant's contention that the trial court improperly had penalized him for not apologizing to the victims, indicated that that claim was foreclosed by *State* v. *Huey*, supra, 199 Conn. 121; see *State* v. *Angel M.*, supra, 180 Conn. App. 289–90 and n.13; see also footnote 7 of this opinion; which the Appellate Court characterized as holding that a defendant's invocation of the right to remain silent at sentencing may be considered by the court as indicative of a lack of remorse. See *State* v. *Angel M.*, supra, 289. We granted certification on the second question to determine whether that purported holding in *Huey* should be overruled. See *State* v. *Angel M.*, supra, 328 Conn. 931. As we also previously explained, however; see footnote 7 of this opinion; in *Huey*, we reasoned that the defendant in that case had *not* invoked his privilege against self-incrimination and, therefore, that the sentencing judge in that case did not penalize him for doing so. See *State* v. *Huey*, supra, 128–29. We need not express any view as to the soundness of our reasoning in *Huey*, however, in view of our conclusion that the trial court in the present case simply did not penalize the defendant for invoking his right against self-incrimination. Accordingly, we do not rely on our analysis or holding in *Huey* for purposes of resolving the present case; our decision in the present case, rather, is based solely on the fact that the trial court imposed no penalty on the defendant—for lack of remorse or any other reason—for his refusal to issue an apology.

Ct. 589, 30 L. Ed. 2d 592 (1972). A "defendant's demeanor, criminal history, [PSI], prospect for rehabilitation and general lack of remorse for the crimes of which he has been convicted" are all factors that the court may consider in fashioning an appropriate sentence. (Internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. 782.

Notwithstanding this highly deferential standard of review, the trial court's discretion in regard to sentencing is not unfettered. E.g., *State* v. *Huey*, supra, 199 Conn. 127. As the Appellate Court explained, a court generally is not prohibited from denying leniency to a defendant who elects to exercise a statutory or constitutional right. *State* v. *Angel M.*, supra, 180 Conn. App. 289; see also *State* v. *Elson*, supra, 311 Conn. 762; *State* v. *Revelo*, 256 Conn. 494, 513, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). Principles of due process, however, forbid a court from retaliating against a defendant by increasing his sentence merely because of the exercise of such a right. E.g., *State* v. *Elson*, supra, 762; *State* v. *Revelo*, supra, 513; see also *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"); *Mallette* v. *Scully*, 752 F.2d 26, 30 (2d Cir. 1984) ("[T]he sentencing judge, in his discretion, may take into account as a mitigating factor the defendant's voluntary cooperation with the authorities. Nowhere have we suggested that the defendant's refusal to cooperate may be considered in increasing the sentence he would otherwise receive. It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." [Emphasis omitted; internal quotation marks omitted.]).

When a defendant claims that a trial court augmented his sentence because of his decision to exercise a constitutional right, the burden is on the defendant to demonstrate the existence of that constitutional violation based on the totality of the circumstances.[12] See *State* v. *Elson*, supra, 311 Conn. 758–59. This is no easy task. As we have explained, "courts in other jurisdictions generally have required remarks by a trial judge to threaten explicitly a defendant with a lengthier sentence should the defendant opt [to exercise a statutory or constitutional right], or indicate that a defendant's sentence was based on that choice. See, e.g., *United States* v. *Cruz*, 977 F.2d 732, 733 (2d Cir. 1992) (I'm the kind of a judge where you get a fair trial . . . [but] [i]f I find that after the trial . . . you didn't have a defense at all, you're going to get the maximum, because you're playing games with me); *United States* v. *Hutchings*, [757 F.2d 11, 13 (2d Cir.)] ([The] judge stated at sentencing that [the] trial was a total waste of public funds and resources . . . [and that] there was no defense in [the] case. [The defendant] was clearly and unquestionably guilty, and there should have been no trial.) [cert. denied, 472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985)]; *People* v. *Mosko*, 190 Mich. App. 204, 210, 475 N.W.2d 866 (1991) (I am very concerned about this case . . . because it was a case that went to trial . . . [a]nd to get up on the stand and [be] sanctimonious and you're self-righteous and you're guilty, that seems to me to be something that is—that

[12] In *State* v. *Kelly*, supra, 256 Conn. 23, this court adopted the majority approach for determining whether a trial court improperly penalizes a defendant for exercising a constitutional right. Id., 82. Under this approach, the defendant must establish, in light of all of the circumstances, "that [he] received a lengthier sentence because he chose to exercise" such a right. Id., 84; see id., 82–83. As we explained in *Kelly*, a minority of jurisdictions have adopted a considerably more lenient standard pursuant to which a reviewing court is obliged to remand for resentencing merely upon a colorable showing by the defendant that the trial court exacted a penalty for the exercise of a constitutional right. Id., 82. We have not been asked in the present case to reconsider the standard we adopted in *Kelly*.

is beyond [decent]) [aff'd, 441 Mich. 496, 495 N.W.2d 534 (1992)].

"[When] a trial court [has] employed more ambiguous language, however, courts generally have rejected claims that the trial court infringed on the defendant's rights. See, e.g., *United States* v. *Tracy*, [12 F.3d 1186, 1202 (2d Cir. 1993)] ([The defendant] not only minimizes his role in this operation, but negates it. In other words, he claims there was really nothing going on here and that he has been unjustly and unfairly and illegally prosecuted by the government . . . .); *State* v. *Brown*, [131 Idaho 61, 73, 951 P.2d 1288 (App. 1998)] (You want to maintain your innocence, that's fine. The evidence shows otherwise. And you have to suffer the consequence. . . . I find that you have abused the justice system and you are paying a consequence because of that.); *State* v. *Tiernan*, [645 A.2d 482, 487 (R.I. 1994)] (defendant required [the victim] to testify by exercising his right to stand trial)." (Internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 82–83.

Consistent with the foregoing authority, in *State* v. *Elson*, supra, 311 Conn. 726, this court concluded that the defendant, Zachary Jay Elson, failed to demonstrate that he was penalized for exercising his right to a jury trial. Id., 740, 760–61. Following Elson's convictions of offenses stemming from his physical assault of a female college student; id., 730–31; the trial court conducted a sentencing hearing at which Elson addressed the court and apologized to the victim. Id., 732–33. Before imposing sentence, the court stated: "We've all heard [Elson's] apology. I don't know how sincere it is, but it is certainly unfortunate that it comes so late in the process. *If [Elson] had been truly apologetic, he wouldn't have put the victim through the trial.* To a large extent, it seems to me that [Elson's] apology represents thinking of himself rather than the victim." (Emphasis altered; internal quotation marks omitted.) Id., 733. On appeal, Elson

pointed to the court's sentencing remarks as convincing evidence that he had been punished for electing to stand trial rather than accepting a plea bargain offered by the state; see id., 736, 756; a contention we rejected for three reasons. See id., 760–62. First, we observed that the length of Elson's sentence belied his claim of vindictiveness because the sentence was significantly less than the maximum exposure he faced and appreciably less than what the state had recommended. See id., 761; see also id. (in determining whether record supported Elson's claim that trial court penalized him for exercising constitutional right, "the length of the sentence that [Elson] received must be evaluated relative to the maximum sentence faced by [Elson] and the sentence recommended by the state"). Second, we reasoned that "the vast majority of the trial court's sentencing remarks reflected a detailed focus on legitimate sentencing considerations"; (internal quotation marks omitted) id.; including the information contained in the PSI, Elson's demeanor, his false trial testimony, his criminal history, his prospects for rehabilitation, the seriousness of the offense, and the fact that he had committed his crime while free on bail awaiting trial on other felony offenses. See id., 735, 761–62. Finally, we deemed it "significant that, when the trial court made the specific comments at issue, it did so in the context of discounting the mitigating factors, including [Elson's] allocution, statements from a family friend and his father, and a letter from his mother, rather than in its separate recitation of factors that would justify lengthening [Elson's] sentence . . . ."[13] Id., 762.

[13] Although we concluded that Elson failed to demonstrate that the trial court had enhanced his sentence to punish him for exercising his right to a trial; *State* v. *Elson*, supra, 311 Conn. 760–61; we nevertheless invoked our supervisory authority to grant him a new sentencing hearing because "[a]n observer hearing the comments at issue . . . could have perceived that the trial court equated [Elson's] exercise of the right to trial with the absence of remorse . . . thereby tainting the public's perception of the sentencing decision . . . ." (Citation omitted; internal quotation marks omitted.) Id., 784. There is no similar risk of public misperception in the

Conversely, in *State* v. *Revelo*, supra, 256 Conn. 494, we concluded that the trial court had increased the sentence of the defendant, Hector Revelo, solely because he elected to exercise his right to challenge the constitutionality of a police search of his home that had resulted in the seizure of a substantial quantity of cocaine. Id., 496–97, 514. After Revelo was charged with certain drug and related offenses stemming from that search, he filed a motion to suppress the cocaine on the ground that the facts alleged in the search warrant on which the seizure of the cocaine was predicated did not support a finding of probable cause. Id., 497. At a pretrial hearing, the trial court announced that, although Revelo had been offered a plea bargain pursuant to which he would be permitted to plead guilty and to receive a sentence of eight years of imprisonment, he elected to have a hearing and a ruling on his motion to suppress. See id. The court further stated that, if Revelo pressed his motion and, after the hearing, it was denied, he could then enter a guilty plea and receive a sentence of nine years instead of eight years. Id., 497–98. Revelo chose the second option, and, in accordance with that election, a hearing was conducted on his motion to suppress, following which the motion was denied.[14] Id., 498. Shortly thereafter, Revelo entered a plea of nolo contendere to the charge of selling illegal drugs, and, as the court previously had promised him, he received a sentence of nine years. Id., 498–99. On appeal, Revelo maintained that the nine year sentence violated his right to due process because he received that sentence, instead of the eight year sentence that he had been offered originally, solely for exercising his

present case due to the trial court's express assurance that the defendant would not be punished for invoking his constitutional right against self-incrimination and maintaining his innocence.

[14] Revelo's motion to suppress was heard and decided by a different judge from the one who participated in the plea discussions with counsel for Revelo. See *State* v. *Revelo*, supra, 256 Conn. 498 n.6.

right to a judicial resolution of his motion to suppress. Id., 499.

We agreed with Revelo, explaining in relevant part: "It has been noted that, in certain circumstances, it may be difficult to draw a meaningful distinction between 'enhancing' the punishment imposed on an accused who exercises a constitutional right and denying him the 'leniency' that he claims he would deserve if he waived that right. . . . Although the distinction between refusing to show leniency to an accused who insists on asserting a constitutional right and punishing an accused for asserting that right may, at times, be a fine one, there is no difficulty in discerning what occurred in [Revelo's] case: the trial court imposed a more severe sentence on [Revelo] solely because he asserted his right to a judicial ruling on his motion to suppress." (Citation omitted.) Id., 513–14.

This case presents a stark contrast to what occurred in *Revelo*. In the present case, after hearing from several character witnesses who spoke in support of the defendant, the trial court asked the defendant if he had anything to say, and he stated that, although the jurors had found him guilty, he was innocent of the charges and intended to appeal. The court responded that it "appreciate[d] [the defendant's] position" and acknowledged that admitting guilt "does create a dilemma" with respect to his desire to appeal. The court further explained, however, that accepting responsibility and apologizing to the victims would likely "help the victims enormously," to which the defendant replied that he could not express remorse for "something that [he] did not do." At that point, the court informed the defendant that he had an "absolute right" to maintain his innocence and assured him that it would "not punish" him for doing so. Although the court also informed the defendant that he would not receive any "extra credit" for refusing to take responsibility for the offenses—in

other words, he would not be granted whatever measure of leniency he otherwise would have been afforded if he had been willing to admit culpability—the court had every right to so advise the defendant. In fact, the court's candor on the issue is commendable, first, because transparency in sentencing is to be encouraged, and, second, because it gave the defendant a final chance to mitigate his sentence, if he chose to do so, by acknowledging his guilt and apologizing to the victims.

Following this colloquy, the court articulated its reasons for the sentence it was about to impose. After noting a number of mitigating factors, the court again observed that, although admitting guilt and apologizing for the offenses would pose a dilemma for the defendant because of his desire to appeal, doing so would be "most helpful" to the victims. Nothing the court stated before announcing its sentence, however, called into question its explicit assurance, made in the plainest of terms, that the defendant would not be penalized for invoking his constitutionally protected right to maintain his innocence.

In this regard, it bears mention that the record in the present case is considerably clearer than the record in *State* v. *Kelly*, supra, 256 Conn. 23, in which we rejected a claim that the trial court violated the right of the defendant, Alex Kelly, to proceed to trial rather than to plead guilty. Id., 79–80. Kelly's contention was predicated on the fact that, at the conclusion of his sentencing hearing, and prior to imposing sentence, the court stated that one of many factors it had considered in reaching a sentencing decision was "whether or not there was a plea or a complete trial," which, the court further stated, "is one of the legal factors to consider in sentencing." (Internal quotation marks omitted.) Id., 80. In disagreeing with the claim, we explained that "the totality of the circumstances surrounding [Kelly's] sentencing gives no indication that the trial court improperly augmented [his] sentence based on his deci-

sion to stand trial." Id., 83. "No fair reading of the record would permit the conclusion that the trial court's comment should be understood to mean that it was lengthening [Kelly's] sentence . . . on [the basis of] his choice to stand trial. Rather, we interpret the trial court's remark as a reminder to [Kelly] of the oft acknowledged truth that many factors favor relative leniency for those who acknowledge their guilt . . . and thus help conserve scarce judicial and prosecutorial resources for those cases that merit the scrutiny afforded by a trial. . . . There is a world of difference between that reminder and a clear showing that [Kelly] received a lengthier sentence because he chose to exercise his right to a jury trial." (Citation omitted; internal quotation marks omitted.) Id., 84. Unlike the comment at issue in *Kelly*—which, unless viewed in the broader context of the court's sentencing remarks, arguably could be construed as suggesting that the court had increased Kelly's sentence because he opted to stand trial—the remarks of the trial court in the present case contained not even the slightest ambiguity: the court in the present case stated clearly and categorically that the defendant would not be punished for invoking his right against self-incrimination. Although, in some cases, a sentencing court's comments may "[cross] that fine line between showing leniency . . . and punishing a defendant for his silence"; (citations omitted) *United States* v. *Stratton*, 820 F.2d 562, 564 (2d Cir. 1987); a distinction that "may be difficult to apply" in a particular case; id.; this is not such a case.[15]

[15] We recognize that a number of courts, including the United States Supreme Court, have questioned the utility of this distinction, at least with respect to its applicability to the granting of leniency for cooperation with the government, while at the same time not repudiating it. See, e.g., *Roberts* v. *United States*, 445 U.S. 552, 557 n.4, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980) ("[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed [on] the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated"); *Mallette* v. *Scully*, supra, 752 F.2d 30 (characterizing distinction as "somewhat illusory" but acknowledging that it alone provides workable framework for

The defendant relies on a few sister state cases—most notably, *State* v. *Burgess*, 156 N.H. 746, 943 A.2d 727 (2008)—to support his claim of a constitutional violation based merely on the trial court's advisement that he could expect a more lenient sentence than he otherwise would receive if he was willing to accept

sentencing purposes). In his dissenting and concurring opinion in *Mallette*, Judge Jon O. Newman explained why, in his view, the distinction between penalizing a defendant for refusing to cooperate and denying leniency for that refusal is conceptually sound. He reasoned: "This [c]ircuit has recognized the distinction between taking into account as a mitigating factor at sentencing a defendant's cooperation with the authorities and administering additional punishment because of a refusal to cooperate. *United States* v. *Bradford*, 645 F.2d 115 (2d Cir. 1981). I do not share the majority's view that this distinction is 'somewhat illusory,' though I acknowledge that doubts about the matter have been significantly expressed. *Roberts* v. *United States*, [supra, 557 n.4]. I acknowledge the basis for such doubts, since it is obvious that [a] defendant who refuses to cooperate often receives a greater sentence than [a] defendant, under otherwise similar circumstances, who cooperates. Of course, that is true of every defendant whose sentence is greater than that of a defendant with mitigating circumstances. But the issue in such cases is not whether one defendant's sentence is higher than another's; it is whether he has been impermissibly punished. That would occur if the sentencing judge started out with a tentative sentence in mind as appropriate for the offense and the offender and then decided to adjust the tentative sentence upward because of some impermissible factor. But the defendant who does not cooperate has no cause for complaint if he receives the judge's tentative sentence, even though the tentative sentence would have been adjusted downward if he had cooperated. Viewing the issue in this way manifestly puts a premium on what was in the judge's mind in formulating the sentence. However, unlike the state of mind of a defendant in a criminal case, it is not necessary that the state of mind of a sentencing judge be ascertained beyond a reasonable doubt. It is sufficient if a reviewing court can have reasonable confidence, giving considerable deference to the articulated explanation of the sentence by the sentencing judge, that the sentence was not adjusted upward because of an impermissible factor." *Mallette* v. *Scully*, supra, 34 (Newman, J., dissenting in part and concurring in part).

In the present case, the trial court left no doubt that the sentence it ultimately imposed was the "tentative" or presumptive sentence that the court had determined to be "appropriate for the offense and the offender"; id.; that is, the sentence that the court was prepared to impose without an acknowledgment of guilt by the defendant. Because the defendant elected to maintain his innocence, the court had no basis to adjust that "tentative" sentence downward as a reward for acceptance of responsibility. Id. This case, therefore, presents a paradigmatic example of the distinction between increasing a defendant's sentence for refusing to admit culpability and granting leniency to a defendant who does so.

responsibility for the offenses. In *Burgess*, the New Hampshire Supreme Court construed its state constitution as eschewing the distinction between granting leniency to a defendant for accepting responsibility and penalizing a defendant for invoking his right against self-incrimination. See id., 760 (concluding that, under New Hampshire constitution, "denying a defendant leniency simply because he fails to speak and express remorse is equivalent to penalizing him for exercising his right to remain silent"); see also *People* v. *Wesley*, 428 Mich. 708, 713, 411 N.W.2d 159 (if defendant maintains his innocence following guilty verdict, sentence will be deemed improper if reviewing court concludes that sentencing court "attempt[ed] to get the defendant to admit guilt" and it appears "that had the defendant affirmatively admitted guilt, his sentence would not have been so severe"), cert. denied, 484 U.S. 967, 108 S. Ct. 459, 98 L. Ed 2d 399 (1987). We are not persuaded by that proposition—which is contrary to the overwhelming weight of authority—because, as we previously explained, there is a meaningful difference between increasing a sentence solely on the basis of the exercise of a constitutional right and denying leniency for invoking that right and declining to accept responsibility. See, e.g., *State* v. *Elson*, supra, 311 Conn. 760–62 (no constitutional violation when trial court stated at sentencing that guilty plea or admission of guilt would have been mitigating factor); *State* v. *Kelly*, supra, 256 Conn. 84 (recognizing critical distinction between granting leniency to defendant who acknowledges guilt, which is perfectly proper, and penalizing defendant for maintaining innocence, which is constitutionally prohibited).

Indeed, we agree with the Second Circuit Court of Appeals that the distinction is a significant one because "it is the only rule that recognizes the reality of the criminal justice system while protecting the integrity

of that system." *Mallette* v. *Scully*, supra, 752 F.2d 30. This is so because the rule advocated by the defendant is unworkable: it effectively would prohibit a sentencing court from granting leniency to a defendant who waives his right to remain silent and accepts responsibility because, in granting such leniency, the court necessarily would be acknowledging the very distinction that the defendant would have us reject. Under that rule, then, it would appear that a court would be barred from granting leniency to a defendant who accepts responsibility merely because that same leniency would be unavailable to a defendant who does not accept responsibility. It is *that* result—one that penalizes a defendant who accepts responsibility by denying the credit that he otherwise would have received for doing so—that is fundamentally unfair.

As the United States Supreme Court has repeatedly recognized, however, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt* v. *New Jersey*, 439 U.S. 212, 218, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). Indeed, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the [c]onstitution does not by that token always forbid requiring him to choose." (Internal quotation marks omitted.) *McKune* v. *Lile*, 536 U.S. 24, 41, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002); see also *United States* v. *Maria*, 186 F.3d 65, 68 n.2 (2d Cir. 1999) ("Criminal defendants are regularly forced to confront the choice between forgoing the exercise of legal rights and risking stiffer penalties. . . . That they face such choices does not, alone, offend due process." (Citation omitted.)). Granting leniency to defendants who accept responsibility for their crimes "may well

affect how criminal defendants choose to exercise their constitutional rights. . . . [But] [p]ersons involved in the criminal law process are faced with a variety of choices. Some of the alternatives may lead to unpleasant consequences. For example, to choose to go to trial may result in greater punishment. To take the stand as a witness in one's case opens the door to possible perjury charges as well as possibly strengthening the prosecution's case. [The opportunity to receive credit for accepting responsibility] may add to the dilemmas facing criminal defendants, but no good reason exists to believe that [the reason for affording a defendant that opportunity is] intended to punish anyone for exercising rights. We are unprepared to equate the possibility of leniency with impermissible punishment." (Citation omitted; footnotes omitted.) *United States* v. *Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989). We, therefore, like the vast majority of courts, "reject [the] contention that the availability of a sentence reduction to one who clearly admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not." *United States* v. *Parker*, 903 F.2d 91, 105 (2d Cir.), cert. denied, 498 U.S. 872, 111 S. Ct. 196, 112 L. Ed. 2d 158 (1990), and cert. denied sub nom. *Moon* v. *United States*, 498 U.S. 874, 111 S. Ct. 201, 112 L. Ed. 2d 162 (1990).

The defendant nonetheless argues that the trial court must have penalized him for maintaining his innocence because the court made repeated references to the defendant's refusal to apologize to the victims, he received the maximum allowable sentence even though he had no prior criminal record, and the PSI placed his risk of reoffending at only 2.1 percent and included a recommendation of a "moderate sentence." We disagree with the defendant's claim. First, it is true, of course, that the court was clear that it would be very beneficial to the victims—and advantageous to the

defendant—if he accepted responsibility for the offenses and issued an apology. As we previously discussed, however, the court was equally clear in acknowledging the "dilemma" that such an admission created for the defendant in light of his desire to appeal, and, most important, the court assured the defendant that he would not be penalized for maintaining his innocence. In view of this assurance, we are not persuaded that what the court said about apologizing to the victims advances the defendant's claim.

With respect to the defendant's contention concerning the severity of his sentence, his maximum exposure for the three offenses was a term of imprisonment of sixty-five years, and he received a total effective prison term of thirty-three years. See footnotes 4 and 8 of this opinion. Although the lengthy period of incarceration imposed on the defendant is no doubt on the high end of the sentencing range, it does not approach the statutory maximum sentence that he potentially could have received. Considering the very broad sentencing discretion vested in the trial court; see, e.g., *State* v. *Baldwin*, 224 Conn. 347, 370–71, 618 A.2d 513 (1993) (claim that sentence is too severe is virtually unreviewable if sentence falls within statutory limits); the prison term imposed on the defendant does not give rise to an inference that the court punished him for refusing to apologize to the victims.

Although the defendant did not have any prior convictions, the court heard sworn testimony from the defendant's daughter, A, that, on several occasions, the defendant also molested her, approximately four or five years after his sexual assault of the victim, when A was eleven years old. At the sentencing hearing, the court observed that A testified "quite credibl[y]" about that uncharged misconduct and that she, like the victim, was "devastated" by the abuse she had suffered at the hands of the defendant. In light of A's convincing testi-

mony that the defendant had molested her as well as the victim, the court was free to discount the fact that the defendant had no prior record.

Nor do we agree with the defendant that the recommendation of a "moderate sentence" in the PSI and its estimate placing the defendant's likelihood of reoffending at 2.1 percent support the conclusion that the trial court increased his sentence for maintaining his innocence, despite the court's assurance that it would do no such thing. Although "our law makes clear that [PSIs] are to play a significant role in reaching a fair sentence"; *State* v. *Thomas*, 296 Conn. 375, 389, 995 A.2d 65 (2010); the trial court's discretion in sentencing is not constrained by any recommendation that may be contained in the report. See *State* v. *Patterson*, 236 Conn. 561, 575, 674 A.2d 416 (1996) ("[c]ourts . . . are afforded equally broad discretion in imposing a sentence when a PSI has been provided").

Finally, it is apparent that the trial court was unpersuaded by the PSI's assessment of the defendant as not posing a serious recidivism risk. As we previously noted, the state sought a " 'significant' " sentence because of the defendant's refusal to acknowledge any wrongdoing or to participate in sex offender treatment, a matter of considerable concern that, the state maintained, put the defendant " 'at a much higher risk' " of reoffending. *State* v. *Angel M.*, supra, 180 Conn. App. 286. The trial court, which referred to the defendant as a "predator," evidently sided with the state. The court also described the defendant's offense as "just about the worst crime we have short of murder," one that "devastate[s]" its victims and "violate[s] the laws of all civilized societies in nature." In light of these remarks, insofar as there is any question as to the trial court's reason for imposing such a substantial sentence, we believe the answer lies in the court's assessment of the gravity of the offenses and their extraordinarily

deleterious effect on the child victim,[16] and not in any desire to punish the defendant for maintaining his innocence.[17]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ECKER, J., with whom McDONALD, J., joins, concurring. I agree with the majority that the trial court did not penalize the defendant, Angel M., for the exercise of his constitutional right to maintain his innocence but, instead, denied the defendant a sentencing benefit

[16] We note that, because "a criminal defendant's right to testify does not include the right to commit perjury"; *LaChance* v. *Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998); the trial court could have enhanced the defendant's sentence on the basis of a finding that his trial testimony was perjurious. See, e.g., *United States* v. *Dunnigan*, 507 U.S. 87, 97, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993). Although it is readily apparent from the court's sentencing remarks that it credited the testimony of the victims and disbelieved the testimony of the defendant, there is nothing in those remarks to indicate that the court increased the defendant's sentence on the basis of a finding of perjury.

[17] Of course, if the defendant believes that his sentence is disproportionate to the penalties imposed in similar cases—a matter on which we express no opinion—his recourse is to file an application for review of the sentence with the Sentence Review Division of the Superior Court, which the legislature created "to [provide] a forum in which to equalize the penalties imposed on similar offenders for similar offenses." (Internal quotation marks omitted.) *State* v. *Casiano*, 282 Conn. 614, 626–27 n.16, 922 A.2d 1065 (2007); see also Practice Book § 43-28 ("[t]he review division shall review the sentence imposed and determine whether the sentence should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended"). To the extent the defendant believes that his sentence is disproportionate to the offenses of which he was convicted, that is an issue to be taken up with the legislature. See, e.g. *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the [state] constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and [to] impose punishment within the limits and according to the methods therein provided").

due to his refusal to apologize to his victims. I write separately because the conclusion that the defendant was denied a benefit to which he was not otherwise entitled does not end the constitutional inquiry. Under the "unconstitutional conditions" doctrine, it is well established "that the government may not deny a benefit to a person because he exercises a constitutional right"; (internal quotation marks omitted) *Koontz* v. *St. Johns River Water Management District*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); unless the benefit is conditioned on a "germane" governmental interest that "is sufficiently related to the benefit . . . ." *National Amusements, Inc.* v. *Dedham*, 43 F.3d 731, 747 (1st Cir.), cert. denied, 515 U.S. 1103, 115 S. Ct. 2247, 132 L. Ed. 2d 255 (1995). With respect to the victim of the crimes of conviction, I believe that the condition imposed by the trial court (i.e., an apology to that victim) was both germane and sufficiently related to the legitimate penological goals of sentencing to pass constitutional scrutiny. I question, however, whether the unconstitutional conditions doctrine was satisfied as to the trial court's requirement of an apology to A, the victim of uncharged misconduct, given that the defendant was not charged with, or convicted of, any crimes in connection with A. Although the defendant does not challenge the judgment of conviction on this specific basis, and we therefore need not decide whether the doctrine of unconstitutional conditions was violated in this case, I highlight the issue so that trial judges choosing to venture onto this thin ice in the future will be sensitive to the constitutional concerns.

As the majority acknowledges, the distinction "between showing leniency [at sentencing] . . . and punishing a defendant for his silence" is a "fine line" that "may be difficult to apply in a particular case . . . ." (Internal quotation marks omitted.) Text accompanying footnote 15 of the majority opinion, quoting

United States v. *Stratton*, 820 F.2d 562, 564 (2d Cir. 1987). Indeed, the United States Supreme Court has expressed "doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed [on a defendant] and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts* v. *United States*, 445 U.S. 552, 557 n.4, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980). To the extent that a principled distinction exists, it necessarily depends on the establishment of a "baseline sentence," which is "the normal sentence that would be meted out if constitutional rights were not salient." (Internal quotation marks omitted.) *United States* v. *Whitten*, 610 F.3d 168, 195 (2d Cir. 2010); see also *United States* v. *Oliveras*, 905 F.2d 623, 628 n.8 (2d Cir. 1990) ("in most situations to even make the threshold identification of whether the government is imposing a penalty or denying a benefit requires the location of some baseline from which the action at issue may be measured"). In the federal courts, the United States Sentencing Guidelines prescribe a "base offense level," which may be adjusted upward or downward depending on the defendant's participation in the crime or acceptance of responsibility. See U.S. Sentencing Guidelines Manual cc. 2–3 (2018). Thus, the federal courts typically can ascertain, by reference to the baseline sentence, whether a trial court has denied a defendant leniency or imposed a punishment as a consequence of an assertion of constitutional rights. See, e.g., *United States* v. *Jones*, 997 F.2d 1475, 1478 (D.C. Cir. 1993) ("[h]ere, there can be little doubt that the baseline sentence for [the defendant] was well above the 127 months ultimately imposed"), cert. denied, 510 U.S. 1065, 114 S. Ct. 741, 126 L. Ed. 2d 704 (1994); *United States* v. *Klotz*, 943 F.2d 707, 710 (7th Cir. 1991) ("Distinguishing between rewards and penalties was hard in the pre-guideline world, for sentencing was so individualistic that it was next to impossible to tell

what would have happened had the constitutional right not been pertinent. Now that the guidelines are in place, however, there is a norm: the presumptive range."). In contrast to the federal system, there is no objectively ascertainable baseline sentence in Connecticut because we utilize a highly individualistic sentencing paradigm that confers on the sentencing judge "very broad discretion in imposing any sentence within the statutory limits . . . ." (Internal quotation marks omitted.) *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986). Given the breadth of sentencing discretion vested in the trial court, there simply is no baseline sentence in our state system. Thus, it typically will be "next to impossible to tell" what sentence would have been imposed in the absence of a defendant's assertion of his or her constitutional rights. *United States* v. *Klotz*, supra, 710. This fundamental point complicates matters in the context of a doctrine that turns on the fine and elusive distinction between benefit and penalty.

We are saved from this conceptual quagmire in the present case, however, because the record clearly reflects that the trial court was holding out a carrot rather than threatening a stick, that is, offering the defendant the benefit of sentencing leniency instead of threatening him with an enhanced sentence. The trial court explained to the defendant that "apologizing, admitting what he did, taking responsibility will help the victims enormously, at least that has been my experience over four decades in this business. However, it puts a crimp in your ability to appeal, do you understand that?" The defendant responded that he "did understand" but that he could not "say sorry for something that [he] did not do . . . ." The trial court replied that "that's your decision . . . . If you wish to continue to deny it, that's your absolute right. *The court will not punish you for that; however, you do not get any extra credit.*" (Emphasis added.) Because the defendant was

denied a sentencing benefit to which he was not otherwise entitled, I agree with the majority that the trial court did not punish the defendant in violation of the due process clause of the fourteenth amendment to the United States constitution for maintaining his innocence.

I write separately because the particular facts of this case implicate another important constitutional limitation at play when a sentencing judge engages in the type of sentence bargaining that occurred here. The majority properly reaffirms the principle that a criminal defendant cannot, consistent with due process principles, be punished "merely for exercising a statutory or constitutional right." *State* v. *Revelo*, 256 Conn. 494, 513, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). But the fact that a court's sentencing offer involves the conferral of a benefit rather than the imposition of a penalty does not give the sentencing judge carte blanche to condition that benefit on the defendant's willingness to say or do anything that the court believes will further the ends of justice. To the contrary, the doctrine of unconstitutional conditions imposes meaningful constitutional limitations on offers of sentencing leniency that are contingent on the defendant's relinquishment of his constitutional rights—even if the defendant can claim no entitlement to leniency in the first place.

Under the unconstitutional conditions doctrine, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those [rights] would in effect be penalized

and inhibited." *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); see also *Koontz* v. *St. Johns River Water Management District*, supra, 570 U.S. 608 ("[v]irtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind"). "The key proposition of the unconstitutional condition[s] doctrine is that the government may not do indirectly what it cannot do directly. The [United States] Supreme Court has articulated this proposition in the context of holding that the government may not grant even a gratuitous benefit on condition that the beneficiary relinquish a constitutional right." *United States* v. *Oliveras*, supra, 905 F.2d 627–28 n.7.

Of course, not all conditions are prohibited under this doctrine. "[I]f a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed. In the final analysis, the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why [the] government may withhold the benefit altogether." (Internal quotation marks omitted.) *National Amusements, Inc.* v. *Dedham*, supra, 43 F.3d 747; see also *Koontz* v. *St. Johns River Water Management District*, supra, 570 U.S. 605–606 (government is allowed "to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal"); *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205, 217, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (conditional benefits burdening constitutional rights are permissible if they "define the federal program" but impermissible if they "reach outside it").

In the present case, the trial court conditioned the "extra credit" sentencing benefit on the defendant's

apology to the victims—plural—both the victim whom he was convicted of sexually assaulting and the victim whose testimony at trial was admitted as evidence of uncharged sexual misconduct.[1] See Conn. Code Evid. (2018) § 4-5 (b) (providing that, if certain conditions are met, "[e]vidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct"). It goes without saying that the government has a legitimate interest in eliciting an apology to the victim of the crime of which the defendant stands convicted. The defendant's acceptance of responsibility, in the form of a sincere apology to the crime victim, manifestly furthers one or more of the legitimate penological goals of sentencing. See *State* v. *Santiago*, 318 Conn. 1, 22, 122 A.3d 1 (2015) (penological objectives of sentencing are "deterrence, retribution, incapacitation, and rehabilitation"). As the United States Supreme Court has observed, "[a]cceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion." *McKune* v. *Lile*, 536 U.S. 24, 47, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Furthermore, "[w]hen offenders express genuine remorse in person to those offended, the effects can be profound. . . . Empirical studies and anecdotal evidence from restorative justice programs confirm that face-to-face expressions of remorse and apology matter immensely to offenders and victims." (Footnote omitted.) S. Bibas & R. Bierschbach, "Integrating Remorse

[1] The record reflects that the trial court referenced the uncharged sexual misconduct on multiple occasions in close proximity to its request for an apology to the "victims," at one point stating: "[The defendant is] a predator, the stepdaughter, natural daughter; although he was not charged with the crimes against his natural daughter, she did testify under oath, [was] subject to cross-examination, and was quite credible. These two young ladies have been devastated by your actions, sir."

and Apology into Criminal Procedure," 114 Yale L.J. 85, 115–16 (2004). Providing a criminal defendant the opportunity to admit his or her wrongdoing redounds to the benefit of society as a whole in numerous respects; a defendant's sincere acceptance of responsibility repairs a tear in the social fabric created by his or her transgression and thereby reaffirms and strengthens the underlying moral and legal principles at stake. Furthermore, the penitential act may make us safer because a repentant and rehabilitated defendant presumably is less likely to offend again. See, e.g., *United States* v. *Lopinski*, 240 F.3d 574, 575 (7th Cir. 2001) (sentencing credit for acceptance of responsibility under federal sentencing guidelines reflects, among other things, "the reduced risk of recidivism of a defendant who by facing up to the wrongfulness of his conduct takes the first step to better behavior in the future"); S. Bibas & R. Bierschbach, supra, 126 ("Offenders who come to terms with their crimes and apologize start on the path to reform. They learn valuable lessons and feel better about themselves as persons. They may thus become less likely to recidivate and are prime candidates for mercy to temper criminal justice."). I agree with the majority that the trial court did not violate the defendant's constitutional rights by conditioning a sentencing benefit on the defendant's apology to the victim for the crimes of conviction.[2]

[2] The present case involves an unusual scenario because the trial court solicited an apology from the defendant after a trial in which the defendant had elected to testify and proclaim his innocence. Under these circumstances, I suspect that many trial judges hearing an apology at such a late stage in the proceedings would have rejected any plea for sentencing leniency on the basis of its timing. See, e.g., *United States* v. *Fonner*, 920 F.2d 1330, 1335 (7th Cir. 1990) ("[t]he . . . judge did not abuse his discretion in concluding that [the defendant's] last-minute apology was a deceitful little show"). Regardless, the trial court in the present case certainly was entitled to hold out hope that an apology to the crime victim, however belated, would serve a beneficial and productive penological purpose.

I question, however, whether a trial court constitutionally may condition a sentencing benefit on a defendant's apology to a victim of uncharged misconduct, which is criminal conduct with which the defendant has not been charged or convicted. As Judge Dupont observed in her concurring opinion in *State* v. *Huey*, 1 Conn. App. 724, 738, 476 A.2d 613 (1984), aff'd,199 Conn. 121, 505 A.2d 1242 (1986), "[t]o force the admission of guilt, at a sentencing . . . of a crime with which the defendant is not charged might jeopardize the defendant's rights in the future, either in connection with a retrial or with an independent trial claiming civil rights violations." Indeed, the Second Circuit Court of Appeals has held that it is unconstitutional "[t]o require a defendant to accept responsibility for crimes other than those to which he has [pleaded] guilty or of which he has been found guilty [because it] in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration." *United States* v. *Oliveras*, supra, 905 F.2d 628; see also *United States* v. *Delacruz*, 862 F.3d 163, 177 (2d Cir. 2017) ("[a] denial of [acceptance of responsibility] credit for behavior [that the defendant] has continued to deny and has not been proved against him beyond a reasonable doubt violates the [f]ifth [a]mendment" (emphasis omitted; internal quotation marks omitted)); *United States* v. *Austin*, 17 F.3d 27, 31 (2d Cir. 1994) (defendant's refusal to accept responsibility for "any offense *other* than the offense that is the subject of the plea" cannot be used to deny defendant sentencing benefit (emphasis in original; internal quotation marks omitted)). The First and Third Circuit Courts of Appeals have expressed similar views. See *United States* v. *Frierson*, 945 F.2d 650, 655–60 (3d Cir. 1991) (holding that trial court's denial of sentencing reduction for accep-

tance of responsibility on basis of defendant's refusal to admit guilt with respect to uncharged misconduct violated defendant's constitutional rights), cert. denied, 503 U.S. 952, 112 S. Ct. 1515, 117 L. Ed. 2d 651 (1992); *United States* v. *Perez-Franco*, 873 F.2d 455, 461–64 (1st Cir. 1989) (same).

To be clear, the legal issue is not free from doubt. Although the reasoning of Judge Dupont and the Second Circuit is persuasive to me, I recognize that there is a substantial line of federal authority holding otherwise. Specifically, a majority of the federal Courts of Appeals have held that the denial of a sentencing benefit constitutionally may be conditioned on a defendant's admission of responsibility to the commission of uncharged misconduct, among other reasons, because such a condition is rationally related to the "legitimate governmental practice of encouraging, through leniency in sentencing, both cooperation with law enforcement authorities and contrition on the part of the defendant." *United States* v. *Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992), cert. denied, 506 U.S. 1071, 113 S. Ct. 1028, 122 L. Ed. 2d 173 (1993); accord *Ebbole* v. *United States*, 8 F.3d 530, 537 (7th Cir. 1993), cert. denied, 510 U.S. 1182, 114 S. Ct. 1229, 127 L. Ed. 2d 573 (1994); see also *United States* v. *Clemons*, 999 F.2d 154, 161 (6th Cir. 1993) (adopting "the rationale of [*Frazier*], a [well balanced] opinion"), cert. denied, 510 U.S. 1050, 114 S. Ct. 704, 126 L. Ed. 2d 671 (1994); *United States* v. *Mourning*, 914 F.2d 699, 707 (5th Cir. 1990) (rejecting defendant's claim that denial of sentencing benefit for refusal to admit responsibility to uncharged misconduct violated defendant's right to silence under fifth amendment because "affording a possibility of a more lenient sentence does not *compel* self-incrimination" (emphasis in original)). As the Fourth Circuit Court of Appeals held in *Frazier*, the denial of a sentencing benefit under such circumstances is not unconstitutional because "[t]he

purpose of conditioning the [sentencing] reduction on full acceptance of responsibility . . . is not to discourage assertion or force waiver [of constitutional rights] or to obtain incriminating information to facilitate future prosecution, but rather, to formalize and further a legitimate governmental practice." *United States* v. *Frazier*, supra, 1085.

The United States Supreme Court has declined to resolve this circuit split; see *Kinder* v. *United States*, 504 U.S. 946, 112 S. Ct. 2290, 119 L. Ed. 2d 214 (1992);[3] so the issue remains unresolved. We need not decide the issue in the present case because the defendant does not claim that the trial court violated his constitutional right to maintain his innocence by conditioning a sentencing benefit on his admission of guilt and apology to a victim of uncharged misconduct. The defendant draws no constitutional distinction between either of the two victims—the one whom he has was convicted of sexually assaulting and the other whom he was not. Although the issue has not been raised or briefed by the parties, I highlight it here so that my agreement with the majority opinion is not misconstrued as an endorsement of a sentencing practice of dubious constitutionality.

For the foregoing reasons, I concur in and join the majority opinion.

[3] Justice Byron White, who dissented from the court's denial of certiorari, described the circuit split and identified the importance of the legal issue. See *Kinder* v. *United States*, supra, 504 U.S. 951 (White, J., dissenting from the denial of certiorari) (although "the First, Second, and Ninth Circuits . . . have determined that conditioning the acceptance of responsibility reduction on confession of uncharged conduct denies the defendant his right against self-incrimination," other circuits, including Fifth Circuit, have held otherwise; "this is not a question of the mere application or simple interpretation of [the acceptance of responsibility guideline], but is instead a recurring issue of constitutional dimension, where the varying conclusions of the [c]ourts of [a]ppeals determine the length of sentence actually imposed").

STATE OF CONNECTICUT *v.* JOSEPH LOUIS IMPERIALE (SC 20391)

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

Syllabus

The defendant, who had been on probation after his conviction of possession of child pornography in the second degree, appealed from the trial court's judgment revoking his probation. In connection with the defendant's child pornography conviction, the sentencing court had imposed a term of imprisonment followed by a period of probation with conditions, including sex offender treatment. After being released from prison, the defendant entered an inpatient sex offender treatment facility for treatment. Before completing his course of treatment there, however, he was discharged on the basis of his failure to adhere to various conditions established by the facility for continued placement there. The defendant subsequently was charged with violating his probation as a result of his failure to complete sex offender treatment. The defendant filed a motion to dismiss the violation of probation charge, contending, inter alia, that the probationary condition requiring him to successfully complete the sex offender treatment program violated his due process rights. The trial court denied the motion and found the defendant to be in violation of his probation. On appeal from the trial court's judgment revoking the defendant's probation, *held* that the trial court properly denied the defendant's motion to dismiss the violation of probation charge: the defendant's claim that his placement at the treatment facility violated his right to due process on the ground that it was the functional equivalent of incarceration was unavailing, as the restrictions imposed on persons receiving treatment at the facility were appreciably less onerous than those placed on prison inmates, and, thus, residency at the facility was materially different from confinement in a prison; moreover, the defendant's placement at the facility furthered the rehabilitative and public safety purposes of probation, and, because the defendant's probation officer reasonably concluded that the defendant's placement at the facility was the best, most appropriate option under the circumstances, that probationary condition did not offend principles of due process; furthermore, there was no merit to the defendant's claim that subjecting him to the highly restrictive conditions at the facility violated his right to equal protection on the ground that he was placed there due to his status as a homeless person upon his release from prison, as that claim

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

founded on the trial court's factual finding that he was not referred to the facility because he was homeless, and the defendant's claim that requiring him to attend the sex offender treatment program at the facility as a condition of probation violated his eighth amendment right to be free from cruel and unusual punishment also failed when, as in the present case, the condition of probation was reasonably necessary to accomplish the legitimate goals of probation.

Argued January 23, 2020—officially released January 7, 2021**

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher, J.*, denied the defendant's motion to dismiss and rendered judgment revoking the defendant's probation, from which the defendant appealed. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, former state's attorney, *David R. Shannon*, supervisory assistant state's attorney, and *Gregory L. Borrelli*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Joseph Louis Imperiale, appeals from the judgment of the trial court, *Danaher, J.*, revoking his probation and sentencing him to an effective term of imprisonment of two years. He claims that the trial court improperly denied his motion to dismiss the violation of probation charge because the condition of probation on which the charge was predicated, namely, that he participate in an inpatient sex offender treatment program, violated his fourteenth amendment rights to due process and equal protection, as well as the constitutional prohibition against the

** January 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

imposition of cruel and unusual punishment. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On January 4, 2013, the defendant pleaded guilty to illegal possession of child pornography in the second degree, in violation of General Statutes § 53a-196e.[1] At the time of the guilty plea, the assistant state's attorney informed the trial court, *Ginocchio, J.*, that, following a police investigation into the trafficking of child pornography, the defendant had confessed to the possession of numerous images on his personal computer depicting young children involved in various sex acts. Before accepting the defendant's plea, the court explained to the defendant that he was waiving certain constitutional rights by pleading guilty, and the defendant stated that he understood he was doing so. The court also explained to the defendant that, under the plea agreement, he would be sentenced to a term of imprisonment of ten years, suspended after four years, followed by ten years of probation, the conditions of which would include sex offender registration and "most likely . . . sex offender evaluation and treatment and many other conditions that may involve contact with children and anything [that the Office of Adult Probation] believe[s] is reasonably related to this charge." The court further advised the defendant that if, following the completion of a presentence investigative report, the court determined that the sentence contemplated under the plea agreement was appropriate, the defendant would not be allowed to withdraw his guilty plea without the court's permission. When asked whether he understood, the

[1] General Statutes § 53a-196e provides in relevant part: "(a) A person is guilty of possessing child pornography in the second degree when such person knowingly possesses (1) twenty or more but fewer than fifty visual depictions of child pornography . . . ."

defendant responded that he did. The defendant also indicated that he understood that he would be permitted to withdraw his plea if the court, after reviewing the presentence investigation report, determined that the sentence agreed on by the parties was not appropriate. Following this colloquy, the court accepted the defendant's guilty plea after finding that he had made it knowingly and voluntarily and with the assistance of competent counsel.

The trial court subsequently determined that the sentence negotiated by the parties was appropriate, and, on March 15, 2013, the court sentenced the defendant in accordance with the terms of the plea agreement. At the time of sentencing, the court also recounted the following standard and special conditions of probation, as expressly set forth under the plea agreement: "[S]ex offender registration, sex offender evaluation and treatment through [a Connecticut Association for the Treatment of Sexual Offenders] provider," and compliance "with all recommended sex offender conditions of probation as deemed appropriate by the supervising [probation] officer." Moreover, in imposing sentence, the court emphasized the seriousness of the crime of possession of child pornography insofar as it fuels and perpetuates the "heinous" and "horrendous" sex trade that so grievously exploits and harms young children.

In August, 2015, after completing a short term sex offender treatment program for inmates, the defendant was released on parole to a transitional housing setting in Torrington. His parole was revoked almost immediately, however, after it was discovered that, just two weeks after his release, he was using a public computer to access child pornography. He was returned to prison on September 1, 2015.

On April 5, 2017, the defendant, who was still incarcerated, first met with his probation officer, Nicole

Grella, via video conference. During this intake meeting, the defendant and Grella reviewed his offense, sentence and the conditions of his probation. They also discussed additional details about the defendant's life, including housing, his support network, and his concerns and anticipated needs for his impending probation. At that time, the defendant explained to Grella that he believed that he had reoffended so soon after being paroled in 2015 because of the abrupt transition from prison to community based, independent living without sufficient structure and support. The defendant further told Grella that he needed additional supervision and counseling to overcome his acknowledged addiction to child pornography and to successfully complete his period of probation.

Prior to this video conference, Grella reviewed the defendant's presentence investigation report and records. As a result of this research, Grella learned, among other things, that the defendant had committed a violent sex offense as a juvenile and that he had failed to successfully complete an inpatient sex offender treatment program at that time. Moreover, while participating in that program, the defendant exhibited "pervasive[ly] negative behavior" and admitted that he had devised a plan to be alone with one of the female staff members and to molest her. In addition, the defendant had been deemed a "high risk to sexually reoffend" on the basis of a sex offender evaluation conducted after he was sentenced to serve time in prison in 2013.

In late March, 2017, Grella spoke with the defendant's mother to discuss housing options for the defendant upon his release from prison. The defendant's mother indicated to Grella that she was in the process of moving out of state but would be able to pay for her son's housing while he remained on probation. Grella spoke with the defendant's mother again in early June, 2017, at which time she told Grella that she had secured a bed

for the defendant at the same residence in Torrington where he had resided briefly following his short-lived release on parole.

Grella thereafter told the defendant that she had decided to refer him to the January Center (center), an inpatient sex offender treatment facility in Montville, for placement there upon his discharge from prison. Grella explained that the center offers the most intensive and restrictive sex offender treatment program available through the Judicial Branch's Court Support Services Division and is operated by an entity known as The Connection, Inc., which runs numerous treatment programs throughout the state. The typical length of a stay at the center, where residents live in individual rooms and participate in daily therapy, is three to six months, depending on the resident's progress. The facility is located on the grounds of the Corrigan Correctional Institution and is surrounded by a high, exterior fence topped with razor wire. Although residents of the center may not leave the facility without permission and a staff escort, the building is unlocked, and staff members are instructed not to restrain or touch a probationer seeking to leave without proper authorization. If a resident who is on probation does leave the center without such authorization, however, he or she may be charged with a violation of probation.

The defendant was initially resistant to being placed at the center, in large measure because he believed that his referral to such a restrictive treatment facility was unduly harsh and punitive. He also told Grella that his placement at the center was not warranted because his mother had secured housing for him and he had already lined up a possible employment opportunity. Over the course of several phone calls with the defendant, however, Grella explained in detail why she believed that placement at the center was the most appropriate discharge option for him. On the basis of her expertise, it

was Grella's view that the conditions imposed by the center, including daily therapy sessions, would afford the defendant the best structure and opportunity for his successful reentry into the community. Grella also discussed other benefits of the defendant's placement at the center, including its minimal cost to him and his mother, and the support and assistance it would afford him when he returned to the community upon his departure from the facility, a consideration that the defendant himself had identified as critical to a successful transition. Over time, the defendant grew more agreeable to his placement at the center, and he assured Grella that he would abide by the center's rules. He also told Grella that he understood that, if he refused to comply with those rules or any other aspect of his discharge plan, he would be in violation of his probation.

On June 28, 2017, the defendant signed the conditions of his probation, thereby acknowledging his obligation to abide by them. Among the court-ordered special probationary conditions, probation officials were authorized to require the defendant to participate in a residential sex offender treatment program, and the defendant was required to complete sex offender evaluation and treatment through an approved provider and to comply with all other conditions deemed appropriate by his probation officer in view of his offense. More specifically, the defendant expressly acknowledged the requirement imposed by his probation officer that he reside and receive treatment at the "[c]enter, a secure [twenty-four] hour residential treatment facility/program," and he further agreed to "follow the . . . [c]enter's restrictions, policies and procedures until satisfactory completion of the program." Finally, the defendant acknowledged that leaving the center without permission would constitute a violation of his probation.

Upon his release from prison on July 14, 2017, the defendant commenced his placement at the center. He

thereafter signed sex offender treatment and accountability agreements pursuant to which he was required to abide by the center's policies and rules, including the requirements that he "not engage in any violence, threats or intimidation" or "in any behavior that adversely [a]ffects the treatment or confidentiality of any other client," and that he "abide by all of the rules of [t]he . . . [c]enter in order to [coexist] . . . with other clients, staff members and volunteers." He also agreed to "be respectful to all staff and clients [of the center]," including "allowing [them] personal space, not getting involved in other client's concerns or staff member's undertakings, not swearing, being aware of how [his] behavior or words can make people feel uncomfortable, analyzing situations [that] may trigger anger before reacting, and not causing . . . disturbances within the . . . [c]enter community." In addition, the defendant acknowledged that any violation of these rules would result in his being issued a ticket and in notification to his probation officer. Finally, the defendant was informed that repeated violations could lead to his immediate dismissal from the center.

Although the defendant completed the initial phase of his treatment program, on October 30, 2017, before completing that program, he was discharged from the center because of his failure to adhere to various conditions established by the center for continued placement there. According to a discharge summary prepared by the center, the defendant's treatment was terminated as a result of his "[noncompliance] with program rules and expectations and disorderly conduct" after receiving multiple disciplinary tickets for engaging in a pattern of wilful disobedience and disrespect that adversely affected the therapeutic environment at the center, repeatedly becoming confrontational toward staff, verbally threatening to harm staff, propping open the door to his room when it was supposed to be closed and

locked,[2] and not completing his assigned chores. On one of those occasions, the center staff called the state police to respond to the defendant's behavior. Shortly thereafter, the staff concluded that they had exhausted all efforts to work productively with the defendant and that he had become "a safety concern to himself and the community."

The defendant subsequently was charged with violating his probation for failing to complete sex offender treatment at the center. The defendant moved to dismiss the charge, claiming that the probationary condition requiring him to successfully complete the center treatment program violated his rights under the due process clause of the fourteenth amendment to the United States constitution.[3] In support of this claim, the defendant asserted that the conditions at the center were so severe and restrictive as to constitute the functional equivalent of incarceration and, therefore, were impermissibly onerous as a matter of law. The defendant further claimed that, even if his placement at the center was not tantamount to incarceration, the restrictions imposed on him there nevertheless violated his right to due process because, in light of his background and offense history, those restrictions were not justified as reasonably related to his rehabilitation. Finally, the defendant asserted a third due process violation, namely, that he had been denied adequate notice of his placement at the center when the trial court sentenced him and placed him on probation.

In addition, the defendant maintained that his referral to the center violated his right to equal protection under

[2] The defendant would prop open the door to his room during required therapy sessions, even though the door was supposed to be closed and locked at that time so as to render the room inaccessible to him during such sessions.

[3] The due process clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., amend. XIV, § 1.

the federal constitution[4] because the referral was predicated on his status as a homeless person. Finally, the defendant claimed that his placement at the center violated the constitutional prohibition against cruel and unusual punishment[5] because he was placed at the center, and thereby subjected to its punitive conditions, on account of his homelessness.[6]

Following an evidentiary hearing, the trial court, *Danaher, J.*,[7] issued a thorough memorandum of decision in which the court credited the state's witnesses, rejected each of the defendant's claims and, accordingly, denied his motion to dismiss. With respect to the defendant's contention that his placement at the center constituted a due process violation because it was tantamount to incarceration, the trial court stated: "[T]he defendant was not incarcerated at the [c]enter. The evidence presented at the hearing . . . makes clear that a probationer leaving the . . . [c]enter would not be charged with escape. The . . . [c]enter is not staffed by correctional officers. It does not contain cells; it has individual rooms. Residents at the . . . [c]enter leave for religious services and medical appointments. Although the . . . [c]enter is on the grounds of a correctional facility and . . . is surrounded by a fence topped with barbed wire, if a probationer referred to

[4] The equal protection clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1.

[5] The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

The eighth amendment's prohibition against cruel and unusual punishment is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Tuilaepa* v. *California*, 512 U.S. 967, 970, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

[6] Several other claims that the defendant raised in the trial court are not the subject of this appeal.

[7] Unless otherwise noted, all references hereinafter to the trial court are to Judge Danaher.

the . . . [c]enter elected to leave without permission, that person could walk through the gate or have the gate opened for them. The staff members at the . . . [c]enter are specifically instructed not to touch or try to restrain a probationer seeking to leave the [c]enter without permission. It is true that, in the foregoing event, the probationer would be charged with violation of probation, but the latter fact does not compel the conclusion that referral to the . . . [c]enter is 'essentially' incarceration."

In rejecting the defendant's claim that his placement at the center violated his right to due process because his referral there was unreasonable, the trial court explained: "[T]he Office of Adult Probation engaged in a careful process that led to the conclusion that referral to the . . . [c]enter was appropriate for this defendant. Indeed, the defendant specifically requested additional help in effecting a transition from a correctional institution due to his inability to refrain from obtaining child pornography. He was, after an analysis, designated as a high risk to reoffend, and the . . . [c]enter was a placement designed to respond to such individuals. It offered group treatment and daily individual treatment. It offered help to those seeking employment and assistance obtaining housing and other services. The defendant's placement at the . . . [c]enter was not in any way arbitrary; it was a carefully selected, eminently reasonable placement for a sex offender such as this defendant." The court further explained: "[T]he evidence adduced at the hearing fully supports the court's finding that the defendant's placement at [the] [c]enter was based on empirical evidence, including an understanding of the defendant's offenses and offense history; his rapid reoffense after his initial release in 2015; his own request for additional assistance in effecting a transition; the nature of the . . . [c]enter; and the programs available at [the] [c]enter for high risk offenders.

The defendant's placement at the . . . [c]enter was hardly unreasonable; on the contrary, it was completely appropriate. That placement comports with all requirements that must apply to a condition of probation."

Finally, the trial court rejected the defendant's equal protection and cruel and unusual punishment claims, both of which were predicated on his contention that he was referred to the center on the basis of his homelessness, because the testimony adduced at the hearing on the motion to dismiss established that he had not been placed there for that reason. Rather, the court found that, "although homelessness is a factor in deciding whether to place a [probationer] in the . . . [c]enter, such placement is based primarily on whether the probationer is a high risk sex offender, not on whether the [probationer] is homeless," and, further, in the present case, the defendant "was not placed at the . . . [c]enter because he was homeless; he was placed at the . . . [c]enter because he is a high risk offender."

Thereafter, the trial court found that the defendant had violated his probation by virtue of his improper actions and conduct at the center, and his failure to complete the treatment program there due to that misconduct. The court revoked the defendant's probation and sentenced him to a term of imprisonment of six years, execution suspended after two years, followed by four years of probation. This appeal followed.[8]

In this court, the defendant renews the constitutional claims that he raised in the trial court, which we address in turn. Before doing so, however, we briefly summarize the principles relating to probation that guide our analysis of the defendant's claims. "[P]robation is, first and foremost, a penal alternative to incarceration . . . .

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

[Its] purpose . . . is to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. . . . [P]robationers . . . do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions. . . . These restrictions are meant to [ensure] that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 180, 842 A.2d 567 (2004).

Nevertheless, because probation is itself "a conditional liberty," once granted, it is "a constitutionally protected interest"; (internal quotation marks omitted) *State* v. *Orr*, 199 Conn. App. 427, 434–35, 237 A.3d 15 (2020); and, therefore, "[a]ny restriction . . . [on] a probationer's otherwise inviolable constitutional rights can be justified only to the extent actually required by legitimate demands of the probation process in any given case." *State* v. *Smith*, 207 Conn. 152, 166, 540 A.2d 679 (1988). In other words, principles of due process require that probationary conditions must be reasonably related to the purposes of probation, with appropriate regard for the background and circumstances of the individual probationer, a requirement that is also mandated statutorily under General Statutes § 53a-30.[9]

[9] General Statutes § 53a-30 provides in relevant part: "(a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant . . . (17) satisfy any other conditions reasonably related to the defendant's rehabilitation. . . .

(b) When a defendant has been sentenced to a period of probation, the Court Support Services Division may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court. . . ."

In view of the nature and goals of probation, however, and because any number of probationary conditions or combinations thereof are likely to be suitable in any particular case, the trial court "has an exceptional degree of flexibility in determining [the] terms [of probation]"; (internal quotation marks omitted) *State* v. *Silas S.*, 301 Conn. 684, 692, 22 A.3d 622 (2011); and we therefore review those terms for abuse of discretion only. See id. Thus, "[i]f it appears that the trial court reasonably was satisfied that the terms of probation had a beneficial purpose consistent with the defendant's reformation and rehabilitation, then the order must stand. . . . In reviewing the issue of discretion, we do so according it every reasonable presumption in favor of the trial court's ruling." (Internal quotation marks omitted.) Id.

"The success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate. . . . In this regard, modifications of probation routinely are left to the [O]ffice of [A]dult [P]robation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future pursuant to . . . § 53a-30. . . . To this end, probation officers shall use all suitable methods to aid and encourage [a probationer] and to bring about improvement in his [or her] conduct and condition." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, supra, 268 Conn. 180–82. Accordingly, it is well established that, depending on the circumstances of a particular case, the Office of Adult Probation properly may impose conditions of probation that place significant restrictions on a probationer's liberty during the term of his or her probation, if such restrictions are reasonably necessary. See, e.g., *State* v. *Reid*, 204 Conn. 52, 55, 526 A.2d 528 (1987). Of course, a defendant may challenge the probationary condition he

or she is alleged to have violated on the ground that it was unreasonable and, therefore, unlawful. See *State* v. *Smith*, 255 Conn. 830, 840, 769 A.2d 698 (2001); see also Practice Book § 41-8 (8) (defendant may file motion to dismiss charge on ground that "the law defining the offense charged is unconstitutional or otherwise invalid"). Indeed, "[e]ven prior to the violation of probation hearing, if an individual on probation believes that the [O]ffice of [A]dult [P]robation [has] imposed an unreasonable condition, he may request a hearing pursuant to . . . § 53a-30 (c)." *State* v. *Smith*, supra, 255 Conn. 840. If a condition of probation is determined to be invalid, a revocation of probation predicated on a violation of that condition also is unlawful. See, e.g., *State* v. *Cooley*, 3 Conn. App. 410, 415, 488 A.2d 1283 ("[i]f . . . the condition [of probation] serves no rehabilitative purpose and there is undisputed evidence that the condition was unnecessary at its inception, or was without any beneficial purpose as of the date of the hearing, reasonableness of a revocation of the probation is lacking"), cert. denied, 196 Conn. 805, 492 A.2d 1241 (1985).

Finally, "in determining whether a condition of probation impinges unduly [on] a constitutional right [in any particular case], a reviewing court should evaluate the condition" to ensure that it is "reasonably related to the purposes of [probation]." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 207 Conn. 170. "Consideration of three factors is required to determine whether [such] a reasonable relationship exists: (1) the purposes sought to be served by [the] probation[ary] [condition]; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." (Internal quotation marks omitted.) Id. Upon application of these principles, we conclude that the trial court properly rejected the defendant's claims.

We first address the defendant's contention that, contrary to the determination of the trial court, his placement at the center violated his right to due process because it was the functional equivalent of incarceration.[10] In support of this contention, the defendant focuses on the highly restrictive nature of the conditions at the center, in particular, the facts that center residents may leave the facility only with permission and an escort, that relatively strict security protocols are followed and enforced by center staff, and that the facility is situated on the grounds of a correctional institution with a fence surrounding it.[11] We disagree with the defendant's claim.

It is axiomatic that "[t]he . . . object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U.S. 126, 131, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). Probationers, on the other hand, are afforded a conditional liberty that is dependent on their adherence to certain specified limitations on the freedoms they otherwise would enjoy, without restriction, if they were not subject to a criminal sanction. See, e.g., *Griffin* v. *Wisconsin*, 483 U.S. 868, 873–75, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). Generally speaking, the infringement on liberty caused by an order of probation is

[10] As the defendant acknowledges, the term "incarceration" is not defined in our statutes, and neither he nor the state has advocated for a particular definition of the term. For present purposes, therefore, we, like the parties, use the term in accordance with its commonly understood meaning, namely, involuntary confinement in a jail or a prison. See *Magee* v. *Commissioner of Correction*, 105 Conn. App. 210, 215, 937 A.2d 72 (imprisonment "commonly and primarily refers to a condition of physical confinement, usually by means of coercion, in a prison"), cert. denied, 286 Conn. 901, 943 A.2d 1102 (2008).

[11] Although situated on the grounds of a correctional institution, it is undisputed that the defendant was not in the custody of the Commissioner of Correction while he resided at the center.

considerably less intrusive than the extreme restrictions attendant to incarceration. See, e.g., *United States* v. *Nachtigal*, 507 U.S. 1, 5, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993). Nevertheless, as we previously noted, conditions of probation that are reasonably necessary and appropriate for the rehabilitation of the probationer and the safety of the community are lawful and proper, even though they place significant restrictions on the probationer's liberty during the term of his or her probation. See, e.g., *Blanton* v. *North Las Vegas*, 489 U.S. 538, 542, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989) ("probation . . . may engender a significant infringement of personal freedom" (internal quotation marks omitted)). Thus, depending on the circumstances of a particular case, probation may "involve serious restraints on a probationer's [lifestyle], associations, movements and activities." *State* v. *Reid*, supra, 204 Conn. 55. "Indeed, conditions [of probation] may appear to the defendant [to be] more onerous than the sentence of confinement [that] might be imposed." (Internal quotation marks omitted.) Id., 55 n.2.

In the present case, the trial court's factual findings, which are unchallenged, demonstrate that, although the restrictions imposed on persons receiving treatment at the center are by no means insignificant, they are appreciably less onerous than those placed on prison inmates, and, accordingly, those findings support the court's conclusion that residency at the center is materially different from confinement in a prison. As we noted previously, the center contains individual rooms rather than cells, residents are not locked in their rooms, and, in further contrast to prison, the center itself is not locked. Indeed, residents may leave the facility with permission and an escort, and, even if a resident seeks to leave the facility without permission, center staff are directed not to restrain the individual as he or she is leaving, and he or she will not be charged with the

crime of escape. To be sure, the center's treatment program is both restrictive and structured. But residents there retain a number of important rights and privileges that are indisputably unavailable to incarcerated individuals. We therefore agree with the trial court that the defendant's placement at the center for a period of months is not tantamount to a term of imprisonment.[12]

In this regard, we are aware of only one occasion in which this court has held that a person who was not imprisoned in a correctional facility nevertheless was confined under circumstances tantamount to incarceration. In *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 780 A.2d 903 (2001), the petitioner, William A. Connelly, was acquitted of kidnapping and assault

[12] The defendant also makes brief reference to an additional alleged due process violation, namely, that he did not receive adequate notice at the time of his plea and sentencing that he could be placed at a facility as restrictive as the center. The trial court rejected this claim and, to the extent that the defendant has renewed that claim on appeal, so do we. As we explained, at the plea hearing, the court, *Ginocchio, J.*, advised the defendant that his probation officer likely would impose "many other conditions," including sex offender evaluation and treatment, that the officer reasonably believed were appropriate in light of the nature of his offense. Additionally, at the time of sentencing, the court ordered as a special condition of probation that the defendant complete "sex offender evaluation and treatment through [an approved] provider" and that he "[c]omply with all recommended sex offender conditions of probation as deemed appropriate by the supervising [probation] officer." Furthermore, under § 53a-30, a probation officer has broad discretion to impose reasonable probationary conditions and, if warranted, to require that a probationer participate in a sex offender treatment program at a residential facility like the center, which, as the trial court expressly found, "provide[s] community based treatment for the treatment of sex offenders." Finally, the defendant himself recognized that he needed an intensive and structured treatment program if he was to successfully address his addiction to child pornography and to avoid reoffending. As we explain more fully hereinafter, in light of the defendant's addiction and his offense history and likelihood of recidivism, his placement at the center fell squarely within the discretion afforded his probation officer to impose such conditions. Consequently, the defendant's claim that he was not on notice that he could be placed at a residential facility like the center is devoid of merit.

by reason of lack of capacity due to mental disease or defect (insanity) and committed to the custody of the Commissioner of Mental Health for a period of ten years, subject to periodic review by the Psychiatric Security Review Board. Id., 399. For the duration of his commitment, Connelly was confined at Whiting Forensic Institute (Whiting) in Middletown, a maximum security facility for the treatment of violent offenders. Id., 405–406. Several years after his commitment and while still a patient at Whiting, Connelly filed a petition for a writ of habeas corpus, claiming that he was entitled to a new trial because the record did not affirmatively establish that he had been advised of his right to a jury trial. Id., 400. The habeas court agreed with Connelly and awarded him a new trial. Id. After a trial at which Connelly did not raise an insanity defense, a jury found Connelly guilty of the kidnapping and assault charges, and he was sentenced to a total effective prison term of forty years. Id.

Thereafter, Connelly filed another habeas petition seeking credit toward his forty year sentence for the period of time that he had been confined at Whiting pursuant to the commitment order following his insanity acquittal. Id., 401. The habeas court again agreed with Connelly's claim and ordered the Commissioner of Correction to grant Connelly credit toward his sentence for the period of his confinement at Whiting. Id., 402. We affirmed the judgment of the habeas court, explaining that, "[a]lthough the *purpose* of an order of commitment issued as a result of an insanity acquittal is significantly different from that of a prison sentence imposed as a result of a criminal conviction . . . the *effect* of such a commitment on the acquittee is no less a deprivation of liberty than that of a prison sentence. Indeed, the United States Supreme Court has aptly characterized the involuntary confinement for treatment of mental illness as a massive curtailment of liberty. . . .

In fact, [t]he United States Supreme Court has recognized involuntary commitment to a mental institution . . . as involving more than a loss of freedom from confinement . . . due to its stigmatizing consequences, and the potential exposure to invasive, compulsory medical and psychiatric treatment." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 405. We further explained that such a "loss of liberty is all the more profound when the institution to which the patient has been committed is a maximum security facility such as Whiting." Id., 405–406. Finally, we observed that a sentenced prisoner who is transferred from a correctional institution to Whiting for treatment is entitled to full credit toward his sentence for the time spent at Whiting. Id., 406.

The present case is readily distinguishable from *Connelly* because, as we have explained, placement at the center is not akin to imprisonment, let alone is it the equivalent of confinement in a maximum security facility. Thus, our reasoning in *Connelly* and our resolution of that case simply are inapplicable to the present case, which presents an entirely different set of relevant circumstances. Moreover, as the trial court observed, the fact that a probationer placed at the center may be charged with violating probation for leaving the center without permission does not alter the conclusion that placement at the center is not functionally the same as incarceration, as a probationer is always subject to being charged with a probation violation whenever he or she fails to comply with a probationary condition. See, e.g., *State* v. *Reid*, supra, 204 Conn. 56–57.

The defendant also asserts that his placement at the center was not reasonably related to the purposes of probation because the factors that Grella considered in determining the sex offender treatment program most appropriate for the defendant militated against a placement as restrictive as the center. To support his claim

that Grella reasonably could not have concluded that his placement at the most restrictive treatment sex offender treatment facility available was warranted, the defendant cites his positive work and disciplinary history in prison, his completion of a short-term sex offender treatment program while incarcerated, and the fact that his mother had secured housing for him upon his release from prison. We are not persuaded.

As we have explained, the Office of Adult Probation has wide latitude to impose conditions on probationers that serve "to foster the offender's reformation and to preserve the public's safety . . . ." *State* v. *Smith*, supra, 207 Conn. 168. Of course, this includes the authority to require a probationer to undergo sex offender treatment when such treatment is reasonably necessary; see, e.g., *State* v. *Smith*, supra, 255 Conn. 844 (sex offender treatment was "a key component of the [defendant's] rehabilitative process because it was directly connected to one of the underlying crimes to which the defendant had pleaded guilty"); see also *State* v. *Thorp*, 57 Conn. App. 112, 117, 747 A.2d 537 (under § 53a-30, sex offender treatment may be imposed as condition of probation, even when it was not explicitly included in court-ordered terms of probation), cert. denied, 253 Conn. 913, 754 A.2d 162 (2000); as well as to require that a probationer adhere to stringent residential conditions and rules. See, e.g., *State* v. *Agli*, 122 Conn. App. 590, 596, 1 A.3d 133 (probation officer properly required probationer convicted of sex offense to adhere to strict curfew at shelter as condition of probation), cert. denied, 298 Conn. 920, 4 A.3d 1229 (2010).

We agree with the trial court that the defendant's placement at the center furthered the rehabilitative and public safety purposes of probation. Before deciding where to refer the defendant, Grella reviewed the defendant's record and spoke with him on a number of occa-

sions to ascertain his needs and to select an appropriate sex offender treatment program tailored to those needs, with due regard, of course, for community safety. Among other things, Grella learned that the defendant had committed a violent sex offense as a juvenile[13] and that he had failed to complete sex offender treatment deemed necessary in light of the offense. In addition, Grella was aware that the defendant had reoffended within days of his release on parole two years earlier despite his having completed a sex offender treatment program in prison. Furthermore, the defendant himself believed that he had not been afforded adequate supervision and guidance following his release on parole and that he needed additional support in order to overcome his admitted addiction to child pornography and to avoid offending again. Based on her eight years of experience as a probation officer, Grella reasonably concluded that the center's intensive program of individual and group therapy, administered in the structured environment of a residential facility and coupled with the housing and employment assistance offered by the center at the time of the defendant's discharge from the center, was likely to afford the defendant his best opportunity to successfully address his child pornography addiction. It also was reasonable for Grella to conclude that, because the defendant presented a high risk of reoffending, legitimate law enforcement interests

[13] We disagree with the defendant's contention that it was improper for Grella to have considered his violent sex offense as a juvenile in referring the defendant to the center. Although at least one court has held that a probationary condition may not be predicated solely on a juvenile conviction; see *United States* v. *Worley*, 685 F.3d 404, 408–409 (4th Cir. 2012); in the present case, the defendant's juvenile record was only one of a number of considerations that led Grella to conclude that the defendant should be placed at the center. The fact that the defendant had committed a violent sex offense as a juvenile, and then failed to complete sex offender treatment following that offense, was certainly relevant to Grella's determination as to the appropriate conditions of probation, and we see no reason why Grella was prohibited from factoring that information into her decision.

would best be served by placing the defendant at a restrictive facility like the center. Cf. *State* v. *Crouch*, 105 Conn. App. 693, 701–702, 939 A.2d 632 (2008) (rejecting defendant's claim that requiring sex offender treatment as condition of probation violated his right to due process because facts of his underlying conviction of risk of injury to child suggested that sex offender evaluation and treatment were conditions of probation that were "reasonably related to the defendant's reformation" and to "the legitimate purpose of law enforcement in rehabilitating him and in protecting the community").

The defendant asserts that, because a less restrictive sex offender treatment program would have sufficed to accomplish probation's dual goals of rehabilitation and public safety, the Office of Adult Probation was obligated to have selected such a program for him. As a general rule, the beneficial rehabilitative purpose of probation will be best served when the probationer is afforded the opportunity to succeed under conditions that do not limit or restrict his liberty to a greater extent than necessary to accomplish that end. Probationary conditions, however, must also account for the community's legitimate safety concerns. Thus, we will not second-guess the imposition of probationary conditions, as long as they may be justified as reasonably necessary to accomplish the purposes of probation. Cf. *State* v. *Faraday*, supra, 268 Conn. 180–82 (probation officer is responsible for determining conditions that will assist probationer in achieving positive change in behavior). As we previously stated, we must afford the probation officer such flexibility because of the many variables involved in the determination of what set of conditions is best suited to a particular probationer. See *State* v. *Misiorski*, 250 Conn. 280, 287–88, 738 A.2d 595 (1999). Because Grella reasonably concluded that the defendant's placement at the center was the best, most appro-

priate option under the circumstances—not *despite* the restrictive conditions there but *because* of them—that probationary condition did not offend principles of due process.

The defendant next claims that subjecting him to the highly restrictive conditions at the center violated his right to equal protection because he was placed there due to his status as a homeless person. We need not consider the substantive issue raised by the defendant's claim, that is, whether the right to equal protection bars the placement of a probationer at the center on the basis of his or her homelessness, because his claim founders on the trial court's factual finding—fully supported by the record—that he was not referred there for that reason. Moreover, it is difficult to see how the defendant could fairly be characterized as homeless in view of the fact that his mother had secured housing for him upon his release from prison. Because the defendant's equal protection claim is belied by the record, the claim fails.

The defendant finally argues that the condition of probation requiring him to attend sex offender treatment at the center violated his eighth amendment right against cruel and unusual punishment because assigning him to the most restrictive treatment facility in the state was grossly disproportionate given his background and offense history.[14] The defendant cannot prevail on this claim because of our determination, explained in connection with our rejection of his due process claim, that his placement at the center was reasonably related to the purposes of probation: a condition of probation that is reasonably necessary to

[14] The defendant apparently did not raise this argument in the trial court in support of his eighth amendment claim; he maintained, rather, that it constituted cruel and unusual punishment to place him at the center due to his homelessness. We see no reason, however, not to address the merits of the eighth amendment argument he now makes in this court.

accomplish the legitimate goals of probation cannot be unduly harsh. Accordingly, the defendant's eighth amendment claim also lacks merit.[15]

The judgment is affirmed.

In this opinion the other justices concurred.

MAURICE ROSS *v.* COMMISSIONER OF CORRECTION (SC 20281)

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

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel provided ineffective assistance by failing to object to certain improper remarks by the prosecutor during closing argument. Specifically, the prosecutor stated in her closing argument that the state's firearms expert, S, had testified that a purposeful trigger pull was required to fire the petitioner's gun, even though S did not make that statement and was prevented from answering the prosecutor's leading question to that effect when the petitioner's trial counsel successfully objected to it. The habeas court rendered judgment denying the petition, concluding that the petitioner had failed to demonstrate that he suffered prejudice. On the granting of certification, the petitioner appealed to the Appellate Court, which affirmed the habeas court's judgment. The Appellate Court concluded that, although at least one of the prosecutor's remarks during closing argument was improper, the doctrine of collateral estoppel barred the petitioner from litigating the issue of prejudice because, in the petitioner's direct appeal from his conviction, the Appellate Court already had determined, in the context of resolving his claim of prosecutorial impropriety, that the same improper remarks did not prejudice him. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the petitioner was collaterally estopped from litigating the issue of whether he was prejudiced by his trial counsel's failure to object to the prosecutor's improper remarks during closing argument, as the issue in the present case was not identical to that presented in the petitioner's direct appeal of his conviction:

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[15] In his reply brief, the defendant concedes that, under the circumstances presented, an adverse decision on his due process claim also would require an adverse decision on his eighth amendment claim.

the petitioner's claim of prosecutorial impropriety in his direct appeal required the Appellate Court to apply the factors set forth in *State* v. *Williams* (204 Conn. 540), and, consistent with *Williams* and its progeny, the Appellate Court properly considered trial counsel's failure to object as evidence that the petitioner was not prejudiced, and it was this aspect of the *Williams* analysis that made it impossible to conclude that collateral estoppel barred the petitioner from litigating the issue of prejudice in his habeas action; moreover, the application of the doctrine of collateral estoppel would preclude the petitioner from seeking a remedy for conduct that he claims affected not only his criminal trial but also his likelihood of success on appeal, and, thus, the application of that doctrine would be fundamentally unfair and inconsistent with due process and the principles underlying the writ of habeas corpus.

2. The petitioner failed to demonstrate that he was prejudiced by his trial counsel's failure to object to the prosecutor's improper remarks and, therefore, could not prevail on the merits of his ineffective assistance claim: the failure of trial counsel to object to the remarks did not undermine this court's confidence in the verdict, as the impropriety was confined to the prosecutor's closing argument, and the trial court instructed the jury that the arguments of counsel did not constitute evidence; moreover, although the prosecutor mischaracterized S's testimony, S's actual testimony constituted strong evidence that the gun that the defendant used to commit the murder of which he had been convicted did not fire accidentally, as the petitioner had claimed; furthermore, the petitioner's own statements and actions before and after the shooting provided strong evidence that he acted intentionally, including evidence that the petitioner believed that the victim had arranged for two of her male friends to assault him, that he purchased a gun thereafter for the purpose of killing the men, and that he did not call for help after he shot the victim.

Argued June 1, 2020—officially released January 11, 2021*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Elgo* and *Bear*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the

* January 11, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

granting of certification, appealed to this court. *Affirmed.*

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KAHN, J. The petitioner, Maurice Ross, appeals[1] from the judgment of the Appellate Court, which affirmed the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the Appellate Court incorrectly concluded that the doctrine of collateral estoppel barred him from litigating the issue of whether he was prejudiced by his trial counsel's failure to object to the improper comments of the prosecutor during closing argument at his criminal trial. The respondent, the Commissioner of Correction, argues that the Appellate Court correctly held that the doctrine precluded the petitioner from litigating the issue of prejudice. In the alternative, the respondent contends that the judgment of the Appellate

[1] This court granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly determine that the doctrine of collateral of estoppel precluded the petitioner from litigating the issue of whether [criminal trial] counsel's failure to object to the prosecutor's improper comments during the petitioner's criminal trial prejudiced him as part of an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because the Appellate Court had previously held in the petitioner's direct appeal from his criminal conviction that those same improper comments did not deprive him of a fair trial?" And (2) "[i]f the doctrine of collateral estoppel does not preclude the petitioner from litigating the issue of prejudice, can the petitioner prevail under *Strickland* v. *Washington*, supra, 466 U.S. 668?" *Ross* v. *Commissioner of Correction*, 331 Conn. 915, 915–16, 204 A.3d 703 (2019).

Court may be affirmed on the basis that the petitioner has failed to demonstrate that he suffered prejudice from his criminal trial counsel's allegedly deficient performance. Although we conclude that the doctrine of collateral estoppel does not apply under the circumstances of the present case, we affirm the judgment of the Appellate Court on the ground that the petitioner has failed to demonstrate prejudice.

The record reveals the following relevant facts and procedural history. Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a). See *State* v. *Ross*, 151 Conn. App. 687, 688, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014), and cert. denied, 314 Conn. 926, 101 A.3d 272 (2014). On appeal to the Appellate Court, the petitioner claimed that the prosecutor's improper comments during closing argument violated his constitutional right to a fair trial. Id. Although the Appellate Court concluded that at least one of the prosecutor's comments was improper, it affirmed the judgment of conviction on the basis of its conclusion that the petitioner had not been prejudiced by the improper remarks. Id., 688, 706.

The Appellate Court set forth the following relevant facts that the jury reasonably could have found. "In early February, 2009, the [petitioner] and the victim, Sholanda Joyner, were involved in a romantic relationship. The two had known each other since they were children, and had dated intermittently during the preceding eleven years. The victim's relationship with the [petitioner] was, as the victim's sister described it, 'dysfunctional . . . .'

"Several days before February 5, 2009, the [petitioner] went to the victim's apartment on Woolsey Street in New Haven and encountered two of her male acquaintances. A physical altercation between the two men and the [petitioner] ensued, and the [petitioner] was

forcefully ejected from the victim's apartment. Shortly thereafter, the [petitioner] purchased a revolver for the purpose of killing the two men. The [petitioner] returned to the victim's apartment the next morning and encountered the individuals who had assaulted him the previous day. After displaying the revolver, the [petitioner] took their money, cell phones, and some drugs." Id., 688–89.

"On February 5, 2009, the victim appeared, crying . . . at her father's doorstep. Approximately two minutes later, the [petitioner] arrived and demanded that the victim leave with him. Over the protests of the victim's stepmother, the [petitioner] grabbed the victim by the arm and pulled her out the door. Later that evening, at the home of the victim's grandmother, the victim was crying and pleading with the [petitioner] to leave her alone. The [petitioner] again commanded the victim to depart with him, and the two left.

"After leaving the house of the victim's grandmother at approximately 11 p.m., the [petitioner] and the victim walked to the victim's apartment. Along the way, the victim stopped and purchased some ecstasy pills and phencyclidine (PCP). The victim and the [petitioner] smoked the PCP while en route to the victim's apartment. After arriving at the victim's home, the [petitioner] and the victim went into the victim's bedroom, and both of them ingested ecstasy. At some point, the [petitioner] retrieved a revolver and asked the victim if she had 'set [him] up . . . .' The [petitioner] then fired one gunshot into her head, intentionally killing her. After moving the victim's body next to the bed, the [petitioner] left the apartment, locking the door behind him, and [traveled] to Waterbury for several days. While in Waterbury, the [petitioner] socialized at a club named 'Club Paradise.'

"The [petitioner] returned to New Haven on February 8, 2009. Two days later, he encountered Terrence Corni-

gans outside of a mosque in New Haven. Although the two men were not acquainted, the [petitioner] confessed to Cornigans that he had killed his girlfriend by shooting her, and asked for money so that he could leave the state. Cornigans refused to give the [petitioner] any money, but agreed to drive him home. The [petitioner] instead directed Cornigans to drive him by the victim's apartment on Woolsey Street. Shortly thereafter, Cornigans returned the [petitioner] to the mosque. Later that night, Cornigans reported to the police what the [petitioner] had told him about killing his girlfriend. The police went to the victim's apartment and discovered her body. The [petitioner] turned himself in to the police the following day." Id., 689–90.

At his criminal trial, the petitioner admitted that he had shot the victim but claimed that the gun had fired accidentally. Id., 690–91. Because the petitioner admitted to the shooting, the key issue at trial was his intent.

In support of its burden to prove that the petitioner intentionally fired the gun, the state presented the testimony of James Stephenson, a firearms and toolmark examiner with the state of Connecticut. Stephenson testified regarding the operation of the petitioner's gun, a ".32 S&W long caliber Harrington & Richardson revolver . . . ." Stephenson had examined the petitioner's firearm for multiple purposes, including to evaluate the amount of force required to pull the trigger.[2] Stephenson testified that there are two ways to fire the petitioner's revolver, single action and double action. In a single action trigger pull, the hammer is first pulled back, and then the trigger is pulled. In a double action trigger pull, the trigger is pulled back all the way without first cocking the hammer. Stephenson's tests revealed

[2] One of Stephenson's coworkers had performed an initial examination of the firearm and confirmed that it was functioning properly. Stephenson cosigned the report on that examination.

that between three and one-half to five and one-half pounds of pressure are required to fire the weapon in a single action trigger pull. A double action pull requires seven and one-half pounds of pressure. During the state's direct examination of Stephenson, the following exchange occurred:

"[The Prosecutor]: Talking about the single action again . . . with the hammer pulled back, if an individual was holding the gun, and just waving it around, without more, would that cause the gun to fire a bullet?

"[Stephenson]: It requires a force placed upon that trigger to cause it to fire. If the person doesn't have their finger on the trigger, if the gun is—if you were to hold the gun in a fashion where, as explained in single action, if my hand were back here, and I was just waving it around, it's not going to fire. It requires that pressure placed against that trigger to cause it to fire.

"[The Prosecutor]: Is the pressure pulling it backward purposely?

"[Criminal Trial Counsel]: Objection, Your Honor. Again, to the characterization purposely or not, that's a conclusion that I think ultimately is going to go to this jury. That's not appropriate.

"[The Court]: Are you claiming it?

"[The Prosecutor]: No, I'll withdraw it."

The prosecutor continued to question Stephenson, who testified that, with regard to a double action trigger pull, an individual could not, simply by waving the gun around with nothing more, cause the gun to fire. The prosecutor did not repeat the question that had prompted criminal trial counsel's objection.

During closing argument, the prosecutor summarized Stephenson's testimony as follows: "The evidence shows, James Stephenson, the ballistics expert, he indicated

that [he] and other ballistics experts, who check and recheck each other's work, examined this gun, and he stated, based on years of experience, and examining thousands of guns, this gun does not just go off, as the [petitioner] claimed, it requires a *purposeful* trigger pull of between five pounds and seven and a half pounds." (Emphasis added.) During her rebuttal argument, the prosecutor again referred to Stephenson's testimony, stating, "Stephenson, [the] ballistics expert, he told you, ladies and gentlemen of the jury, the gun is safe, don't worry, that this gun does not just go off. It takes a *purposeful* action, a real pull." (Emphasis added.) Also in her rebuttal, the prosecutor stated: "I know a couple of you indicated on voir dire that you shot guns, you are familiar with guns, perhaps many of you are not, however; this is, if you will, the smoking gun. If the injury to her head, the conduct leading up to that night, his conduct after, and all of the information that you have is not enough to prove intent to prove murder, then you will know when he fired this gun because, *as . . . Stephenson eloquently put it*, it takes a *purposeful* pull back, it does not go off. We asked him, if you are shaking the gun around, waving the gun around, even if you have your finger on the trigger, it doesn't go off. No, they tested the gun, there was no malfunction with it. They test fired it at the laboratory. In order for this to discharge a bullet, it takes a *very deliberate, purposeful act*." (Emphasis added.)

After his conviction was affirmed on direct appeal, the petitioner instituted the present habeas action, claiming that his criminal trial counsel rendered ineffective assistance by, inter alia, failing to object to the prosecutor's improper remarks during closing argument.[3] The habeas court denied the petition. The court

[3] The petitioner also claimed, before the habeas court, that his criminal trial counsel rendered ineffective assistance by failing to present expert testimony of a toxicologist in support of a planned intoxication defense. The Appellate Court concluded that the habeas court had properly rejected this claim. See *Ross* v. *Commissioner of Correction*, 188 Conn. App. 251,

determined that the petitioner had failed to demonstrate, as required by *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that he had suffered prejudice by his criminal trial counsel's failure to object.

On appeal, the Appellate Court did not address the question of whether the habeas court correctly concluded that the petitioner had failed to demonstrate prejudice. Instead, the court held that the petitioner was collaterally estopped from litigating the issue of prejudice because, in the direct appeal, the Appellate Court had "already determined that the prosecutor's improper comments did not prejudice the petitioner." *Ross* v. *Commissioner of Correction*, 188 Conn. App. 251, 258, 204 A.3d 792 (2019). The Appellate Court observed that, in the direct appeal, in support of his claim of prosecutorial impropriety, the petitioner had relied on the same improper remarks that now formed the basis of his claim of ineffective assistance of counsel. Id. The court reasoned, therefore, that it already had determined in the direct appeal that those remarks "did not deprive the [petitioner] of a fair trial." (Internal quotation marks omitted.) Id. Accordingly, the Appellate Court affirmed the judgment of the habeas court denying the petition. Id., 259. This certified appeal followed.

I

We first address the petitioner's claim that the Appellate Court incorrectly concluded that he was collaterally estopped from litigating the issue of whether his criminal trial counsel's failure to object to the prosecutor's improper remarks prejudiced him. The respondent contends that the respective prejudice prongs of the tests for prosecutorial impropriety and ineffective assistance

255, 204 A.3d 792 (2019). That determination is not before us in this certified appeal.

of counsel present identical issues. See *State* v. *Williams*, 204 Conn. 523, 539–40, 529 A.2d 653 (1987); see also *Strickland* v. *Washington*, supra, 466 U.S. 694–95. Specifically, the respondent claims that, because the prejudice prongs of both tests require the petitioner to prove that, but for the predicate conduct, it is probable, or likely, that the result of the proceedings would have been different, they are identical for purposes of the doctrine of collateral estoppel. Therefore, the respondent argues, because the Appellate Court already applied *Williams* in the petitioner's direct appeal to conclude that the prosecutor's improper remarks did not prejudice him, he is collaterally estopped from arguing in the habeas action that, pursuant to *Strickland*, he was prejudiced by his criminal trial counsel's failure to object to those remarks.[4] Because we conclude that the issue in the present case is not identical to that presented in the direct appeal, we agree with the petitioner.

"[T]he doctrines of collateral estoppel and res judicata, commonly referred to as issue preclusion and claim preclusion, respectively, have been described as related ideas on a continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that has been determined in a prior suit." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 532 n.5, 205 A.3d 552 (2019). "For an issue to be subject to collateral estoppel,

[4] The respondent concedes that the *claims* presented in the petitioner's direct appeal and in his habeas action are different. In the direct appeal, the petitioner claimed that the prosecutorial improprieties deprived him of his right to due process, whereas, in this habeas action, he argues that his criminal trial counsel's ineffective assistance violated his right to counsel under the sixth and fourteenth amendments to the United States constitution. Thus, claim preclusion could not apply to the petitioner's claim of ineffective assistance of counsel.

it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 146, 60 A.3d 946 (2013).

This court has applied the doctrines of collateral estoppel and res judicata in the habeas context. See, e.g., *In re Application for Writ of Habeas Corpus by Ross ex rel. Ross*, 272 Conn. 653, 662, 866 A.2d 542 (2005) (appeal barred by doctrine of collateral estoppel because plaintiffs in error had "been afforded a full and fair opportunity to litigate the issue of . . . alleged incompetency [of defendant] in prior proceedings"); *McCarthy* v. *Warden*, 213 Conn. 289, 294–96, 567 A.2d 1187 (1989) (doctrine of res judicata precluded relitigation of identical due process claim between identical parties previously adjudicated in federal court), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990). In the criminal context generally, we have observed that "[w]hether two claims . . . are the same for the purposes of res judicata should . . . be considered in a practical frame and viewed with an eye to all the circumstances of the proceedings." (Internal quotation marks omitted.) *McCarthy* v. *Warden*, supra, 295.

In applying the doctrine of res judicata in the habeas context, we have recognized the significance of the unique circumstances raised by collaterally attacking a final judgment. Specifically, we have stated that, "[a]lthough the doctrine of res judicata in its fullest sense bars claims that could have been raised in a prior proceeding, such an application in the habeas corpus context would be unduly harsh. . . . Unique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Foremost among those considerations is the interest in making certain

that no one is deprived of liberty in violation of his or her constitutional rights. . . . With that in mind, we limit the application of the doctrine of res judicata in circumstances such as these to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *State* v. *Miranda*, 274 Conn. 727, 773, 878 A.2d 1118 (2005) (*Katz, J.*, dissenting).[5]

The same policy considerations that we have relied on to circumscribe the application of the doctrine of res judicata to habeas proceedings guide us in applying the doctrine of collateral estoppel in this context.[6] That is, the writ of habeas corpus permits a collateral attack on a final judgment in order to provide "a remedy for a miscarriage of justice or other prejudice. . . . As this court stated in *Bunkley* v. *Commissioner of Correction*,

[5] Outside of the habeas context, res judicata, or claim preclusion, prevents the parties to a prior action, or their privies, from pursuing not only claims that were actually made in the prior action, but also any claims that could have been raised. See, e.g., *Ventres* v. *Goodspeed Airport, LLC*, 301 Conn. 194, 215–16, 21 A.3d 709 (2011) (concluding that res judicata precluded parties to prior action from litigating claim that was not, but could have been, made in prior action).

[6] We are guided by the analysis of the Appellate Court in *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). In that case, the Appellate Court concluded that the petitioner's claim of ineffective assistance of counsel was not barred by the doctrine of res judicata. Id., 63. In his direct appeal, the petitioner in *Diaz* argued that a comment made by the trial court in its final charge to the jury violated his fourteenth amendment right to due process. Id., 60, 63. The court concluded that the remark, although improper, constituted harmless error. Id., 60. In the petitioner's subsequent habeas action, he claimed that his criminal trial counsel had rendered ineffective assistance by failing to object to the improper remark. Id. The habeas court determined that the doctrine of res judicata barred the petitioner's claim. Id., 61. On appeal, the Appellate Court held that the habeas court had improperly applied the doctrine of res judicata because the two claims—a fourteenth amendment due process claim and an ineffective assistance of counsel claim alleging violations of the sixth and fourteenth amendments to the United States constitution—were not identical. Id., 63. The Appellate Court concluded that the petitioner's ineffective assistance claim was "a separate claim, thus requiring separate legal analysis." Id., 66.

222 Conn. 444, 460–61, 610 A.2d 598 (1992) [overruled in part on other grounds by *Small* v. *Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008)], the principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." (Internal quotation marks omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 561, 153 A.3d 1233 (2017). We must therefore carefully balance the interests of finality that drive the doctrine of collateral estoppel against the constitutional rights secured by the writ. Moreover, we consider the question of whether the issues presented in the habeas action and the direct appeal are identical, "in a practical frame," and view it "with an eye to all the circumstances of the proceedings." (Internal quotation marks omitted.) *McCarthy* v. *Warden*, supra, 213 Conn. 295.

Although, when viewed broadly, the question presented by the prejudice prongs of both *Williams* and *Strickland*—whether the petitioner was deprived of his right to a fair trial—suggests that the issues are identical, there is a key distinction between the operation and focus of the two tests, which answer the ultimate question by employing substantially different means, by evaluating the effect of different conduct undertaken by different actors. See *Strickland* v. *Washington*, supra, 466 U.S. 687; *State* v. *Williams*, supra, 204 Conn. 539. *Williams* evaluates the prejudicial effect of the conduct of the prosecutor; *Strickland*'s focus is on the prejudicial effect of defense counsel's conduct. As a result, the analyses employed by *Williams* and *Strickland* differ. It is undeniable that there is considerable overlap in the evaluation of prejudice for both claims. Understood practically, however, the connection between the issue of prejudice and trial counsel's failure to object differs significantly in the two contexts. In a

habeas action, trial counsel's failure to object forms the basis for a petitioner's claim that counsel's performance was deficient. With respect to the prejudice prong of *Strickland*, the question is whether the *effect* of that failure to object prejudiced the petitioner. By contrast, on direct appeal, the same failure to object operates to support the conclusion that the alleged prosecutorial impropriety did not prejudice a defendant.

The petitioner's claim of prosecutorial impropriety in the direct appeal required the Appellate Court to apply what have come to be known as the *Williams* factors. See *State* v. *Williams*, supra, 204 Conn. 540. Specifically, in *Williams*, we explained that, in determining whether a defendant was deprived of his due process right to a fair trial by prosecutorial impropriety, courts should consider: "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) Id. In evaluating the severity of the impropriety, we have accorded significant weight to defense counsel's failure to object, explaining that such a failure is "a strong indicator that [defense] counsel did not perceive [the improprieties] as seriously jeopardizing the defendant's fair trial rights." *State* v. *Jones*, 320 Conn. 22, 38, 128 A.3d 431 (2015); see also *State* v. *Angel T.*, 292 Conn. 262, 289, 973 A.2d 1207 (2009) ("[w]hen considering whether prosecutorial [impropriety] was severe, this court consider[s] it highly significant that defense counsel failed to object to any of the improper remarks, [to] request curative instructions, or [to] move for a mistrial" (internal quotation marks omitted)). Accordingly, "the fact that defense counsel did not object to one or more incidents of [impropriety]

must be considered in determining whether and to what extent the [impropriety] contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted." *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004).

Consistent with *Williams* and its progeny, in determining whether the petitioner had been prejudiced by the prosecutor's improper remarks during closing argument, the Appellate Court on direct appeal gave significant weight to criminal trial counsel's failure to object to those remarks at trial. Specifically, in concluding that the improper remarks had not deprived the petitioner of his right to a fair trial, the Appellate Court considered it "highly significant that [criminal trial] counsel failed to object to any of the improper remarks, [to] request curative instructions, or [to] move for a mistrial. [Criminal trial] counsel, therefore, presumably [did] not view the alleged impropriety as prejudicial enough to seriously jeopardize the [petitioner's] right to a fair trial. . . . Given the [petitioner's] failure to object, only instances of grossly egregious misconduct will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Ross*, supra, 151 Conn. App. 701. On appeal, accordingly, the Appellate Court properly considered criminal trial counsel's failure to object as evidence that the petitioner was not prejudiced by the prosecutor's improper remarks.

In drawing the inference of lack of prejudice on the basis of criminal trial counsel's failure to object, the Appellate Court, consistent with *Williams* and its progeny, presumed that counsel was competent. The heavy reliance placed on criminal trial counsel's failure to object as evidence of a lack of prejudice in a direct appeal could naturally lead to a claim of ineffective assistance in a subsequent habeas action. It is this aspect of the *Williams* analysis—reliance on counsel's failure to object as evidence of a lack of prejudice—

that renders it impossible to conclude that collateral estoppel bars the petitioner from litigating the issue of whether he was prejudiced at trial and on direct appeal by his criminal trial counsel's failure to object to the prosecutor's improper remarks.

As for *Williams*' heavy reliance on trial counsel's failure to object as evidence of a lack of prejudice, in the present case, the application of the doctrine of collateral estoppel would leave the petitioner with no ability to establish how his criminal trial counsel's failure to object affected his trial and his appeal.[7] Put differently, applying the doctrine under these circumstances would effectively preclude him from seeking a remedy for conduct that he claims affected not only his criminal trial but also his likelihood of success on appeal. Applying the doctrine of collateral estoppel to bar the petitioner from litigating whether his criminal trial counsel's failure to object to the improper remarks prejudiced him at trial and on direct appeal would be fundamentally unfair and, therefore, inconsistent with due process and the principles underlying the writ of habeas corpus.

II

We next address the issue of whether the judgment of the Appellate Court may be affirmed on the alternative ground that the petitioner has failed to demonstrate that he suffered prejudice from his criminal trial counsel's failure to object to the improper remarks made by the prosecutor during closing argument. We conclude that the petitioner failed to demonstrate prejudice as required by *Strickland*.

[7] Our ruling is limited to the circumstances presented in this case and does not preclude the application of collateral estoppel in the habeas context. For example, it might be appropriate to apply the doctrine of collateral estoppel to a subsequent habeas claim when the lack of an objection by defense counsel is either not an issue or was not held against a defendant on direct appeal. That question is not before us.

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626–27, 212 A.3d 678 (2019). A reasonable probability is one that is "sufficient to undermine confidence in the verdict that resulted in his appeal." (Internal quotation marks omitted.) *Hickey* v. *Commissioner of Correction*, 329 Conn. 605, 618, 188 A.3d 715 (2018). As we already have noted, a reviewing court may resolve the petitioner's claim on either ground. *Meletrich* v. *Commissioner of Correction*, supra, 627.

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland*, however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 90–91, 52 A.3d 655 (2012). In *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 67, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011), the Appellate Court reflected on the "interplay" between a petitioner's direct appeal and subsequent habeas action, observing that its conclusion in the direct appeal, that

the trial court's improper comment had constituted harmless error, "while not dispositive, [was] persuasive."

The petitioner in the present case must demonstrate that there is "a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, supra, 466 U.S. 694. Our review of the record persuades us that the petitioner has failed to demonstrate at the habeas court that he was prejudiced by his criminal trial counsel's failure to object to the improper remarks.

We begin with the Appellate Court's decision in the direct appeal, discounting that decision's reliance on criminal trial counsel's failure to object. The Appellate Court agreed with the petitioner that the prosecutor's mischaracterization of the testimony of the state's firearms expert during closing argument was improper. *State* v. *Ross*, supra, 151 Conn. App. 695. Specifically, the prosecutor stated several times in her closing argument that Stephenson had testified that a purposeful pull was required to fire the petitioner's revolver, despite the fact that Stephenson did not make that statement, and, in fact, was prevented from answering the prosecutor's leading question to that effect when criminal trial counsel successfully objected to it. See id., 698. In rejecting the petitioner's claim that he was prejudiced by the improper remarks, the Appellate Court relied on the trial court's general instructions. Id., 702–703. Those instructions advised the jury that arguments made by counsel are not testimony or evidence, and that it must base its verdict solely on the evidence. See id. The Appellate Court acknowledged that the impropriety went to a central issue in the case—the petitioner's mental state—and was not invited by criminal trial counsel. Id., 705. The state's evidence regarding the petitioner's mental state, however, was

strong. The Appellate Court summarized the evidence on which it relied in arriving at that conclusion: "[T]he state presented evidence that the [petitioner] and the victim were involved in a tumultuous relationship, that the [petitioner] believed the victim had arranged for two of her male acquaintances to assault him, that he purchased a revolver for the purpose of killing these two men, and that immediately before shooting the victim in the head, he asked her, 'are you trying to set me up?' Moreover, the state presented evidence that the [petitioner] did not summon help for the victim after shooting her, but instead left the apartment, locked the door behind him, and fled to Waterbury, where he socialized at a nightclub with another individual." Id., 704.

In its memorandum of decision denying the petition, the habeas court observed that "[t]he petitioner proffered no evidence at the habeas trial regarding prejudice that differs from that evaluated by the Appellate Court on direct appeal." Our review of the record before the habeas court reveals that, on the issue of the prosecutor's improper remarks, the petitioner presented solely the testimony of his criminal trial counsel, which pertained not to prejudice, but to whether his criminal trial counsel's failure to object, to request a curative instruction or to move for a mistrial constituted deficient performance.[8] On the issue of prejudice, habeas counsel argued to the habeas court that the improper remarks went to the key issue in the case—whether the petitioner intended to pull the trigger.

[8] The petitioner's criminal trial counsel testified that it was his practice to object to improper remarks during closing argument only for "egregious" improprieties. For less severe improprieties, he testified, he preferred to avoid "highlighting" any improper remarks. He explained that it was his view that interrupting opposing counsel during closing argument results in "bad vibes" from the jury. He did not offer any strategic reason for failing to object outside of the presence of the jury, to request a curative instruction, or to move for a mistrial.

The failure of the petitioner's criminal trial counsel to object to the improper remarks does not undermine our confidence in the verdict. The impropriety was confined to the prosecutor's closing argument, and the court instructed the jury that the arguments of counsel do not constitute evidence. The improper remarks also must be understood in the context of the strength of the state's case. Although the prosecutor incorrectly stated that Stephenson testified that the petitioner's revolver required a "purposeful" pull to fire, Stephenson's actual testimony constituted strong evidence that the gun did not fire accidentally, as the petitioner had claimed. Specifically, the prosecutor asked Stephenson, "if an individual was holding the gun, and just waving it around, without more, would that cause the gun to fire a bullet?" Stephenson responded: "It requires a force placed upon that trigger to cause it to fire. If the person doesn't have their finger on the trigger, if the gun is—if you were to hold the gun in a fashion where, as explained in single action, if my hand were back here, and I was just waving it around, it's not going to fire. It requires that pressure placed against that trigger to cause it to fire."

As the Appellate Court observed, the evidence presented by the state demonstrated that the petitioner believed that the victim had arranged for two of her male friends to assault him, that the petitioner purchased a gun shortly thereafter for the purpose of killing the men, and that, immediately prior to shooting her, the petitioner accused the victim of setting him up. *State* v. *Ross*, supra, 151 Conn. App. 704. Additional evidence presented by the state, on which the jury properly could have relied to conclude that the petitioner intentionally pulled the trigger, revealed that he did not call for help after he shot the victim. Instead, he left her body in her apartment and went to Waterbury, where he went to a club and stayed for several days. Five days

after shooting the victim, the petitioner approached a stranger outside of a mosque in New Haven, Cornigans, and told him that he had shot the victim. Specifically, the petitioner told Cornigans that he and the victim were in her apartment. He was on the bed when he heard a knock on the door and saw rays of light. He then walked toward the victim, said, are you trying to "set me up" and shot her in the temple. When he spoke to Cornigans, the petitioner did not state that he accidentally shot the victim when he was waving the gun around. He did, however, ask Cornigans to help him move the body and asked for money so he could leave the state.

The state's evidence that the petitioner intentionally shot the victim was compelling. Although Stephenson's testimony countered the petitioner's claim that he shot the victim accidentally, it was the petitioner's own statements and actions before and after the shooting that provided the strongest evidence that he acted intentionally. He purchased the gun for the purpose of killing two men who he believed assaulted him upon the victim's request. He admitted to Cornigans that he said to the victim, you "set me up," and that he then shot her in the temple. All of his actions, including leaving her body in the apartment, going to parties in Waterbury, and asking Cornigans to help him move the body and to give him money so he could leave the state, provided evidence of consciousness of guilt and defied his claim of an accidental shooting. In light of the strength of the state's case, we conclude that the petitioner has failed to demonstrate a "reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 627.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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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

Klein *v.* Quinnipiac University 574
Negligence; premises liability; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court did not err in failing to give licensee instruction to jury and that any error was harmless; appeal dismissed on ground that certification was improvidently granted.

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.
Ross *v.* Commissioner of Correction 718
Habeas corpus; whether Appellate Court incorrectly concluded that petitioner was collaterally estopped from litigating issue of whether he was prejudiced by his trial counsel's failure to object to prosecutor's improper remarks during closing argument; whether issue raised was identical to that presented in petitioner's direct appeal of his conviction: whether petitioner demonstrated that he was prejudiced by his trial counsel's failure to object to prosecutor's improper remarks.
Solon *v.* Slater (Order) 908
State *v.* Angel M.. 655
Sexual assault first degree; attempt to commit sexual assault first degree; risk of injury to child; certification from Appellate Court; claim that trial court had violated defendant's right to due process by improperly augmenting his sentence for his refusal to apologize to two victims after he had been found guilty of crimes charged in connection with his sexual assault of one of those victims; whether Appellate Court incorrectly concluded that trial court had not punished defendant for invoking his right against self-incrimination and for refusing to apologize to victims.
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 war-

rant, 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.* Imperiale 694

Revocation of probation; sex offender treatment as condition of probation; motion to dismiss violation of probation charge; claim that defendant's placement at inpatient sex offender treatment facility upon release from prison as condition of probation violated his right to due process on ground that it was functional equivalent of incarceration; whether defendant's placement at facility furthered rehabilitative and public safety purposes of probation; claim that subjecting defendant to highly restrictive conditions at sex offender treatment facility violated his right to equal protection on ground that he was placed there due to his status as homeless person upon his release from prison; claim that requiring defendant to attend sex offender treatment program at facility as condition of probation violated his eighth amendment right to be free from cruel and unusual punishment.

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.

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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.* Raynor. 527

Murder; certification from Appellate Court; whether Appellate Court properly upheld trial court's denial of defendant's motion for hearing pursuant to State *v.* Porter *(241 Conn. 57) on reliability and accuracy of methodology used by expert witness in connection with his anticipated firearm and toolmark testimony; whether trial court's denial of defendant's motion for* Porter *hearing was harmless; whether Appellate Court improperly upheld trial court's denial of defendant's motion to limit scope of witness' firearm and toolmark testimony; whether Appellate Court properly upheld trial court's admission of certain uncharged misconduct evidence.*

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.
State *v.* Ruiz 612
Violation of probation; motion to suppress identification; claim that one-on-one show up procedure that police used in connection with identification of defendant violated his due process rights; certification from Appellate Court; whether identification of defendant was reliable.
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Burglary third degree; attempt to commit tampering with physical evidence; attempt to commit arson second degree; whether Appellate Court improperly addressed, sua sponte, issue of evidentiary sufficiency distinct from defendant's claim, without calling for supplemental briefing as required by Blumberg Associates Worldwide, Inc. *v.* Brown & Brown of Connecticut, Inc. *(311 Conn. 123).*
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CONNECTICUT APPELLATE REPORTS

Vol. 206

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* STEPHANIE U.*
(AC 41793)

Bright, C. J., and Prescott and Elgo, Js.

Syllabus

Convicted of various crimes in connection with her actions while attempting to pick up her child from day care while allegedly under the influence of intoxicating liquor or drugs, the defendant appealed to this court. The defendant testified on her own behalf at trial. During cross-examination, the prosecutor asked the defendant whether she had an interest in the outcome of the trial and implied that the defendant had the opportunity to tailor her testimony by taking the stand after observing the testimony of all of the other witnesses. Additionally, during the rebuttal portion of her closing argument, the prosecutor argued that the defendant was the only witness who had the opportunity to hear the testimony of the other witnesses prior to giving her own testimony, that she had a vested interest in the outcome of the case, and that the jurors could consider that interest in their decision-making process. On appeal,

* 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 victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the defendant claimed, inter alia, that the prosecutor's questioning and argument constituted generic tailoring, which violated her right to confrontation and her right to testify on her own behalf under both the state and federal constitutions. *Held*:

1. The defendant failed to prove her unpreserved claim that the prosecutor violated her state constitutional rights to confront witnesses against her and to testify on her own behalf: although the state's tailoring questions and argument were generic because they were not tied to evidence that specifically gave rise to an inference of tailoring and instead focused on the defendant's presence in the courtroom, her ability to observe the proceedings, and her interest in the outcome of the trial, the defendant failed to prove that the state constitution offered greater protection than the federal constitution and, accordingly, failed to establish a constitutional violation under *State* v. *Geisler* (222 Conn. 672), as the language of article first, § 8, of the Connecticut constitution was virtually identical to that of the sixth amendment to the federal constitution, Connecticut's early recognition of a defendant's right to testify provided no insight as to whether the state historically viewed generic tailoring as improper, most of the cases that the defendant claimed were persuasive precedent from other states relied on the supervisory authority of the courts and on public policy to prohibit generic tailoring arguments or questions rather than on their state constitutions, the United States Supreme Court in *Portuondo* v. *Agard* (529 U.S. 61) held that generic tailoring arguments did not violate the federal constitution, Connecticut precedent after *Portuondo* did not demonstrate that the state courts considered generic tailoring arguments to raise state constitutional issues, and the defendant's argument that public policy considerations required a conclusion that generic tailoring arguments violated the state constitution was not compelling.
2. The prosecutor did not deny the defendant her due process of law under either the federal or state constitutions: the defendant's claim was unpreserved and it failed under the third prong of *State* v. *Golding* (213 Conn. 233); moreover, our Supreme Court in *State* v. *Medrano* (308 Conn. 604) held that a trial court's instruction that a jury could consider the defendant's interest in the outcome of the case did not implicate the defendant's right to due process, and the defendant in this case failed to demonstrate that a prosecutor's similar argument could have more of an impact on her due process rights than a court's jury instruction.
3. The prosecutor did not deprive the defendant of a fair trial when she argued that the defendant had tailored her testimony and that she had a motive to lie: the defendant failed to establish a claim of prosecutorial impropriety because she failed to prove that the prosecutor's argument and questions infringed on her constitutional rights.
4. This court declined to employ its supervisory authority over the administration of justice to expand the Supreme Court's decision in *State* v.

Medrano (308 Conn. 604) to prohibit a prosecutor from making arguments about the defendant's interest in the outcome of his or her criminal trial, the defendant having failed to persuade this court that such argument merits the exercise of that authority.

5. Although the defendant was not entitled to a new trial because the prosecutor's generic tailoring questions and comments did not affect the fairness of her trial, this court exercised its supervisory authority over the administration of justice to prohibit prosecutors from employing generic tailoring arguments in future criminal cases: this court determined that generic tailoring arguments should be prohibited because they were likely to implicate the perceived fairness of the judicial system and could give rise to a danger of juror misunderstanding; accordingly, this court held that, prior to asking tailoring questions or before making such comments in closing arguments in the future, a prosecutor must inform the trial court and the defendant of her intention to do so and, if the defendant objects, the trial court must determine that the prosecutor's questions or argument are specific before allowing the state to proceed.
6. The defendant could not prevail on her claim that her conviction of attempt to commit risk of injury to a child should be vacated because the crime was cognizable: our Supreme Court determined in *State* v. *Sorabella* (277 Conn. 155) that attempt to commit risk of injury to a child was a cognizable offense and this court was bound by that decision.

Argued January 5—officially released August 24, 2021

Procedural History

Substitute information charging the defendant with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle while her license was under suspension and attempt to commit risk of injury to a child, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the jury before *Seeley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

James M. Ralls, assistant state's attorney, with whom were *Matthew C. Gedansky*, state's attorney, and *Jaclyn*

Dulude, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Stephanie U., appeals from the judgment of conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (1), operating a motor vehicle while her operator's license was under suspension in violation of General Statutes § 14-215 (a), and attempt to commit risk of injury to a child in violation of General Statutes §§ 53-21 (a) (1) and 53a-49 (a) (2). On appeal, the defendant claims that (1) the prosecutor violated her state constitutional rights to confront witnesses against her and to testify on her own behalf by improperly attacking her credibility during cross-examination and in her closing rebuttal argument by suggesting that she had tailored her testimony to conform to the evidence she had overheard during her trial, (2) the prosecutor denied her due process of law under both the federal and state constitutions when, during cross-examination, the prosecutor asked the defendant whether she had an interest in the outcome of the trial, and when, during rebuttal argument, the prosecutor told the jury that it could consider the defendant's vested interest in the outcome of the trial, (3) prosecutorial impropriety deprived her of a fair trial when the prosecutor argued that she had tailored her testimony and that she had a motive to lie, (4) this court, in the alternative, should order a new trial after we employ our supervisory authority to prohibit questions and arguments that amount to generic tailoring and/or telling or implying to the jury that it can or should discredit the defendant's trial testimony because she has an "interest in the outcome" of her trial, and (5) her conviction of attempt to commit risk of injury to a child should be vacated because it is not a cognizable crime. We reject the defendant's claims, although we

agree with her request to exercise our supervisory authority over the administration of justice on the issue of generic tailoring. Nevertheless, because we conclude that the prospective rules we articulate regarding generic tailoring would not have changed the outcome of the defendant's trial, we affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury on the basis of the evidence presented at trial, and the relevant procedural history, inform our review of the defendant's claims. On October 30, 2015, at approximately 5 p.m., the defendant arrived to pick up her one year old child at a Vernon day care center. Jessica Woodruff also was there to pick up her own child, and she witnessed the defendant stumbling out of a vehicle, having difficulty walking into the day care, repeatedly stumbling, having difficulty "hold[ing] herself up," and falling backward. Woodruff believed that the defendant was intoxicated. Once inside, several people, including Woodruff; the assistant director of the day care, Kathleen Wheeler; and a teacher at the day care, Elyse DeGemmis, observed the defendant slur, mumble, and grab onto various objects in an effort to support herself. Wheeler and DeGemmis were so concerned that they called 911.

Detective John Divenere of the Vernon Police Department was dispatched to the day care on a report of an intoxicated woman attempting to pick up her child. On his arrival, someone pointed out the defendant. When Divenere asked the defendant for identification, she handed him her state identification card and, when asked about her driver's license, she told him that it had been suspended. Divenere observed that the defendant's eyes were glassy, her speech was slow and slurred, and she was having difficulty maintaining her balance. The defendant denied to Divenere that she had taken drugs or alcohol, or that she had medical issues,

disabilities, or diabetes. Divenere administered two "preliminary" tests that are not part of the field sobriety tests, namely, the "alphabet" test and the "counting backwards" test. At his request, the defendant performed each test several times. The defendant slurred her speech and skipped letters and numbers during each of the tests. The defendant appeared intoxicated to Divenere, who then administered several field sobriety tests, all of which the defendant failed. Officer David Provencher, who also had arrived at the day care, recorded on his body camera the defendant performing the field sobriety tests. Divenere arrested the defendant and took her to the police station.[1]

At approximately 6 p.m., while at the police station, Divenere advised the defendant of her rights. The defendant again denied that she had any medical issues or that she had consumed alcohol. She did state that she was prescribed Xanax but that she had not taken it that day. Divenere observed that the defendant did not smell of alcohol or marijuana, her eyes were not bloodshot or red, and her pupils were not dilated or constricted. Divenere did not find any drugs, drug paraphernalia, or alcohol in the defendant's vehicle or purse. Divenere administered a Breathalyzer test, which resulted in a reading of zero. He then asked the defendant to take a urine test, which the defendant initially agreed to take but then declined.[2]

On the basis of this evidence, the jury found the defendant guilty of illegal operation of a motor vehicle while

[1] After Divenere arrested the defendant, a staff member of the day care telephoned the defendant's grandmother, who picked up the child.

[2] The court instructed the jury that it could draw an adverse inference from the defendant's refusal but that it was not required to do so. The court instructed: "Evidence was presented that after the defendant submitted to a breath test, she refused to submit to a urine test. If you find that the defendant did refuse to submit to the urine test, you may make any reasonable inference that follows from that fact, but you are not required to do so."

under the influence of intoxicating alcohol or drugs, illegal operation of a motor vehicle while her license was under suspension, and attempt to commit risk of injury to a child. The court accepted the jury's verdict and sentenced the defendant to a total effective term of five years of imprisonment, execution suspended after eighteen months, followed by five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the prosecutor violated her state constitutional rights, under article first, § 8, to confront witnesses against her and to testify on her own behalf by improperly attacking her credibility when engaging in a generic tailoring argument, by suggesting during cross-examination and during closing rebuttal argument that she had tailored her testimony to conform to the evidence that she heard during her criminal trial. The defendant did not preserve her claim and asks for review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–240, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[3]

[3] "Pursuant to *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. . . . *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, [supra, 317 Conn. 781] (modifying third prong of *Golding*)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 548 n.9, 212 A.3d 208 (2019). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 102–103, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018).

We conclude that the defendant's claim is reviewable but that it fails under the third prong of *Golding*. In particular, we conclude that the defendant has failed to prove that the state constitution offers greater protection than the federal constitution with respect to confrontation rights, and, therefore, she cannot establish that a state constitutional violation exists.

The following additional facts are necessary to our consideration of the defendant's claim. During trial, the defendant testified on her own behalf. She explained to the jury that she had experienced mental health issues, including mood disorders, anxiety, and bipolar disorder, since she was a child, and that she takes Xanax as needed. She also testified that the day before this incident, she had gotten into a verbal altercation with a coworker and quit her job. The defendant further explained that, on the day of the incident, she met with her manager and someone from human resources to ask for her job back, but she was not successful. She testified that, later in the day, when it was time to pick up her child from day care, her grandmother, who had been providing transportation, was unavailable; so, despite knowing that her license was under suspension, she drove to the day care to pick up her child. She denied that she had been disorientated when she went to the day care, but she testified that the body camera video convinced her that she had undergone a mental health episode while at the day care center. She explained that the video showed her experiencing tics and pulling her hair, which signaled a mental health episode.

During cross-examination, the prosecutor asked the defendant:

"Q. And you've had an opportunity to sit in court and listen to all of the witnesses testify in this case; correct?

"A. Yes.

"Q. So you've been able to listen to their testimony and figure out what you're going to say today; correct?

"A. What I'm going to say today?

"Q. Yeah; during your testimony.

"A. No.

"Q. You haven't listened to their testimony?

"A. Yes. I've listened to what they've had to say.

"Q. Okay. And you have a lot riding on this case, don't you?

"A. Today?

"Q. Sure.

"A. Well, yeah. I have my son, my apartment. I have a life. My son is everything to me."

The next day, during the rebuttal portion of her closing argument, the prosecutor argued in relevant part: "Also consider the fact that the only witness to have sat in on the testimony of all the other witnesses in this case is the defendant. None of the other witnesses got to hear the others' testimony. The defendant knew what everyone said and had that knowledge when she testified. She has a vested interest in the outcome of this case. And that can also be taken into account when you're deliberating this case.

"Does it make sense, with regard to the day care workers, that three independent individuals who have no interest in this case would tell you similar stories and describe similar behaviors of the defendant; that this would be untruthful or lying testimony, as indicated by defense counsel?

"The defendant testified that she did not act in any way as described by the day care workers. Totally

unequivocal; I did not act that way at all. These are individuals out in the community, going about their day-to-day lives, going to work, picking up children. Think about how those witnesses testified, as opposed to the defendant."

On appeal, the defendant argues that, "[d]uring cross-examination, the state asked the defendant point blank whether she had listened to all of the witnesses who had testified beforehand and 'figured out' what she was going to say. Furthermore, in its rebuttal, the state argued that the defendant was the only witness who heard all of the other testimony, and she tailored her evidence accordingly. These generic tailoring arguments violated the defendant's right of confrontation and right to testify because they turned the defendant's unassailable rights to be present during all the testimony and to testify on her own behalf into a weapon used against her. This court must hold, under the Connecticut constitution article [first], § 8 . . . that the state may not raise generic tailoring claims at any point in the trial."

A

We first consider whether the questions and remarks of the prosecutor amounted to generic tailoring.

"A prosecutor makes a tailoring argument when he or she attacks the credibility of a testifying defendant by asking the jury to infer that the defendant has fabricated his testimony to conform to the testimony of previous witnesses. See *Portuondo* v. *Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). The term most frequently is used to refer to a prosecutor's direct comment during closing argument on the defendant's opportunity to tailor his testimony, although a prosecutor sometimes also will use cross-examination to convey a discrediting tailoring message to the jury. There

are two types of tailoring arguments: generic and specific. The former occurs when the prosecutor argues the inference solely on the basis of the defendant's presence at trial and his accompanying opportunity to fabricate or tailor his testimony. *State* v. *Alexander*, 254 Conn. 290, 300, 755 A.2d 868 (2000); see also *State* v. *Daniels*, 182 N.J. 80, 98, 861 A.2d 808 (2004) ([g]eneric accusations occur when the prosecutor, despite no specific evidentiary basis that [the] defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony). A specific tailoring argument, by contrast, occurs when a prosecutor makes express reference to the evidence, from which the jury might reasonably infer that the substance of the defendant's testimony was fabricated to conform to the state's case as presented at trial. See *State* v. *Daniels*, supra, 98 ([a]llegations of tailoring are specific when there is evidence in the record, which the prosecutor can identify, that supports an inference of tailoring)." (Footnote omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 543–44, 212 A.3d 208 (2019).

In *Weatherspoon*, our Supreme Court concluded that the prosecutor's tailoring argument was specific because it "contained two different but related evidence-based assertions: first, the discrepancy between the defendant's pretrial statement to [the police] and his in-court trial testimony supports the inference that his in-court testimony is false; and second, the defendant's false testimony about his memory allowed him to conform his recitation of events to that of [another witness'] trial testimony, thereby supporting a reasonable inference of tailoring." Id., 549–50. By contrast, "[g]eneric tailoring arguments occur when the prosecution attacks the defendant's credibility by simply draw-

ing the jury's attention to the defendant's presence at trial and his resultant opportunity to tailor his testimony." (Internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 99 n.11, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018).

Our Supreme Court in *Weatherspoon* was asked to decide whether generic tailoring arguments, which do not violate the federal constitution; see *Portuondo* v. *Agard*, supra, 529 U.S. 70–73; violate a defendant's right to confrontation under article first, § 8, of the Connecticut constitution. *State* v. *Weatherspoon*, supra, 332 Conn. 543. The court did not reach the question because it concluded that the tailoring argument made by the prosecutor in that case was a specific tailoring argument and the defendant had not claimed on appeal that specific tailoring arguments violate the state constitution. Id., 549–50.

In the present case, the defendant argues that the prosecutor's questions during cross-examination of the defendant and her remarks during her rebuttal closing argument were generic tailoring, and she asks that we address the state constitutional question not reached by our Supreme Court in *Weatherspoon*. The state argues that we should not reach the constitutional question because, as in *Weatherspoon*, the state's tailoring argument in the present case was specific and not generic. We agree with the defendant that the state's tailoring argument was generic.

During cross-examination, the prosecutor asked the defendant about her ability to listen to all of the arguments and figure out what she was going to say before she testified. Such questioning focused the jury's attention, not on any specific evidence that the defendant tailored her testimony but, instead, on the defendant's mere presence in the courtroom, her opportunity to

observe the proceedings, her ability to tailor her testimony on the basis of her presence in the courtroom and her observations, and the fact that she had a vested interested in the outcome of her criminal trial.

Then, during the rebuttal portion of her closing argument, the prosecutor similarly called to the jury's attention the fact that the defendant was the only testifying witness to have heard all of the trial testimony, and that she knew the substance of each witness' testimony before she, herself, testified. The prosecutor then again tied that argument to the fact that the defendant had a vested interest in the proceedings.

The state argues that the defendant is viewing the tailoring questions and remarks of the prosecutor out of context. According to the state, the tailoring comments were anchored sufficiently to evidence presented at trial to make them specific and not generic. With respect to the tailoring questions asked during cross-examination, the state argues that those questions followed the prosecutor's questions about the defendant's mental health, to which the defendant attributed her behavior on the day of her arrest. The state argues that the prosecutor's questions were intended to show that "the defendant tailored her testimony to the state's evidence of intoxication when she claimed, for the first time at trial, that her long-standing psychiatric problems mimicked drug induced intoxication." With respect to the comments made during the prosecutor's rebuttal closing argument, the state argues that, immediately following the prosecutor's "generic remarks," she compared the defendant's testimony to the consistency of the evidence from the day care workers, the police and the video recordings of the defendant's behavior. We are not persuaded that the record supports either of the state's arguments.

First, the prosecutor's questions that preceded her generic tailoring questions were unrelated to the defendant's testimony that her psychiatric problems caused her behavior that led to her arrest. Instead, the prosecutor's questions focused on the defendant's performance of the field sobriety tests, whether the defendant refused to provide a urine sample because she knew that it would show the presence of Xanax in her system, her long history of taking Xanax, and whether she took it on the day she was arrested to cope with the stressful situation at work. The fact that the defendant was present in court and heard the testimony of others was wholly unrelated to the inferences the state was asking the jury to draw from the defendant's answers to these questions. Because there is no connection between the tailoring questions asked by the state and the questions that preceded them, the tailoring questions were generic and not specific.

Second, the prosecutor's tailoring comments during her rebuttal closing argument were similarly generic because the argument that followed, on which the state relies, was not based on evidence that had any correlation to the defendant's presence in court. In particular, the prosecutor argued that the testimony of other witnesses regarding the defendant's behavior was more believable than the defendant's because the testimony of those witnesses was consistent with each other and those witnesses had no motivation to lie. In making this argument, the prosecutor made specific reference to the defendant's testimony that she did not act as those witnesses described. Thus, unlike in *Weatherspoon*, the prosecutor in the present case did not argue that defendant tailored her testimony to be consistent with the testimony of the state's witnesses. To the contrary, she argued that the defendant's testimony was flatly contrary to the testimony of more believable witnesses. Because the prosecutor's tailoring comments

were not tied to specific evidence that gave rise to an inference of tailoring, the tailoring comments were generic, not specific.

B

Having concluded that the prosecutor's tailoring arguments were generic and not specific, we consider the question not reached in *Weatherspoon*—whether the prosecutor's generic tailoring questions and argument violated the defendant's state constitutional rights to confront witnesses and to testify on her own behalf in violation of article first, § 8.[4] The defendant argues that under the factors set forth in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), she has established a state constitutional violation. We are not persuaded.

"In . . . *Geisler* . . . we identified six nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution: (1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies. . . . These factors, [commonly referred to as the *Geisler* factors and] which we consider in turn, inform our application of the established state constitutional standards . . . to the defendant's claims in the present

[4] Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

case." (Citation omitted; internal quotation marks omitted.) *State* v. *McCleese*, 333 Conn. 378, 387–88, 215 A.3d 1154 (2019). Because "[i]t is not critical to a proper *Geisler* analysis that we discuss the various factors in any particular order or even that we address each factor"; id., 388; we review the *Geisler* factors in the order briefed by the defendant.

1

The first *Geisler* factor the defendant discusses is the operative constitutional text. See id., 387. Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ." The defendant concedes that this *Geisler* factor favors the state. We agree.

As the defendant acknowledges, the language of article first, § 8, regarding the right to confrontation is virtually identical to that in the sixth amendment to the federal constitution. Compare U.S. Const., amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"), with article first, § 8, of the Connecticut constitution ("[i]n all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him"). Because the United States Supreme Court has concluded that generic tailoring arguments do not violate federal constitutional rights; *State* v. *Weatherspoon*, supra, 332 Conn. 545–46; we agree with the defendant that this factor favors the state.

2

The next *Geisler* factor that the defendant discusses is the historical insights into the intent of our constitutional forebears. See *State* v. *McCleese*, supra, 333 Conn.

387. She concedes that the right to confrontation in the sixth amendment to the United States constitution and in article first, § 8, are nearly identical. She argues, however, that Connecticut has a long history of concern regarding a defendant's rights under article first, § 8; see *State* v. *Cassidy*, 236 Conn. 112, 122–24, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part by *State* v. *Alexander*, 254 Conn. 290, 295–96, 755 A.2d 868 (2000); and that this court should conclude that generic tailoring arguments impermissibly burden a defendant's right to testify. She contends that this *Geisler* factor favors the defendant. We conclude that this factor favors the state.

The defendant cites to historical facts in Connecticut that demonstrate the importance of the right to testify on one's own behalf throughout our history. We readily acknowledge the historical and continued importance of such a right. Nevertheless, Connecticut's early recognition of a defendant's right to testify provides no insight into whether generic tailoring was historically viewed as improper. In fact, the United States Supreme Court rejected a similar argument in *Portuondo* v. *Agard*, supra, 529 U.S. 65–66.

In *Portuondo*, the defendant argued that the prosecutor's generic tailoring argument violated his right to due process in the same way that a prosecutor violates a defendant's due process rights by commenting on a defendant's refusal to testify. Id., 64–65. In rejecting the defendant's argument, the court stated: "As an initial matter, [the defendant's] claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the [f]ourteenth [a]mendment extended the strictures of the [f]ifth and [s]ixth [a]mendments to the [s]tates. The process by which criminal defendants were brought to justice in 1791 largely obviated the need for comments of the type the prosecutor made

here. Defendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace detailing the events in dispute. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination 109, 112, 114 (R. Helmholz et al. eds. 1997). If their story at trial—where they typically spoke and conducted their defense personally, without counsel, see J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776), p. 574 (1944); A. Scott, Criminal Law in Colonial Virginia 79 (1930)—differed from their pretrial statement, the contradiction could be noted. See [L.] Levy, Origins of the Fifth Amendment and Its Critics, 19 Cardozo L. Rev. 821, 843 (1997). Moreover, what they said at trial was not considered to be evidence, since they were disqualified from testifying under oath. See 2 J. Wigmore, Evidence § 579 (3d. [E]d. 1940).

"The pretrial statement did not begin to fall into disuse until the [1830s], see Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination, supra, [198], and the first [s]tate to make defendants competent witnesses was Maine, in 1864, see 2 Wigmore, supra, § 579, [701]. In response to these developments, some [s]tates attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses. See 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896). Although the majority of [s]tates did not impose such a restriction, there is no evidence to suggest they also took the affirmative step of forbidding comment upon the defendant's opportunity to tailor his testimony." *Portuondo* v. *Agard*, supra, 529 U.S. 65–66.

Consistent with this history, in *State* v. *Weatherspoon*, supra, 332 Conn. 545, our Supreme Court explained that the issue of generic tailoring was not addressed in

Connecticut until 1996: "Our court *first addressed* the constitutionality of tailoring arguments in *State* v. *Cassidy*, [supra, 236 Conn. 120–29]." (Emphasis added.) We conclude that this factor favors the state.

3

The next *Geisler* factor discussed by the defendant is the persuasive precedents of other states. See *State* v. *McCleese*, supra, 333 Conn. 387. She argues that several states that have considered generic tailoring since the United States Supreme Court decided *Portuondo* barred its use as violative of their state constitution or public policy. The defendant, citing, as examples, *Martinez* v. *People*, 244 P.3d 135 (Colo. 2010) (en banc); *State* v. *Walsh*, 125 Hawaii 271, 260 P.3d 350 (2011); *Commonwealth* v. *Gaudette*, 441 Mass. 762, 808 N.E.2d 798 (2004), which relied on *Commonwealth* v. *Person*, 400 Mass. 136, 508 N.E.2d 88 (1987); *State* v. *Swanson*, 707 N.W.2d 645 (Minn. 2006); *State* v. *Daniels*, supra, 182 N.J. 80; *People* v. *Pagan*, 2 App. Div. 3d 879, 769 N.Y.S.2d 741 (2003); and *State* v. *Wallin*, 166 Wn. App. 364, 269 P.3d 1072 (2012), contends that this factor favors the defendant.

The state responds that the few jurisdictions cited by the defendant either fail to explain their rationale or utilize "conclusory" reasoning, and they often ignore the "legitimate concerns" voiced by the majority in *Portuondo*. Furthermore, the state argues, "only one [state], Hawaii, seems to have [banned generic tailoring] as a matter of state constitutional law." The state contends, therefore, that this *Geisler* factor favors the state. We conclude that, although several states prohibit generic tailoring, our review of the cases relied on by the defendant reveals that nearly all of them do so on policy, rather than state constitutional, grounds. See also K. Kumor, "State Criminal Procedure Rights: How Much

Should the U.S. Supreme Court Influence?," 89 Fordham L. Rev. 931, 939 (2020) ("[O]nly five states have expanded on this federal precedent, and only one has used its state constitution to do so. The five states are Colorado, Hawaii, Massachusetts, Minnesota, and New Jersey, with Hawaii being the only state to rely on its state constitution. All other states with opinions on this issue have conformed to the Supreme Court's holding." (Footnotes omitted.)).

A review of the cases relied on by the defendant confirms the state's argument. In *Commonwealth* v. *Person*, supra, 400 Mass. 139, a case decided before *Portuondo*, the prosecutor had argued to the jury that "because the defendant [had] sat through all the [c]ommonwealth's evidence he was able to fabricate a cover story tailored to answer every detail of the evidence against him . . . ." The Supreme Judicial Court of Massachusetts held that such argument amounted to prosecutorial impropriety because "[t]he defendant is entitled to hear the [c]ommonwealth's evidence and to confront the witnesses against him." Id., 139–40. The court, however, declined to consider the constitutional implications, if any, of the prosecutor's generic tailoring argument. Id., 142 n.7.

Seventeen years after *Person*, the Supreme Judicial Court of Massachusetts decided *Commonwealth* v. *Gaudette*, supra, 441 Mass. 762. In *Gaudette*, which was decided after *Portuondo*, the state requested, in light of *Portuondo*, that the court reconsider its *Person* prohibition on the prosecutor's use of generic tailoring arguments. Id., 763. The court, without considering whether generic tailoring violated the Massachusetts constitution, reaffirmed its holding in *Person*, stating that "it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony to con-

form to the trial evidence unless there is evidence introduced at trial to support that argument." Id., 767.

In *Martinez* v. *People*, supra, 244 P.3d 136–37, "[d]uring closing rebuttal argument, the prosecutor twice [had] accused the defendant of tailoring his testimony to meet the facts testified to by prior witnesses. The prosecutor did not, however, tie these accusations of tailoring to evidence presented at trial. Rather, the prosecutor said that the defendant's mere presence at trial enabled him to tailor his testimony." Although the defendant objected to this argument, he did not raise a constitutional ground in his objection. Id., 139. The Supreme Court of Colorado, therefore, would not consider whether the prosecutor's argument infringed on the defendant's rights under the Colorado constitution. Id. Nevertheless, the court held that such argument was improper "as a matter of sound trial practice" due to "constitutional concerns." Id., 141.

In *State* v. *Daniels*, supra, 182 N.J. 88, 98, the Supreme Court of New Jersey, although not ruling on whether generically tailored comments by the prosecutor were "constitutionally permissible" concluded that "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts [several constitutional] rights, permitting the prosecutor to punish the defendant for exercising that which the [c]onstitution guarantees." The court also opined that generic tailoring arguments "undermine the core principle of our criminal justice system—that a defendant is entitled to a fair trial"—and "debase the truth-seeking function of the adversary process, violate the respect for the defendant's individual dignity, and ignore the presumption of innocence that survives until a guilty verdict is returned. . . . We simply cannot conclude that generic accusations are a legitimate means to bring about a just conviction. . . . Therefore, pursuant to our supervisory authority, we hold that prosecutors are prohibited from making

generic accusations of tailoring during summation." (Citations omitted; internal quotation marks omitted.) Id., 98. The court, thereafter, held that such argument is prohibited during cross-examination as well. Id., 99.

Similarly, in *State* v. *Swanson*, supra, 707 N.W.2d 657–58, the Minnesota Supreme Court concluded: "We believe, however, that although not constitutionally required, the better rule is that the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." The court noted that the Supreme Judicial Court of Massachusetts had taken the same approach in *Gaudette*. Id., 658 n.2.

The only case offered by the defendant that clearly held that generic tailoring violated the state constitution is *State* v. *Walsh*, supra, 125 Hawaii 286–87.[5] In *Walsh*, "the prosecutor [had] accused [the defendant] of tailoring his testimony when, in discussing credibility, she argued that [the defendant] benefitted from hearing the testimony of the other witnesses before he testified. Manifestly the prosecutor's remarks drew the jury's attention to [the defendant's] presence at trial and his resultant opportunity to tailor his testimony . . . ." (Internal quotation marks omitted.) Id., 286. The Supreme Court of Hawaii held in relevant part: "(1) in the criminal trial of a defendant, the prosecution's

[5] In *State* v. *Wallin*, supra, 166 Wn. App. 376–77, the Court of Appeals of Washington reversed the defendant's conviction because the prosecutor had made a generic tailoring argument. In doing so, the court noted that "*Mattson* (Hawaii), *Daniels* (New Jersey), and *Swanson* (Minnesota) are helpful." Id., 376. The court further noted that the *Mattson* decision was based on an analysis of the Hawaii constitution, whereas the courts in *Daniels* and *Swanson* relied "on their ability to fashion a trial practice rule, which is not something that we could do." Id. Thus, it appears that the court in *Wallin* relied on the Washington constitution in reaching its conclusion, although it did not engage in a substantive analysis of the relevant provisions of its state constitution.

statements that a testifying defendant benefitted from his trial presence and, thus, is less credible because he heard the testimony of other witnesses . . . constitute[s] prohibited generic tailoring arguments; (2) prohibited generic tailoring arguments are reviewable as plain error inasmuch as they affect a defendant's substantial constitutional rights; (3) standard jury instructions regarding witness testimony and counsel's arguments do not cure such improper arguments; (4) accordingly, whenever a defendant testifies, the jury must be instructed that the defendant has a right to be present during trial; and (5) in this case the error is not harmless beyond a reasonable doubt." (Internal quotation marks omitted.) Id., 274. The court explained: "[U]pholding a defendant's rights under the confrontation clause is essential to providing a defendant with a fair trial . . . and . . . a prosecutor's comments may not infringe on a defendant's constitutional rights . . . . The right of confrontation is a substantial right. . . . The confrontation right provides the criminal defendant with the opportunity to defend himself [or herself] through our adversary system by prohibiting ex parte trials, granting the defendant an opportunity to test the evidence in front of a jury, and guaranteeing the right to face-to-face confrontation. . . .

"Generic accusations of tailoring also discourage a defendant from exercising his constitutional right to testify[6] on his own behalf. . . . Additionally, [i]t is well

[6] "The right of a defendant to testify is guaranteed by sections 5, 14, and 10 of article I of the Hawaii Constitution. . . . The right is essential to due process of law as guaranteed under section 5 of article 1. . . . The right to testify is also guaranteed through the compulsory process clause of section 14, which states in pertinent part that the accused shall have compulsory process for obtaining witnesses in the accused's favor . . . . Logically included in the accused's right to call witnesses . . . is a right to testify himself, should he decide it is in his favor to do so . . . since the most important witness for the defense in many criminal cases is the defendant himself. . . . The opportunity to testify is a necessary corollary to the guarantee, under section 10, against compelled testimony since every criminal

settled that an accused has a fundamental right to be present at each critical stage of the criminal proceeding. . . . The right of a criminal defendant to be present at his trial is of no less than constitutional magnitude, and is founded upon the [c]onfrontation and [d]ue [p]rocess clauses of both the United States and Hawaii [c]onstitutions. . . . It is a right of fundamental importance." (Citations omitted; emphasis omitted; footnote in original; internal quotation marks omitted.) Id., 284–85.

Although all of these cases speak to constitutional issues and concerns, with the exception of *Walsh* and *Wallin*, none of them relies on a state constitution to support the prohibition of generic tailoring arguments or questions. Rather, they rely on the supervisory authority of those courts and on public policy grounds. Furthermore, as demonstrated by the cases discussed herein, *Walsh* and *Wallin* appear to represent a minority of states that have chosen to depart from *Portuondo* in some fashion. We conclude, therefore, that this factor favors the state.

4

The next *Geisler* factor that the defendant discusses is the persuasive relevant federal precedents. See *State* v. *McCleese*, supra, 333 Conn. 387. The defendant concedes that the United States Supreme Court in *Portuondo* held that "generic tailoring arguments do not violate the federal constitution" and that, therefore, this factor favors the state. See *Portuondo* v. *Agard*, supra, 529 U.S. 73. We agree.

5

The fifth factor briefed by the defendant concerns related Connecticut precedent. See *State* v. *McCleese*, supra, 333 Conn. 387. In her main appellate brief, the

defendant is privileged to testify in his or her defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Walsh*, supra, 125 Hawaii 285 n.22.

defendant argues, in toto: "The first time this issue came up in Connecticut was in *Cassidy*, where this court strongly disapproved of generic tailoring arguments because [i]nviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated. [*State* v. *Cassidy*, supra, 236 Conn. 127]. However, the court in [*State* v.] *Alexander*, [supra] 254 Conn. 290, overruled *Cassidy*. Subsequent attempts to revisit this issue were unsuccessful. *State* v. *Perez*, [78 Conn. App. 610, 629, 828 A.2d 626 (2003), cert. denied, 271 Conn. 901, 859 A.2d 565 (2004)]; *State* v. *Papantoniou*, [supra, 185 Conn. App. 93].[7] Recently, as discussed in more detail above, [our Supreme Court] readdressed this issue [in] *Weatherspoon*, where [the] court indicated that, should the practice of generic tailoring arguments persist, a rule prohibiting them may become necessary. [*State* v. *Weatherspoon*, supra] 332 Conn. 554. Based upon the decision in *Weatherspoon*, this factor favors the defendant." (Footnote added; internal quotation marks omitted.) The state concedes that this factor "appears to favor the defendant." We agree.

In *Weatherspoon*, our Supreme Court explained: "[We] first addressed the constitutionality of tailoring arguments in *State* v. *Cassidy*, [supra, 236 Conn. 120–29]. We held in *Cassidy* that generic tailoring arguments violate the sixth amendment's confrontation clause . . . but specific tailoring arguments are constitutionally permissible because they are linked solely to the

[7] In *State* v. *Papantoniou*, supra, 185 Conn. App. 100 n.14, this court did not address the defendant's claim that generic tailoring arguments violated the defendant's rights under the Connecticut constitution. Instead, we concluded that, even if we assumed that a constitutional violation had occurred, the defendant could not prevail on his unpreserved constitutional claim because the state had proved that the alleged constitutional violation was harmless beyond a reasonable doubt. Id., 103.

evidence and not, either directly or indirectly, to the defendant's presence at trial. . . . This court's reasoning was straightforward: Inviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated. . . . *Cassidy*, however, reassured the state that the prohibition against generic tailoring arguments did not prevent the prosecution from aggressively attacking a testifying defendant's credibility. We stated that the prosecutor, in his closing argument . . . was not free to assert that the defendant's presence at trial had enabled him to tailor his testimony to that of other witnesses. Such argument exceeded the bounds of fair comment because it unfairly penalized the defendant for asserting his constitutionally protected right to confront his accusers at trial. . . .

"Four years later, the sixth amendment underpinning of *Cassidy* was removed when the United States Supreme Court held that generic tailoring arguments do not violate any federal constitutional rights. *Portuondo* v. *Agard*, supra, 529 U.S. 75–76. In *Portuondo* . . . [t]he court pointed out that generic tailoring arguments pertain to the defendant's credibility as a witness, and [are] therefore in accord with our [long-standing] rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness. . . .

"The *Portuondo* majority emphasized that its ruling was limited to federal constitutional grounds and did not address whether generic tailoring arguments were always desirable as a matter of sound trial practice, which, the court explained, was an inquiry best left to trial courts, and to the appellate courts which routinely review their work. . . . This caveat also was noted in a concurrence by Justice Stevens, in which he expressed

the view that generic tailoring arguments should be discouraged rather than validated, and emphasized that the majority's holding does not, of course, deprive [s]tates or trial judges of the power . . . to prevent such argument[s] altogether. . . .

"Because *Cassidy* was decided under the federal constitution, *Portuondo* required us to overrule its holding, which we did in *State* v. *Alexander*, supra, 254 Conn. 296. We stated in *Alexander* that generic tailoring comments on the defendant's presence at trial and his accompanying opportunity to fabricate or tailor his testimony were permissible under the federal constitution. . . . Although the defendant in *Alexander* raised a state constitutional claim through supplemental briefing, this court was not persuaded by his argument." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 545–47.

The court further explained: "Although the present case does not require us to decide at this time whether to adopt a formal rule prohibiting generic tailoring arguments as an exercise of our supervisory authority, such a rule may become necessary if future cases reveal that tailoring arguments are being made indiscriminately and without an appropriate evidentiary basis. Likewise, the fact that generic tailoring arguments do not burden federal constitutional rights does not mean that they pass constitutional muster under our state constitution. We express no view on these issues, but observe that a number of our sister states have determined that generic tailoring arguments are impermissible as a matter of sound trial practice or state law." Id., 554.

Although this history indicates that it may be time for us to exercise our supervisory authority to prohibit generic tailoring arguments or cross-examination in criminal cases, we conclude that this history does not

necessarily demonstrate that our appellate courts, after *Portuondo*, consider this a matter of state constitutional law. Nevertheless, because it is obvious that we have recognized in our case law the possibility that such generic tailoring arguments and questions on cross-examination during a criminal trial potentially could impact a defendant's state constitutional rights, we conclude that this factor, on balance, slightly favors the defendant.

6

The final *Geisler* factor briefed by the defendant requires us to consider relevant public policies, including economical and sociological considerations. See *State* v. *McCleese*, supra, 333 Conn. 387. The defendant argues that generic tailoring comments violate Connecticut public policy, stating: "As [B.] Gershman's Prosecutorial Misconduct § 11.16 (2d Ed. 2015) warns, a generic tailoring insinuation may impinge on a defendant's right to take the stand and his right to confront witnesses because the comment implies that a truthful defendant would have stayed out of the courtroom before testifying. Furthermore, the argument violates the defendant's right to testify because the state can only make the argument when the defendant takes the stand." (Internal quotation marks omitted.) She also argues in her reply brief that "[t]elling the jury that it may . . . use the defendant's presence to find her less believable sends [a] . . . message . . . that her presence [at her criminal trial] means she is less believable. . . . [This] tie[s] the defendant's credibility to her presence at trial, burdening her rights to confront and testify. . . . Mentioning that the defendant was the only witness to watch the other witnesses exacerbates the problem because it implies that the other witnesses are automatically more believable because they were sequestered." (Citations omitted.)

Although we agree in part with the defendant's argument concerning the implications of generic tailoring on the jury's perception of the defendant during her criminal trial; see part IV of this opinion; we are not persuaded, in light of our analysis in parts I B 1 through 5 of this opinion, by the defendant's argument that public policy considerations compel a conclusion that generic tailoring violates our state constitution.

C

On the basis of our analysis of the *Geisler* factors, the defendant has not persuaded us that article first, § 8, of the Connecticut constitution affords greater protection than its federal counterparts, the fifth and sixth amendments, on the issue of generic tailoring as to the defendant's right of confrontation and her right to testify on her on own behalf. Consequently, her claim that the prosecutor's generic tailoring comments violated her rights under the article first, § 8, of our state constitution fails.

II

The defendant next claims that the prosecutor violated her federal and state constitutional rights to due process of law[8] when, during cross-examination, she asked the defendant whether she had a vested interest in the outcome of the trial, and when, during rebuttal, the prosecutor told the jury that it could consider the defendant's vested interest in the outcome of the trial. She argues that "[t]hese questions and comments improperly infringed upon the defendant's presumption

[8] The defendant does not brief separately a state constitutional due process claim or contend that the state constitution affords greater protections than its federal counterpart. Accordingly, we consider this claim only under the federal constitution. See, e.g., *State* v. *Scott*, 158 Conn. App. 809, 814 n.4, 121 A.3d 742 (when analysis of rights under Connecticut constitution is not briefed separately by appellant, we consider rights as coextensive with federal constitution), cert. denied, 319 Conn. 946, 125 A.3d 527 (2015).

of innocence. Furthermore, they are contrary to the rule of *State* v. *Medrano*, 308 Conn. 604, [629–31, 65 A.3d 503] (2013), in which the court, under its supervisory powers, instructed the trial courts not to instruct the jury as to the defendant's special interest in the outcome of the case. This error was not harmless and this court must overturn the defendant's convictions on that basis." Because this claim is unpreserved, the defendant requests *Golding* review. See footnote 3 of this opinion. The defendant's claim fails under the third prong of *Golding*.

The following additional facts are relevant to our discussion. During cross-examination of the defendant, the following colloquy occurred:

"[The Prosecutor]: And you have a lot riding on this case, don't you?

"[The Defendant]: Today?

"[The Prosecutor]: Sure.

"[The Defendant]: Well, yeah. I have my son, my apartment. I have a life. My son is everything to me." The defendant did not object.

During the prosecutor's summation, it argued to the jury, inter alia, that the defendant had a "vested interest in the outcome of this case. And that can also be taken into account when you're deliberating this case." The defendant did not object to this argument.

On appeal, the defendant claims that the prosecutor violated her right to due process of law and that such questions and comments violate the spirit of *Medrano*, which, she argues, should be read to include an implied prohibition on the prosecutor telling the jury that the defendant has a vested interest in the outcome of the case, in addition to its explicit prohibition on such statements in the context of the trial court's jury instructions.

In *Medrano*, our Supreme Court considered, in relevant part, whether the defendant had been deprived of his right to a fair trial and to present a defense when the trial court instructed the jury that it could consider whether the defendant had an interest in the outcome of the case when assessing the credibility of his trial testimony. *State* v. *Medrano*, supra, 308 Conn. 624–25. The court held that the instruction "was not unduly repetitive, nor did it transcend the bounds of evenhandedness." Id., 626. Nevertheless, because such an instruction "could give rise to a danger of juror misunderstanding," the court employed its supervisory authority over the administration of justice by directing the trial court, in the future, "to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Id., 630–31; see also *State* v. *Courtney G.*, Conn. , n.9, A.3d (2021) (explaining holding in *Medrano*).

In the present case, the defendant has not persuaded us that the questions and argument of the prosecutor implicated her right to due process of law. Our Supreme Court in *Medrano* held that the trial court's instructions, specifically telling the jury that it could consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial, did not implicate the defendant's right to due process of law. *State* v. *Medrano*, supra, 308 Conn. 625. The defendant in the present case has failed to persuade us that a prosecutor's similar *argument* could have more of an implication on the defendant's right to due process of law than a court's jury instructions.

In the alternative, the defendant requests that we employ our supervisory authority to expand on our Supreme Court's decision in *Medrano* by making the prohibition set forth therein applicable to comments by

prosecutors. We will discuss the use of our supervisory authority over the administration of justice in part IV of this opinion.

III

The defendant also claims that the prosecutor committed improprieties that deprived her of a fair trial when she argued that the defendant had tailored her testimony, implied that she had a motive to lie, and infringed on her right to the presumption of innocence. Having concluded in parts I and II of this opinion that the questions and argument of the prosecutor did not infringe on the defendant's constitutional rights, we need not consider this claim further. See id., 610 ("[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.)). The defendant has failed to establish her claim.

IV

We next consider the defendant's requests that we employ our supervisory authority over the administration of justice to prohibit the prosecutor from making generic tailoring arguments and comments and that we expand on our Supreme Court's decision in *Medrano* to prohibit the prosecutor from making "interest in the outcome" arguments about the defendant.[9] As for

[9] We note that the claims of error giving rise to these requests were not preserved and that our supervisory authority "is not intended to serve as a bypass to the bypass [doctrines], permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. . . . [A] defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts in the administration of justice in all aspects of the criminal process." (Citation omitted; internal quotation marks omitted.) *State* v.

prosecutorial argument on the defendant's "interest in the outcome" of her criminal trial, the defendant has failed to persuade us that such argument merits the exercise of our supervisory authority. See *State* v. *Courtney G.*, supra, Conn. n.9. On the issue of generic tailoring, we agree to exercise our supervisory authority over the administration of justice to prohibit such questions and arguments because they are likely to implicate the perceived fairness of the judicial system and they could give rise to a danger of juror misunderstanding.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 552. "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . .

"We recognize that this court's supervisory authority is not a form of free-floating justice, untethered to legal

Elson, 311 Conn. 726, 768, 91 A.3d 862 (2014); see also *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155–61, 84 A.3d 840 (2014) (noting that "a reviewing court has the authority to review [unpreserved] claims under its supervisory power" and setting forth "general principles" of such review). We conclude that the record in the present case is adequate for review of the defendant's claims, both parties have had the opportunity to be heard on these claims, neither party will suffer unfair prejudice by our review of the claims, and the state, which responded to these claims in its brief, does not object to review pursuant to our supervisory authority. See *In re Yasiel R.*, supra, 317 Conn. 790. Furthermore, for the reasons that follow, we conclude that the defendant's claims implicate the perceived fairness of the judicial system as a whole and merit review under our supervisory authority.

principle. . . . Rather, the rule invoking our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process. . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers." (Citations omitted; internal quotation marks omitted.) *In re Yasiel R.*, supra, 317 Conn. 789–90.

"Generally, cases in which we have invoked our supervisory authority for rule making have fallen into two categories . . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 552–53; id. (deciding it was unnecessary to consider defendant's request for exercise of supervisory authority because prosecutor's tailoring argument was specific rather than generic).

A

The defendant requests that we employ our supervisory authority over the administration of justice to expand on our Supreme Court's decision in *Medrano* to prohibit the prosecutor from employing "interest in the outcome" questions and arguments about a defendant who exercises her or his right to testify. She argues that " '[i]nterest in the outcome' arguments apply to

both guilty and innocent defendants and therefore are of minimal value in assessing the defendant's credibility. Furthermore, [the] court in *Medrano* banned jury instructions that emphasize the defendant's interest in the outcome of the case, and it significantly defeats the purpose of this rule to then allow the state to argue about the defendant's interest in the outcome and tell the jury that it may take that interest into consideration." We are not persuaded by the defendant's arguments in support of this request.

In *Medrano*, our Supreme Court held that the trial court's instructions, telling the jury that it could consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial, did not implicate the defendant's right to due process of law but that they could give rise to a danger of juror misunderstanding. *State* v. *Medrano*, supra, 308 Conn. 629–31. In the present case, the defendant's attempts to equate the court's instructions with the argument of the prosecutor are not persuasive. In cases where a criminal defendant has taken the witness stand, the jury is well aware that the defendant is the one on trial and that he or she has an interest in the outcome of the case. The argument of the prosecutor, reminding the jury that the defendant has an interest does not carry the inherent danger of misunderstanding that a judge's instruction would have on the jury. As our Supreme Court recently noted: "Our holding in *Medrano* was predicated on the trial court's role as a neutral and detached arbiter of justice and its duty to instruct the jurors on the law in a fair, impartial, and dispassionate manner. Although a prosecutor is a minister of justice . . . she is not neutral, detached, impartial, or dispassionate. Instead, a prosecutor is an advocate with a professional obligation to argue zealously, albeit fairly, on behalf of the state." (Citation omitted.) *State* v. *Courtney G.*, supra, Conn. n.9. The jury

understands the difference between advocacy by the state on one hand and an instruction of law by the court on the other, which it is told it must follow. The argument of counsel is just that, argument, and the jury in the present case specifically was instructed as such. Accordingly, we are not persuaded by the defendant's argument.

B

The defendant also requests that, for policy reasons, we employ our supervisory authority over the administration of justice to prohibit the prosecutor from making generic tailoring arguments. She argues that if we were to prohibit such remarks, "[t]he prosecutor would still be free to challenge a defendant's overall credibility by making specific tailoring arguments. In closing, the prosecutor could comment on the defendant's testimony, and how it matched or conflicted with other evidence. The prosecutor [however] could not refer explicitly to the fact that the defendant was in the courtroom or that he [or she] heard the testimony of other witnesses, and was thus able to tailor his [or her] testimony. . . . This is a rule that can be readily fashioned and easily followed in a trial setting." (Citation omitted; internal quotation marks omitted.) We agree that there are important public policy reasons that make it necessary for us to employ our supervisory authority over the administration of justice to set forth a procedure to ensure that prosecutors make only specific and not generic tailoring remarks during a criminal trial.

In reaching this conclusion, we are guided by the rationale that our Supreme Court has set forth for the exercise of appellate supervisory authority. "We deem it appropriate, in light of concerns of fundamental fairness, to consider the substance of this issue pursuant to our supervisory authority for the purpose of providing guidance to trial courts in future cases. As an appellate

court, we possess an inherent supervisory authority over the administration of justice. . . . The standards that we set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . We previously have exercised our supervisory powers to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; internal quotation marks omitted.) *Duperry* v. *Solnit*, 261 Conn. 309, 326–27, 803 A.2d 287 (2002); id., 329–31 (employing supervisory authority to enact new rule mandating that trial court must canvass defendant who, with no contestation by prosecutor, pleads not guilty by reason of insanity, but declining to apply that rule to present case); see also *State* v. *Carrion*, 313 Conn. 823, 847–49, 100 A.3d 361 (2014) (although defendant failed to prove that jury charge deprived him of fair trial, our Supreme Court exercised its supervisory authority over administration of justice to direct trial court to refrain from giving that particular instruction in future).

In *Carrion*, our Supreme Court explained that "the cases in which this court has invoked its supervisory authority can be divided into two different categories. In the first category are cases [in which] we have utilized our supervisory power[s] to articulate a procedural rule as a matter of policy, either as holding or dictum, but without reversing convictions or portions thereof. In the second category are cases [in which] we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. Although we . . . have noted

that [o]ur cases have not always been clear as to the reason for this distinction . . . a review of the cases in both categories demonstrates that, in contrast to the second category, the first category consists of cases [in which] there was no perceived or actual injustice apparent on the record, but the facts of the case lent themselves to the articulation of prophylactic procedural rules that might well avert such problems in the future. . . .

"For purposes of the second category of cases—cases in which we reverse a conviction—the defendant must establish that the invocation of our supervisory authority is truly necessary because [o]ur supervisory powers are not a last bastion of hope for every untenable appeal. . . . In such circumstances, the exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Because [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system, this court will invoke its supervisory powers to reverse a conviction only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . This demanding standard is perfectly appropriate when we are asked to reverse a conviction under our supervisory powers.

"The first category of cases, however, presents an entirely different set of circumstances. We invoke our supervisory authority in such a case . . . not because the use of that authority is necessary to ensure that justice is achieved in the particular case. Rather, we have determined that the defendant in that case

received a fair trial and therefore is not entitled to the extraordinary remedy of a new trial. Nevertheless, it may be appropriate, in such circumstances, to direct our trial [judges] to conduct themselves in a particular manner so as to promote fairness, both perceived and actual, *in future cases*. As we tacitly have recognized by invoking our supervisory authority in such cases, because we are not imposing any remedy in the case [on appeal]—let alone the extraordinary remedy of a new trial—there is no need for this court to justify the use of extraordinary measures prior to exercising its supervisory authority. Rather . . . we are free to invoke our supervisory authority prospectively when prudence and good sense so dictate." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Carrion*, supra, 313 Conn. 850–52; see also *State* v. *Elson*, 311 Conn. 726, 768–70 n.30, 91 A.3d 862 (2014). This is such a case.

First, this case does not fit into the second category of cases requiring the extraordinary remedy of a retrial because the record reflects that the generic tailoring comments of the prosecutor did not affect the fairness of the defendant's trial. The defendant admitted to driving while her license was under suspension, and, as to the crimes of driving while under the influence of intoxicating drugs or alcohol and attempt to commit risk of injury to a child, the evidence demonstrates that the people with whom she had come into contact at the day care believed that her behavior and demeanor exhibited intoxication, that she failed the field sobriety tests that were administered, and that she was unsteady on her feet and confused. Furthermore, Divenere testified that the medication Xanax is used for anxiety and panic disorders and that the defendant told him that she was taking Xanax, although she did not admit to having taken it that day. Divenere also testified that "Xanax can impair one's ability to drive," and that, after

the defendant tested negative for alcohol, he asked her to provide a urine sample so that he could test for drugs, but she refused. The jury reasonably could infer from the defendant's refusal to provide the requested urine sample that she was concerned that such a sample would show the presence of Xanax in her system. Furthermore, the prosecutor's generic tailoring comments were limited in nature, compromising only a few questions and only three sentences of the prosecutor's rebuttal argument. Because we have concluded that generic tailoring does not implicate the defendant's constitutional rights, the burden to prove any harm from the prosecutor's use of generic tailoring is on the defendant, and she has failed to prove that the prosecutor's limited use of generic tailoring during her criminal trial was harmful.

Despite our conclusion that the prosecutor's generic tailoring comments did not prejudice the defendant, we are convinced that, to ensure the perceived and actual fairness of trials in the future, generic tailoring arguments should be avoided. Under our criminal justice system, a defendant has both federal and state constitutional rights, including the rights to be present at trial, to confront the state's witnesses, to call witnesses and present evidence, and to testify, or to not testify, on his or her own behalf. See U.S. Const., amends. V, VI and XIV; Conn. Const., art. I, § 8. "[A] criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are essential to a fair trial. *Pointer* v. *Texas*, 380 U.S. 400, 403, [85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965) . . . . Indeed, a criminal defendant has the right to be present at trial, see *Illinois* v. *Allen*, 397 U.S. 337, 338, [90 S. Ct. 1057, 25 L. Ed. 2d 353] (1970), to be confronted with the witnesses against him and to hear the [s]tate's evidence, see *Pointer* [v. *Texas*], supra, [403], to present witnesses and evidence in his defense, see *Washington* v. *Texas*,

388 U.S. 14, 18–19, [87 S. Ct. 1920, 18 L. Ed. 2d 1019] (1967), and to testify on his own behalf, see *Rock* v. *Arkansas*, 483 U.S. 44, 49, [107 S. Ct. 2704, 97 L. Ed. 2d 37] (1987).'' (Internal quotation marks omitted.) *State* v. *Daniels*, supra, 182 N.J. 97–98.

Under our rules of practice, a criminal defendant is required to be present at his or her criminal trial, unless excused under Practice Book § 44-8.[10] Additionally, the order of the presentation of evidence at a criminal trial, unless there is cause to permit otherwise, *must proceed* as follows: ''(1) The prosecuting authority shall present the case-in-chief. (2) The defendant may present a case-in-chief. (3) The prosecuting authority and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit a party to present evidence not of a rebuttal nature, and if the prosecuting authority is permitted to present further evidence in chief, the defendant may respond with further evidence in chief. (4) The prosecuting authority shall be entitled to make the opening and final closing arguments. (5) The defendant may make a single closing argument following the opening argument of the prosecuting authority.'' Practice Book § 42-35; see also General Statutes § 54-88. Accordingly, for a defendant to exercise his or her rights to be present at trial and to confront that state's witnesses, he or she necessarily must sit through the state's case *before*

[10] Practice Book § 44-8 provides: ''The defendant *must be present at the trial* and at the sentencing hearing, but, if the defendant will be represented by counsel at the trial or sentencing hearing, the judicial authority may: (1) Excuse the defendant from being present at the trial or a part thereof or the sentencing hearing if the defendant waives the right to be present; (2) Direct that the trial or a part thereof or the sentencing hearing be conducted in the defendant's absence if the judicial authority determines that the defendant waived the right to be present; or (3) Direct that the trial or a part thereof be conducted in the absence of the defendant if the judicial authority has justifiably excluded the defendant from the courtroom because of his or her disruptive conduct, pursuant to Section 42-46.'' (Emphasis added.)

exercising the right to testify. See Practice Book § 42-35. That is the way our system is designed.

Although the United States Supreme Court in *Portuondo* declined to recognize a federal constitutional prohibition against a prosecutor making comments concerning a testifying defendant's opportunity to tailor his or her testimony because of his or her mere presence in the courtroom during the state's case, the "*Portuondo* majority emphasized that its ruling was limited to federal constitutional grounds and did not address whether generic tailoring arguments were always desirable as a matter of sound trial practice, which, the court explained, was an inquiry best left to trial courts, and to the appellate courts which routinely review their work. *Portuondo* v. *Agard*, supra, 529 U.S. 73 n.4. This caveat also was noted in a concurrence by Justice Stevens, in which he expressed the view that generic tailoring arguments should be discouraged rather than validated, and emphasized that the majority's holding does not, of course, deprive [s]tates or trial judges of the power . . . to prevent such argument[s] altogether. Id., 76." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 546–47.

"Justice Ginsburg dissented in *Portuondo* on the basis of her belief that generic tailoring arguments in closing arguments unduly burden a defendant's sixth amendment right to be present at trial and to confront the accusers against him, and do not aid the jury in its truth-seeking function because a prosecutorial comment . . . tied only to the defendant's presence in the courtroom and not to his actual testimony does not assist the jury in sort[ing] those who tailor their testimony from those who do not, much less the guilty from the innocent. [*Portuondo* v. *Agard*, supra, 529 U.S. 77–78]." (Internal quotation marks omitted.) *State* v. *Weath-*

erspoon, supra, 332 Conn. 547 n.8. Justice Ginsburg contended, instead, that the majority was "transform[ing] a defendant's presence at trial from a [s]ixth [a]mendment right into an automatic burden on his credibility." *Portuondo* v. *Agard*, supra, 76 (Ginsburg, J., dissenting).

Our Supreme Court in *Weatherspoon* carefully explained that "a tailoring argument does not automatically become appropriate just because a defendant chooses to testify in his or her criminal trial, and *prosecutors and trial courts must take care to ensure that any such argument is tied expressly and specifically to evidence that actually supports the inference of tailoring*. It is true that the United States Supreme Court held in *Portuondo* that tailoring arguments do not violate the sixth amendment, but the court made equally clear, however, that state courts may prohibit or limit tailoring arguments by local decree as a matter of sound trial practice. See [id.] 73 n.4; id., 76 (Stevens, J., concurring)." (Emphasis added.) *State* v. *Weatherspoon*, supra, 332 Conn. 553–54.

Although the United States Supreme Court has determined that generic tailoring arguments are not violative of the federal constitution, and our appellate courts, since shortly after *Portuondo*; see *State* v. *Alexander*, supra, 254 Conn. 295–96 (overruling *State* v. *Cassidy*, supra, 236 Conn. 112); have not been persuaded that such arguments are violative of the Connecticut constitution, we, nonetheless, agree with the defendant that these remarks should be prohibited because they are likely to implicate the perceived fairness of the judicial system and they could give rise to a danger of juror misunderstanding.

In *State* v. *Cassidy*, supra, 236 Conn. 120, our Supreme Court determined that generic tailoring arguments, made by the prosecutor during closing argument to the

jury, "invited the jury to draw an inference adverse to the defendant solely because he asserted his constitutional right to be present at trial and, consequently, that those comments unreasonably interfered with the defendant's free exercise of that right." The court explained: "The right to confrontation is fundamental to a fair trial under both the federal and state constitutions. *Pointer* v. *Texas*, [supra, 380 U.S. 403]; *State* v. *Jarzbek*, 204 Conn. 683, 707, 529 A.2d 1245 (1987) [cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988)]; *State* v. *Reardon*, 172 Conn. 593, 599–600, 376 A.2d 65 (1977). It is expressly protected by the sixth and fourteenth amendments to the United States constitution; *Davis* v. *Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Pointer* v. *Texas*, supra, [403]; and by article first, § 8, of the Connecticut constitution. *State* v. *Torello*, 103 Conn. 511, 513, 131 A. 429 (1925). *State* v. *Hufford*, 205 Conn. 386, 400–401, 533 A.2d 866 (1987). The right of physical confrontation is a . . . fundamental component of the [federal and state confrontation] clauses . . . *State* v. *Jarzbek*, supra, 692; and guarantees an accused the right to be present in the courtroom at every stage of his trial. *Illinois* v. *Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

"Like cross-examination, face-to-face confrontation [at trial] . . . ensure[s] the integrity of the [fact-finding] process . . . *Coy* v. *Iowa*, 487 U.S. 1012, 1019–20, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); because [i]t is always more difficult to tell a lie about a person to his face than behind his back. Id., 1019. Thus, [i]t is widely recognized that physical confrontation contributes significantly, albeit intangibly, to the truth-seeking process . . . . In addition, physical confrontation furthers other goals of our criminal justice system, in that it reflects respect for the defendant's dignity and the presumption of innocence until proven guilty. *State*

v. *Jarzbek*, supra, 204 Conn. 695. Indeed, the literal right to confront one's accusers is so deeply rooted in human feelings of what is necessary for fairness [that] the right of confrontation contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. *Coy* v. *Iowa*, supra, 1018–19, quoting *Lee* v. *Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986). Because of the important goals furthered by an accused's right to encounter adverse witnesses face-to-face, the free exercise of that right may not be impaired absent a compelling justification for the infringement. See, e.g., *Maryland* v. *Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured); *State* v. *Jarzbek*, supra, 704–705 (exclusion of defendant during testimony of minor victim of sexual assault warranted only upon clear and convincing showing by state of compelling need to do so)." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Cassidy*, supra, 236 Conn. 122–24.

Although our Supreme Court overruled *Cassidy* in *State* v. *Alexander*, supra, 254 Conn. 296, it did so in light of *Portuondo*; see id., 296, 299–300; and it was not asked to use its supervisory authority to ban generic tailoring arguments. Nevertheless, the concerns regarding the use of generic tailoring expressed by the court in *Cassidy* have not gone away since *Portuondo* and have led a number of state appellate courts to use their supervisory authority to prohibit such arguments. We join those courts today.

In particular, we agree with the New Jersey Supreme Court that "[p]rosecutorial comment suggesting that a

defendant tailored his testimony inverts [her rights to be present at trial, confront the witnesses presented against her and to hear the state's case], permitting the prosecutor to punish the defendant for exercising that which the [c]onstitution guarantees. Although, after *Portuondo*, prosecutorial accusations of tailoring are permissible under the [f]ederal [c]onstitution, we nonetheless find that they undermine the core principle of our criminal justice system—that a defendant is entitled to a fair trial." *State* v. *Daniels*, supra, 182 N.J. 98. We also are mindful that our Supreme Court in *Weatherspoon* noted the importance of tying a tailoring argument *specifically* to evidence that gives rise to an inference of tailoring. See *State* v. *Weatherspoon*, supra, 332 Conn. 544. When it did so, the court also stated: "Our approval of specific tailoring arguments should not be taken as a blanket approval of all tailoring arguments. . . . Although the present case does not require us to decide at this time whether to adopt a formal rule prohibiting generic tailoring arguments as an exercise of our supervisory authority, such a rule may become necessary if future cases reveal that tailoring arguments are being made indiscriminately and without an appropriate evidentiary basis." (Citation omitted.) Id., 553–54. Thus, although our Supreme Court did not address explicitly the propriety of generic tailoring arguments, it made clear that it remains concerned, even after *Alexander*, about the use of such arguments. We conclude that the present case, which does involve generic tailoring arguments by the prosecutor, requires us to decide whether to exercise our supervisory authority, and, for the reasons set forth in this part IV B, we do so to prohibit generic tailoring arguments at all future criminal trials.

In announcing this new rule of procedure, we recognize that the line between generic and specific tailoring arguments is not always clear. For this reason, we set

forth the following procedure to be used if the state wishes to make a tailoring argument. Prior to asking questions on cross-examination of the defendant that suggest that the defendant has tailored his or her testimony or before making such comments in closing arguments, the prosecutor shall alert the defendant and the court of the intention to do so. If the defendant objects to such cross-examination or comments, the court must rule on whether the proposed questions or comments constitute generic or specific tailoring. If the court concludes that the cross-examination or comments constitute specific tailoring because they are tied to specific evidence that gives rise to an inference that the defendant has tailored his or her testimony, the questions or comments, unless otherwise improper, should be permitted. If the court concludes that the questions or comments constitute generic tailoring, they shall be prohibited. In addition, to the extent that the court permits a specific tailoring argument to be made, the defendant may request that the court instruct the jury during its final charge that the defendant had an absolute right to be present throughout the entire trial and that the jury may not draw an inference that the defendant's testimony is not credible simply because the defendant was present during the trial. The trial court shall include such a charge in its final charge to the jury if it is requested. This procedure strikes the appropriate balance of ensuring that the state is not deprived of the opportunity to ask questions or make comments based on the evidence, while at the same time ensuring that the defendant's rights to be present at his or her criminal trial and to confront the state's witnesses are not burdened by a suggestion that he or she has taken unfair advantage by exercising those rights.

V

The defendant's final claim is that her conviction of attempt to commit risk of injury to a child should be

vacated because it is not a cognizable crime. The defendant, although requesting review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40; see footnote 3 of this opinion; concedes that "the Appellate Court cannot overrule a Supreme Court case and, therefore, [she] makes this argument for the sake of future review." We conclude, as recognized by the defendant, that we are bound by our Supreme Court's decision in *State* v. *Sorabella*, 277 Conn. 155, 172–74, 891 A.2d 897 (rejecting claim that "attempt to commit risk of injury to a child . . . is not a cognizable offense"), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). Accordingly, the defendant has preserved this issue should our Supreme Court wish to revisit its decision. She, nonetheless, cannot prevail on that claim in this appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

ROCKSTONE CAPITAL, LLC *v.* MORGAN J. CALDWELL, JR., ET AL.
(AC 43653)

Elgo, Cradle and DiPentima, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property that was jointly owned by the defendants, C and D, who were domestic partners. The plaintiff purchased a line of credit that had been extended to C's business, W Co., and guaranteed by C. After the plaintiff brought a collections action against W Co. and C for nonpayment, the plaintiff, W Co., C and D entered into a settlement agreement in which, inter alia, the plaintiff agreed to forbear litigation and reduce the total amount of the indebtedness owed in exchange for W Co.'s and C's agreement to waive all defenses they had with respect to the agreement and to make regular payments on the debt. D guaranteed payment of the sums due under the settlement agreement on a nonrecourse basis, and C and D granted the plaintiff a mortgage against their respective interests in their residence to secure their obligations under the settlement agreement. After W Co. and C defaulted on their payment obligations, the plaintiff

declared the entire outstanding balance immediately due and payable and brought a foreclosure action against the real property. C and D each pleaded separate special defenses. D claimed that she did not read the settlement agreement prior to executing the document and that she was not represented by counsel in connection with the same. The trial court granted the plaintiff's motion to strike C's special defenses but denied the plaintiff's motion with respect to D's special defenses. Following a bench trial, the trial court rendered a judgment of strict foreclosure in favor of the plaintiff against C but determined that, with respect to D, the settlement agreement was unconscionable and unenforceable. The trial court explained that the settlement agreement was both procedurally and substantively unconscionable as to D due to, inter alia, the rushed nature of the closing, her lack of business acumen, her unawareness of the terms of the agreement, a lack of consideration, and the overly harsh terms of the agreement. On the plaintiff's appeal to this court, *held* that the trial court improperly concluded that the settlement agreement was procedurally and substantively unconscionable as to D; the court's findings with respect to the contract formation process failed to support a legal conclusion of procedural unconscionability because there was no language barrier between the parties, D had entered into a prior mortgage and, as a result, had some familiarity with mortgage documents, D's education level and business sophistication were immaterial, as she did not argue that the settlement agreement was ambiguous or exceedingly complicated and her surprise regarding the contract terms derived solely from her failure to read the agreement, and the court did not find that the plaintiff was responsible for any misconduct during the contract formation process, as it did not mislead or take advantage of D; moreover, the trial court's conclusion that the settlement agreement was substantively unconscionable because D did not receive any direct consideration in exchange for her agreement to mortgage her interest in her residence was clearly erroneous, as, even though D was not previously obligated to pay the debts of C or W Co., she received consideration for her guarantee because, if the settlement agreement had been honored, she would have avoided having to share title to her home with the plaintiff and she incurred the liability so that C could receive the direct benefit of forbearing litigation and reducing his total indebtedness; accordingly, the judgment with respect to D was reversed and the case was remanded with direction to render a judgment of strict foreclosure against D.

Argued May 17—officially released August 24, 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 court, *Lee*, *J.*, granted the plaintiff's motion to strike the named defendant's special defenses and denied the plaintiff's motion to strike the special defenses of the defendant Vicki A. Ditri; thereafter, the matter was tried to the court, *Lee*, *J.*; judgment of strict foreclosure against the named defendant, from which the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

Deborah L. Dorio, with whom, on the brief, was *Michael A. Pease*, for the appellant (plaintiff).

Sophie Laing, certified legal intern, with whom were *Jeffrey Gentes*, and, on the brief, *J. L. Pottenger*, *Jr.*, and *Chaarushena Deb* and *Zaria Noble*, certified legal interns, for the appellee (defendant Vicki A. Ditri).

Opinion

CRADLE, J. In this strict foreclosure action, we consider the enforceability of a settlement and forbearance agreement (settlement agreement) entered into by the plaintiff, Rockstone Capital, LLC, the defendants, Vicki A. Ditri and Morgan J. Caldwell, Jr., and Caldwell's business, Wesconn Automotive Center, LLC (Wesconn), that resulted from a collections action brought by the plaintiff against Caldwell and Wesconn.[1] The plaintiff appeals from the judgment of the trial court, rendered after a court trial, in favor of the defendant, on her special defense that the settlement agreement was unconscionable and, therefore, unenforceable. On appeal, the plaintiff contends that the trial court improperly concluded that the settlement agreement was both procedurally and substantively unconscionable as to

[1] The plaintiff's complaint originally named Caldwell and Ditri as defendants. Caldwell did not appeal from the trial court's judgment of strict foreclosure rendered against him in favor of the plaintiff and is not a party to this appeal. All references to the defendant in this opinion are to Ditri.

the defendant. We agree and, accordingly, reverse in part the judgment of the trial court.[2]

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The defendant and Caldwell have been in an intimate relationship for more than twenty-eight years. Since the 1990s, they have jointly owned and lived in a residence located at 11 Devon Avenue in Norwalk (Devon Avenue property). In August, 2003, Wesconn[3] obtained a line of credit with Fleet National Bank, now Bank of America, N.A., in the initial amount of $27,000, which amount was later increased to $75,000.[4] Caldwell executed a personal guarantee of payment and performance of the credit line. On December 14, 2004, Fleet National Bank issued an additional $5400 to Wesconn, and Caldwell again executed a guarantee of payment and performance.

The plaintiff purchased Wesconn's line of credit and Caldwell's guarantees from Bank of America, N.A., in

[2] The defendant argues, as alternative grounds for affirmance, that the settlement agreement is invalid for (1) lack of consideration and (2) lack of mutual assent. She raised these issues for the first time in her brief to this court and did not file a preliminary statement of alternative grounds on which the judgment may be affirmed, in accordance with Practice Book § 63-4 (a) (1) (A). "[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to [alternative] grounds for affirmance." (Internal quotation marks omitted.) *Li* v. *Yaggi*, 185 Conn. App. 691, 711, 198 A.3d 123 (2018). Because the trial court's determination of unconscionability depended largely on its finding that the settlement agreement contained "no direct consideration," we address that issue later in this opinion. The trial court did not, however, make specific factual findings regarding mutual assent or resolve the issue in its memorandum of decision. Accordingly, the record is inadequate on the issue of mutual assent and, therefore, we decline to review that claim.

[3] The defendant did not possess an ownership interest in Wesconn and was not involved in its business operations.

[4] At trial, Caldwell claimed that his secretary/bookkeeper fraudulently drew on the line of credit for her own benefit, increasing it from the initial amount to $75,000. The secretary was charged with fraud in 2008, and eventually pleaded guilty to that charge. The trial court repeatedly rejected this assertion as a valid special defense to the plaintiff's claim in this case.

2006, and was assigned all rights to the debts. In 2007, the plaintiff brought a collections action against Wesconn and Caldwell, alleging nonpayment of principal and interest. To resolve the action, the plaintiff, Wesconn, Caldwell, and the defendant[5] entered into the settlement agreement on August 31, 2010.[6] The settlement agreement provided generally that Caldwell and Wesconn would agree to waive all defenses with respect to the agreement and would make regular payments in exchange for the plaintiff's offer to forbear litigation and reduce the total amount of indebtedness. To secure the obligations under the settlement agreement, Caldwell and the defendant granted the plaintiff an open-end mortgage against their respective interests in the Devon Avenue property. The defendant has never had any personal liability for the debt, beyond her interest in the Devon Avenue property.[7]

On the day of closing, and at Caldwell's behest, the defendant traveled to the office of Caldwell's attorneys

[5] Although the defendant was not obligated on the note to Wesconn and Caldwell and, therefore, was not a party to the collections action, she nevertheless executed the settlement agreement and the mortgage.

[6] The settlement agreement identified Wesconn and Caldwell's indebtedness as $175,000, plus interest and costs of collections, including attorney's fees. The terms provided for a settlement sum of $119,000, payable by an initial payment of $8000, due within three days of signing, and monthly payments thereafter. The settlement agreement also set the interest rate at 10 percent, with a default rate of 18 percent. As of July 16, 2019, the date of trial, the total indebtedness had increased to $435,485.84, with a per diem interest charge of $83.63.

[7] Paragraph 14 of the settlement agreement provides, "[t]he undersigned, Vicki A. Ditri, hereby agrees to the terms and conditions of this Agreement, and hereby guarantees the payment of the sums due hereunder by [Wesconn] to ROCKSTONE on a non-recourse basis, meaning that, notwithstanding the foregoing, ROCKSTONE and Vicki A. Ditri hereby acknowledge and agree that Vicki A. Ditri's liability for the payment of the sums due and owing by [Wesconn] herein shall be limited to Vicki A. Ditri's interest in, and to that certain real property commonly known as 11 Devon Avenue, Norwalk, Connecticut, which interest shall be secured by and subject to the terms and conditions of a[n] Open-End Mortgage, attached hereto."

during her lunch break to execute the settlement agreement. Prior to signing, Caldwell had not informed the defendant of the nature of the agreement and had simply asked her to "sign some papers." The defendant had not spoken with Caldwell's attorneys before the closing date and was not provided an advance copy of the settlement agreement. At the signing, the defendant was unrepresented by counsel, and neither Caldwell nor his attorneys explained to the defendant what the settlement agreement or mortgage entailed. The settlement agreement was opened to the signature page when the defendant arrived, and she did not read the other pages before signing it. The plaintiff was not present at the closing.

Wesconn and Caldwell subsequently defaulted on the amounts owed under the settlement agreement and the plaintiff exercised its option to declare the entire balance immediately due and payable. The plaintiff then filed the present action on April 26, 2018, seeking to foreclose the mortgage on the Devon Avenue property. Caldwell and the defendant, each self-represented, filed individual appearances and pleaded separate special defenses.[8] In her answer, the defendant alleged the following special defense: "I Vicki Ditri was not involved in Wesconn Auto [and] Tire. Maria Janice Lawrence stole money from Wesconn Tire [and] Auto, she got arrested. Next thing I know I have to go to a lawyer's office (not my lawyer I was not [i]nvolved), to sign papers which I never read and was not represented by

[8] In his answer, Caldwell alleged the following special defense: "I had a [secretary] that embezzled a lot of money on opening lines of credit, cashing company checks made to my business, credit cards, cash, and was arrested. She was ordered restitution. She broke her probation and was rearrested after failing to pay 800 plus dollars a month back to me and Wesconn. She cried and told the judge she was on social security and disability and had no way of repaying me. The judge ordered her no restitution and she did not pay me back for approx[imately] $100,000.00. So sad."

a lawyer. I would never agree to [forbearance] (which I just learned what that means!)."

On June 14, 2018, the plaintiff filed motions to strike both Caldwell's and the defendant's special defenses on the ground that they were legally insufficient because they did not "relate to the making of the debt obligation . . . ." The trial court, *Lee*, *J.*, granted the motion to strike Caldwell's special defense but denied the motion as to the defendant's special defense.

A bench trial was held on July 16, 2019. On November 7, 2019, the trial court, *Lee*, *J.*, issued its memorandum of decision. The court determined that the plaintiff had established a prima facie case of mortgage foreclosure and rendered a judgment of strict foreclosure in favor of the plaintiff against Caldwell.[9] With regard to the defendant, however, the court held that the settlement agreement was unconscionable and, consequently, unenforceable. Specifically, the court explained, inter alia, that the rushed nature of the closing, the defendant's lack of business acumen, and the "overly harsh" terms of the settlement agreement rendered the agreement both procedurally and substantively unconscionable.

On December 27, 2019, the plaintiff filed a motion for articulation seeking articulation on five points.[10]

[9] The court also awarded the plaintiff (1) attorney's fees and costs in the amount of $104,289.11; (2) appraisal fees in the amount of $1300; and (3) title search fees in the amount of $225.

[10] Specifically, the plaintiff sought articulation on the following points: (1) "In ruling that the [defendant] had sustained the burden of proof as to her unconscionability defense, did the court consider its concomitant finding that 'there [was] no proof of any misconduct by [the plaintiff]?' " (2) "After finding that ordinarily the failure to read a document is not a defense to enforceability but that the handling of the closing here created the requisite 'surprise,' did the court consider the fact that there was no evidence adduced to show that the [defendant] ever asked any questions about the subject matter of the documents or sought additional time to review the documents?" (3) "Was the factual and legal basis for the court's determination that the [defendant] received no 'direct consideration' for agreeing to the mortgage limited to the fact [that] she had no legal obligation to pay the debts of

The trial court, *Lee, J.*, responded to the plaintiff's motion for articulation, explaining, inter alia, that the "conduct of the closing of the underlying settlement agreement and its provisions, pursuant to which [the defendant] agreed to a mortgage securing . . . Caldwell's obligations, despite having no liability herself, and being unaware of the contents or effect of the document she was signing" militated a determination of unconscionability. The plaintiff's motion for further articulation was denied. This appeal followed.

The plaintiff claims that the trial court erred in concluding that the settlement agreement was both procedurally and substantively unconscionable as to the defendant. We agree with the plaintiff.

The following legal principles guide our analysis of the plaintiff's claim on appeal. "We first note that the defense of unconscionability is a recognized defense to a foreclosure action. . . . The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. . . . As applied to real estate mortgages, the doctrine of unconscionability draws heavily on its counterpart in the Uniform Commercial Code which, although formally limited to transactions involving personal property, furnishes a useful guide for real property transactions. . . . As Official Comment 1 to § 2-302 of the Uniform Commercial Code suggests, [t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . .

Wesconn or . . . Caldwell?" (4) "Did the court consider the plain language of paragraph 1 (a) and paragraph [5] of the settlement agreement as set forth in the memorandum of decision in ruling for the [defendant]?" And (5) "[h]ow did the court's finding that the [defendant] was not a sophisticated business person excuse her failure to ask commonsense questions at the closing, or to seek more time to review and understand the documents?"

Unconscionability is determined on a case-by-case basis, taking into account all of the relevant facts and circumstances." (Citations omitted; internal quotation marks omitted.) *Hirsch* v. *Woermer*, 184 Conn. App. 583, 588–89, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018).

In practice, we have divided claims of unconscionability into two categories—one substantive and the other procedural. "Substantive unconscionability focuses on the content of the contract, as distinguished from procedural unconscionability, which focuses on the process by which the allegedly offensive terms found their way into the agreement." (Internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87 n.14, 612 A.2d 1130 (1992), quoting J. Calamari & J. Perillo, Contracts (3d Ed. 1987) § 9-37, p. 399. Procedural unconscionability is intended to prevent unfair surprise and substantive unconscionability is intended to prevent oppression. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998).

"The doctrine of unconscionability, as a defense to contract enforcement, generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, supra, 184 Conn. App. 589–90, quoting *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 741, 3 A.3d 957 (2010); see also *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, 191 A.3d 212 (2018).

"[T]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case." *Iamartino* v. *Avallone*,

2 Conn. App. 119, 125, 477 A.2d 124, cert. denied, 194 Conn. 802, 478 A.2d 1025 (1984). "[O]ur review on appeal is unlimited by the clearly erroneous standard. . . . [T]he ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and . . . the trial court's determination on that issue is subject to a plenary review on appeal. It also means, however, that the factual findings of the trial court that underlie that determination are entitled to the same deference on appeal that other factual findings command. Thus, those findings must stand unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 88. With the foregoing principles in mind, we turn to the plaintiff's claim on appeal.

The plaintiff first argues that the trial court improperly concluded that the settlement agreement was procedurally unconscionable as to the defendant. Specifically, the plaintiff claims that the trial court's findings pertaining to the contract formation process fail to support a legal conclusion of procedural unconscionability.[11] We agree.

Our Supreme Court has considered various factors in engaging in procedural unconscionability analyses, including the contracting party's business acumen, the party's awareness of material preconditions to the contract, whether the party was represented by counsel during the transaction period, and the existence of a language barrier between the contracting parties. See id., 89–91. In addition, this court has considered the contracting party's level of education, the party's ability to read and understand the agreement at issue, and the

[11] Because we conclude that the court's findings did not support its legal conclusion that the settlement agreement was procedurally unconscionable, we need not address the plaintiff's claim that those findings are not supported by the record.

reasonableness of the party's expectation to fulfill the contractual obligations. *Family Financial Services, Inc.* v. *Spencer*, 41 Conn. App. 754, 763–64, 677 A.2d 479 (1996). We have also assessed the conduct of the parties during the contract's formation, focusing on the process by which the allegedly unconscionable terms found their way into the agreement. Id. (concluding that loan agreement was procedurally unconscionable where plaintiff's attorneys rushed unrepresented defendant into signing, failed to disclose identities of true lenders, and withheld material term until closing).

In the present case, the trial court found that the defendant lacked business acumen; the closing was rushed because the defendant was on her lunch break; the defendant was unrepresented at the closing; neither Caldwell nor Caldwell's attorneys explained the settlement agreement or the mortgage to the defendant; and the documents for the defendant to sign were folded back so that only the signature page was exposed. We conclude that these findings are insufficient to render the settlement agreement procedurally unconscionable.

As an initial matter, the trial court did not find that either the defendant or Caldwell had an unreasonable expectation in fulfilling their obligations under the settlement agreement. Put another way, the court did not find that Caldwell's financial situation made it apparent that he could not reasonably expect to make the scheduled payments, or that the plaintiff entered the agreement simply to reap the equity in the Devon Avenue property. Likewise, the trial court did not find that the defendant experienced difficulty speaking or understanding English. Accordingly, there was no language barrier that prevented her from comprehending the settlement agreement. Although the trial court found that the defendant was an unsophisticated party, that finding is discounted due to the fact that she had entered into a prior mortgage agreement and, therefore, had some

familiarity with mortgage documents. See *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 90–91 (trial court's finding that defendants had entered into prior mortgage transaction undermined defendants' argument that they lacked business acumen).

Additionally, the defendant's level of education or business sophistication is largely immaterial to the particular circumstances in the present case. The defendant does not argue that the settlement agreement was ambiguous or exceedingly complicated. Rather, her alleged surprise regarding the contractual terms derives from her failure to read the agreement. Where a party does not attempt to understand its contractual obligations before signing, considerations such as education level, business acumen, and complexity of the contractual language become less relevant to our analysis. Indeed, a contracting party's negligent failure to read and understand an agreement has consistently been rejected as an unconscionability defense to contract enforcement. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 351–52 ("[w]e have never held that principles of unconscionability supersede, in toto, the duty of a contracting party to read the terms of an agreement or else be deemed to have notice of the terms"); *Emeritus Senior Living* v. *Lepore*, supra, 183 Conn. App. 30 n.5 ("The defendant's purported ignorance [with regard to understanding that signing an assisted living residency agreement as her mother's representative would make her personally liable to the plaintiff] . . . does not lead us to conclude that the formation of the agreement was procedurally unconscionable. The defendant had an obligation to read the agreement . . . and understand it before signing." (Citation omitted.)); see also *Ursini* v. *Goldman*, 118 Conn. 554, 562, 173 A. 789 (1934) ("where a person of mature years and who can read and write, signs or accepts a formal written contract affecting [her] . . .

interests, it is [her] duty to read it and notice of its contents will be imputed to [her] if [she] negligently fails to do so").

Moreover, our court has limited determinations of procedural unconscionability to cases where bargaining or contractual improprieties were committed by the plaintiff. *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, 70 Conn. App. 60, 70, 797 A.2d 1165 (2002) ("we know of no case . . . in which a party may invoke unconscionability without a showing of some kind of relevant misconduct by the party seeking enforcement of a contract"); see also *Emeritus Senior Living* v. *Lepore*, supra, 183 Conn. App. 29–30 and n.5 (rejecting claim of procedural unconscionability where defendant had not presented any evidence that demonstrated that *plaintiff* had prevented her from reading or understanding agreement).

Where the claim of unconscionability is directed at the actions and representations of third parties, rather than the plaintiff, we have required that an agency relationship exist between the plaintiff and the third party.[12] *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 522 n.9, 202 A.3d 1092 (2019) ("[b]ecause the defendant did not establish that [the third party] was an agent or employee of [the plaintiff's predecessor in interest], the court correctly concluded that the defendant could not prevail on his special defense of unconscionability"); *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 192, 81 A.3d 1189 (2013) ("existence of an agency relationship is critical to the viability of the defendants' special [defense of unconscionability] . . . insofar as the special [defense] . . . [is] primarily directed toward the representations and actions of the [third

[12] In instances where the plaintiff is not an original party to the contract and, thus, played no part in the contract formation process, the defendant must demonstrate an agency relationship between the third party and the plaintiff's predecessor in interest. See *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 515–16, 202 A.3d 1092 (2019).

party] . . . not the plaintiff''), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014).

Here, the trial court did not find that the plaintiff was responsible for any misconduct in the contract formation process. There is no evidence that the plaintiff intended to mislead the defendant or sought to take advantage of her lack of counsel. Rather, the allegedly rushed nature of the signing, folded pages, and failure to explain the settlement agreement and mortgage each stem from Caldwell, his attorneys, or the defendant's own constraints. In fact, the plaintiff was not even present at the time the defendant signed the settlement agreement. Moreover, as the other party to the contract, Caldwell can in no way be characterized as the plaintiff's agent, and the defendant does not argue that he was acting in such capacity. Accordingly, we conclude that the trial court's findings fail to support a determination that the settlement agreement was procedurally unconscionable as to the defendant.

The plaintiff also challenges the trial court's determination that the settlement agreement was substantively unconscionable. In particular, the plaintiff argues that the factual basis underlying the court's legal conclusion that the settlement agreement was substantively unconscionable—that the defendant received ''no direct consideration'' for agreeing to the mortgage on her home—was clearly erroneous. We agree.[13]

[13] The trial court also determined that the ''overly harsh'' terms of the settlement agreement rendered the contract substantively unconscionable, but the court failed to identify the specific provisions it claimed to be oppressive. The trial court explained in its articulation that the consultation with counsel clause of the settlement agreement was ''so contrary to the facts of the situation, that . . . it was consistent with the oppressive nature of the document . . . .'' The clause states that, ''[t]he parties hereto acknowledge each has had the opportunity to be advised by counsel and the parties agree that for all purposes (including the resolution of any ambiguities herein), this [a]greement shall be deemed to have been negotiated by the parties and strictly construed as if both parties shared equally in the drafting of [the] same.'' The trial court's conclusion, however, has little to do with the contract's substance and, instead, simply restates the

"[C]onsideration is [t]hat which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . [It] consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. . . . [U]nder the law of contract, a promise is generally not enforceable unless it is supported by consideration." (Citations omitted; internal quotation marks omitted.) *NSS Restaurant Services, Inc.* v. *West Main Pizza of Plainville, LLC*, 132 Conn. App. 736, 740–41, 35 A.3d 289 (2011).

It is axiomatic that the "doctrine of consideration does not require or imply an equal exchange between the contracting parties. . . . The general rule is that, in the absence of fraud or other unconscionable circumstances, a contract will not be rendered unenforceable at the behest of one of the contracting parties merely because of an inadequacy of consideration." (Internal quotation marks omitted.) *Christian* v. *Gouldin*, 72 Conn. App. 14, 23, 804 A.2d 865 (2002). "Whether an agreement is supported by consideration is a factual inquiry reserved for the trier of fact and subject to review under the clearly erroneous standard." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 442, 927 A.2d 843 (2007).

The trial court's finding of "no direct consideration" is based on the fact that the defendant was not obligated to pay Wesconn's and Caldwell's business debts. In other words, the court held that the plaintiff's offer to forbear litigation and reduce Caldwell's indebtedness provided nothing of value in exchange for the defendant's interest in the Devon Avenue property. Consideration is not construed so narrowly.

As this court has repeatedly recognized, the intangible benefit of assisting one's family is sufficient to constitute valuable consideration. *Sullo Investments, LLC*

arguments that the defendant was (1) unrepresented at the closing and (2) received inadequate consideration.

v. *Moreau*, 151 Conn. App. 372, 383–84, 95 A.3d 1144 (2014) (holding that father's ability to help his son finance purchase of restaurant equipment, despite not personally receiving loan proceeds, established consideration); *Deutsche Bank National Trust Co.* v. *DelMastro*, 133 Conn. App. 669, 680–81, 38 A.3d 166 (finding mortgage supported by consideration where mother "received the benefit of trying to help her son" and "incurred a detriment by assuming the role of guarantor to the mortgage," but did not receive financial benefit (internal quotation marks omitted)), cert. denied, 304 Conn. 917, 40 A.3d 783 (2012).

The fact that consideration did not directly flow from the plaintiff to the defendant in the form of a financial or legal benefit does not render the settlement agreement unenforceable. See *Sullo Investments, LLC* v. *Moreau*, supra, 151 Conn. App. 382–84. The settlement agreement was entered into in order to reduce Caldwell's and Wesconn's debts and avoid a potential collections judgment. If the agreement had been honored, Caldwell would have been able to retain his interest in the family home and the defendant would not have had to share title with the plaintiff. This is sufficient to establish consideration.

Finally, our courts have upheld contractual agreements as enforceable where one party incurs personal liability for a third person's debts in exchange for the other party's offer to forgo pursuing legal action on those debts.[14] *Hofmann* v. *De Felice*, 136 Conn. 187,

[14] Although neither party raised the argument, we also note that the defendant's role in the settlement agreement is similar to that of an accommodation party. General Statutes § 42a-3-419 (a) provides in relevant part that where "an instrument is issued for value given for the benefit of a party to the instrument . . . and another party to the instrument . . . signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party 'for accommodation.' " The accommodation party is obliged to pay the instrument in the capacity in which she signs, notwithstanding whether the accommodation party receives

190, 70 A.2d 129 (1949) (reversing trial court's finding of no consideration where defendant assumed responsibility for her parents' debts in exchange for plaintiff's promise to abstain from pursuing collections action against her parents); see also *Markel* v. *DiFrancesco*, 93 Conn. 355, 359–60, 105 A. 703 (1919) (finding adequate consideration for note that wife signed with husband for benefit of plaintiff in exchange for plaintiff's agreement to extend maturity date of husband's existing indebtedness). "An agreement to forbear to sue in consideration of a written promise by a third person to pay the debt of another constitutes a valid contract." *Hofmann* v. *De Felice*, supra, 190. In the present case, the record indicates that the defendant incurred a liability—her interest in the Devon Avenue property—so that Caldwell could receive the direct benefit of the plaintiff's forbearing litigation and reducing his total indebtedness. Accordingly, we conclude that the trial court erred in holding the settlement agreement substantively unconscionable and, therefore, unenforceable as to the defendant.

The judgment is reversed with respect to the trial court's determination that the settlement agreement was procedurally and substantively unconscionable as to the defendant and the case is remanded with direction to render a judgment of strict foreclosure against the defendant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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consideration for the accommodation. General Statutes § 42a-3-419 (b). "The want of consideration is the peculiar characteristic of accommodation paper" and, as such, lack of consideration is ineffective as a special defense. *Seaboard Finance Co. of Connecticut, Inc.* v. *Dorman*, 4 Conn. Cir. 154, 156, 227 A.2d 441 (1966).

JULIO GUTIERREZ *v.* DANIEL MOSOR (AC 43881)

Alvord, Clark and Sullivan, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court rendered for the plaintiff after a trial to the jury on the issue of damages in which the defendant was precluded from offering evidence as a result of a prior default the court imposed against him as a sanction for failing to attend his scheduled deposition. The defendant claimed, inter alia, that the trial court abused its discretion by imposing and thereafter refusing to set aside the default. The plaintiff contractor had brought an action in negligence against the defendant as a result of injuries the plaintiff suffered after falling from a platform on property where the defendant allegedly was constructing a house. The self-represented defendant timely filed an answer and special defense to the plaintiff's complaint. More than two years later, the plaintiff filed a reply to the special defense and, about one year after that, issued to the defendant a renotice for his deposition at the law office of the plaintiff's counsel. Thereafter, the defendant, who had not filed an objection to the plaintiff's motion for default, then filed a motion, through counsel, to set aside the default, claiming that good cause existed to set aside the default because, as a then self-represented party, he had been confused about where to appear and what would happen on the date of the deposition. The trial court denied the motion to set aside the default, noting that the defendant had failed to file an objection to that motion and concluding that he failed to demonstrate good cause to set aside the default. *Held* that the trial court abused its discretion in granting the plaintiff's motion for default, as the sanction of default was not proportional to the defendant's single discovery violation when he failed to attend his deposition: there was an insufficient record from which the court could have determined that the defendant's conduct was wilful or in bad faith, as the motion for default simply alleged that he had notice of and was aware of the deposition but failed to attend, and the record was devoid of evidence regarding the cause of his noncompliance or whether his conduct demonstrated an egregious or continuing pattern of behavior, or contumacious or unwarranted disregard for the court's authority; moreover, the defendant's failure to object to the motion for default had no bearing on whether the court's sanction was proportional to his violation, the court made no finding of prejudice to the plaintiff, and nothing in the record showed that, for at least three years of the four and one-half year pendency of the plaintiff's action prior to trial, the delay argued by the plaintiff was in any way attributable to the defendant; furthermore, the court had available to it a variety of other sanctions

it could have imposed that would have reimbursed the plaintiff for fees he may have incurred with respect to the deposition and vindicated his interest in avoiding undue expense during discovery while ensuring that a trial on the merits of the case could take place; accordingly, the judgment was reversed and the case was remanded for further proceedings.

Argued May 13—officially released August 24, 2021

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, defaulted the defendant; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, denied the defendant's motions to set aside the default and for permission to file notice as to a hearing in damages; subsequently, the issue of damages was tried to the jury before *Dubay*, *J.*; verdict for the plaintiff; thereafter, the court, *Dubay*, *J.*, denied the defendant's motion to set aside the verdict and rendered judgment for the plaintiff, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

Joseph A. La Bella, for the appellant (defendant).

Deborah V. Jekot, with whom, on the brief, was *Jack G. Steigelfest*, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The defendant, Daniel Mosor, appeals from the judgment of the trial court, rendered in favor of the plaintiff, Julio Gutierrez, after the defendant was defaulted for failing to appear at a deposition prior to a trial to a jury on the issue of damages. On appeal, the defendant claims that the court abused its discretion by (1) defaulting him for a single failure to attend the deposition, (2) refusing to set aside the default, and (3) sustaining the plaintiff's objection to the defendant's motion for permission to file a notice as to the hearing in damages, which precluded him from offering any

evidence contesting liability at the trial before the jury. We agree with the defendant's first claim and, accordingly, reverse the judgment of the trial court.

The following factual and procedural history is relevant to our resolution of the claims on appeal. The plaintiff commenced this action against the defendant on January 12, 2015. In his complaint, the plaintiff alleged that the defendant was the owner or party in possession and control of certain real property at 2010 Manchester Road in Glastonbury, on which the defendant was constructing a house. In connection therewith, the defendant hired various contractors, including the plaintiff, to perform work. The complaint further alleged that, "[o]n or about June 13, 2014, the plaintiff was standing on a metal staging platform attached to two ladders on each end that were leaning against the edge of the roof," and that "[o]ne or both of the ladders shifted because the legs of the ladders were located on a soft, wet and muddy surface, causing the staging to become unstable and causing the plaintiff to fall approximately [fifteen] to [twenty] feet to the ground." According to the complaint, the plaintiff's resulting injuries were caused by the "carelessness and negligence of the defendant . . . ."

On January 28, 2015, the self-represented defendant filed an answer and special defense, in which he denied that he was the owner or party in possession and control of the subject property, and asserted the following as a special defense: "I subcontracted [the] roof to a subcontractor by the name of Jose Flores, who was the employer of [the plaintiff]. Jose and [the plaintiff] went on the job site on a rainy day when they had no permission and should not have been staging a roof [in] that type of weather conditions. I don't know who [the plaintiff] is, and I don't know what he was doing on the job site." Just over two years later, on January 31, 2017, the plaintiff filed a reply denying the allegations of the

special defense, as well as a claim for a jury trial.[1] The next day, February 1, 2017, the plaintiff also filed a certificate of closed pleadings and a claim for the trial list.

Almost one year later, on January 29, 2018, the plaintiff's attorney issued to the defendant a "renotice" of his deposition, which was to take place on March 14, 2018, at 10 a.m. in the law office of the plaintiff's attorney. According to the plaintiff's attorney, the defendant called the attorney's office on Monday, March 12, 2018, to confirm the appointment, although he thought it was for a court appearance. The plaintiff's attorney responded in a call back to the defendant and left a message, stating that the renotice was not for a court appearance but for a deposition that was scheduled to take place at the attorney's office. The defendant never responded to that message. On March 14, 2018, the day of the deposition, the plaintiff's attorney, again, called the defendant to confirm his appearance and left another message for him, but he did not respond to that message, either.

Thereafter, on March 26, 2018, the plaintiff filed a motion for default for the defendant's failure to appear at his deposition. In support of his motion for default, the plaintiff attached the deposition notice, as well as a brief transcript of the deposition's preliminary proceeding on March 14, 2018, in which his attorney recounted the events leading up to the deposition. The motion simply asserted that the defendant had notice, and was aware of the scheduled deposition and failed to appear. In granting the plaintiff's motion for default, the court, *Shapiro, J.*, stated: "The defendant filed no objection in response to the motion for default. Since the defendant failed to attend his scheduled deposition,

[1] The reason for that two year delay is not clear from the record.

a default may enter against the defendant." Notice of the default was issued by the court on April 11, 2018.

On September 27, 2018, counsel filed an appearance on behalf of the defendant, who, until that point, had been acting as a self-represented party. The defendant's attorney also filed a motion for a continuance of a hearing in damages that was scheduled to take place on October 10, 2018. On November 29, 2018, the defendant's attorney, again, filed a motion for a continuance of the hearing in damages, which previously had been rescheduled to take place on December 5, 2018. Both motions for continuances were granted by the court.

Thereafter, on January 2, 2019, the defendant, through counsel, filed a motion to set aside the default, in which he claimed that good cause existed for setting aside the default. Specifically, he claimed that, as a self-represented party, he "was confused about where to appear and what was happening on the date of the scheduled deposition," and that he never spoke with anyone from the office of the plaintiff's attorney because they simply left him messages. On that same day, the defendant also filed a notice as to the hearing in damages, in which he sought to give notice of his defenses to the action pursuant to Practice Book § 17-34.[2] The plaintiff filed an objection to the motion to set aside the default, as well as an objection to the defendant's notice of defenses, claiming that the notice was not timely filed within the ten day period provided for in Practice Book § 17-35 (b).[3]

[2] Practice Book § 17-34 (a) provides in relevant part: "In any hearing in damages upon default, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff's complaint, except such as relate to the amount of damages, unless notice has been given to the plaintiff of the intention to contradict such allegations and of the subject matter which the defendant intends to contradict . . . ."

[3] Practice Book § 17-35 (b) provides: "In all actions in which there may be a hearing in damages, notice of defenses must be filed within ten days after notice from the clerk to the defendant that a default has been entered."

In a memorandum of decision dated January 17, 2019, the court, *Hon. Robert B. Shapiro*, judge trial referee, denied the defendant's motion to set aside the default, concluding that the defendant had failed to demonstrate good cause for setting aside the default. The court determined that the plaintiff had been "prejudiced by the defendant's delay in attending to this matter," finding that the defendant never provided an excuse for his delay in presenting the argument that he was confused by the notice of deposition, that the defendant's attorney waited more than three months after filing an appearance in this matter to file the motion to set aside the default, and that the defendant did not provide an affidavit in support of his motion to set aside the default. The court further stated that "the defendant's failure to respond to the plaintiff's motion for default may not be excused," and that, "[i]f the default were opened now, almost one year will have passed since the plaintiff's January 29, 2018 notice of deposition. The plaintiff has been prejudiced also by the defendant's delay in that [the plaintiff] consented to a motion to continue the previously scheduled hearing in damages, only to face the motion to open, which was filed shortly before the continuation date of that hearing."

Following the denial of his motion to set aside the default, the defendant filed a motion for permission to file a notice as to the hearing in damages pursuant to Practice Book § 17-34. In his motion, he alleged that, in light of the circumstances as set forth in his attached affidavit, it would be appropriate for the court to allow him to contest some of the allegations of the complaint. In his affidavit, the defendant attested to the following: he is not an attorney and lacks legal training; he was prepared to appear in court on March 14, 2018, and did, in fact appear at the courthouse in Middletown; he called the plaintiff's counsel to confirm that he would

be appearing in court on March 14, 2018; he, as a self-represented party, did not understand the significance of the notice of deposition at the time it was scheduled; he did not wilfully disobey the court; he has a good and valid defense to the plaintiff's action; and he was not familiar with a notice of defenses in March and April, 2018. The court also denied the defendant's motion for permission, noting, first, that the defendant did not file a notice of defenses within the ten day period required by Practice Book § 17-35 (b), and, second, that, even though it had discretion to permit a late filing of a notice of defenses, it "[was] not persuaded by the defendant's statements about his lack of familiarity with the court process." Specifically, the court found that "the defendant did not pay proper attention to this matter," that, even though he was self-represented through most of the proceedings, "the rules of practice [could not] be ignored to the detriment of other parties," that discovery would have to be opened if the court permitted the defendant's late filing, and that it did not credit the defendant's statement that he appeared at the courthouse in Middletown given that this matter had been filed in the Superior Court in Hartford. Accordingly, the defendant was precluded from offering any evidence as to liability at the hearing in damages.

On September 17, 2019, the case proceeded to a hearing in damages before a jury, which returned a verdict in favor of the plaintiff, awarding him damages in the amount of $181,201.81. On January 16, 2020, the court, *Dubay, J.*, denied the defendant's motion to set aside the verdict and rendered judgment in favor of the plaintiff, stating: "While this court may have decided the issue differently given our law's preference to have matters heard on their merits, this court cannot and will not overrule [Judge] Shapiro . . . by granting this motion." The defendant's timely appeal to this court

followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims that the trial court abused its discretion in defaulting him as a sanction for his failure to attend the deposition. Specifically, the defendant claims that the court's imposition of the sanction of default was an abuse of discretion because (1) there was nothing in the record demonstrating that he acted in bad faith, that his failure to attend the deposition resulted from wilful misconduct, or that he engaged in a repeated pattern of misbehavior, (2) his conduct did not rise to the level of being contumacious, and (3) the sanction imposed was disproportionate to the conduct at issue. We agree.

We first set forth our standard of review and the legal principles applicable to this claim. "A trial court's power to sanction a litigant or counsel stems from two different sources of authority, its inherent powers and the rules of practice." *Lafferty* v. *Jones*, 336 Conn. 332, 373, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). The court's "inherent authority permits sanctions for dilatory, bad faith and harassing litigation conduct"; (internal quotation marks omitted) id.; and, pursuant to "Practice Book § 13-14, for noncompliance with the court's discovery orders"; id.; or for the party's failure to appear and testify at a duly noticed deposition. See also Practice Book § 13-14 (a). One such permissible sanction under § 13-14 is "[t]he entry of a nonsuit or default against the party failing to comply . . . ." Practice Book § 13-14 (b) (1). "[T]he primary purpose of a sanction for violation of a discovery order is to ensure that the [party's] rights are protected, not to exact punishment on the [noncomplying party] for its allegedly improper conduct." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, 267 Conn. 73, 85, 836 A.2d 1167 (2003).

Our Supreme Court has stated that, "[i]n reviewing the portion of the sanctions based on the violation of discovery orders, we consider three factors. First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [257 Conn. 1, 17–18, 776 A.2d 1115 (2001)]. The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did *given the facts presented*. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery. . . . Trial court judges face great difficulties in controlling discovery procedures which all too often are abused by one side or the other and this court should support the trial judges' reasonable use of sanctions to control discovery." (Citation omitted; emphasis added; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 373–74.

In the present case, even though the defendant claims that he was confused and thought that he was supposed to be in court on March 14, 2018, the notice of deposition was reasonably clear and provided that his deposition was to take place at the law office of the plaintiff's

attorney in Hartford. Moreover, there is no dispute that the defendant failed to attend the scheduled deposition. The defendant's appellate brief focuses primarily on his claim that the sanction imposed was disproportionate to the conduct.

Our Supreme Court previously has set forth the factors that an appellate court must consider when reviewing the reasonableness of a sanction imposed by the trial court. See *Yeager* v. *Alvarez*, 302 Conn. 772, 787, 31 A.3d 794 (2011). Those factors include: "(1) the cause of the [sanctioned party's] failure to [comply with the discovery order], that is, whether it is due to inability rather than the [wilfulness], bad faith or fault of the [sanctioned party] . . . (2) the degree of prejudice suffered by the opposing party, which in turn may depend on the importance of the information requested to that party's case . . . and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Internal quotation marks omitted.) Id.

"[I]n assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 76, 176 A.3d 1167 (2018). In *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 1, our Supreme Court cautioned that a trial "court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows *deliberate, contumacious or unwarranted disregard for the court's authority* . . .

the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court.'' (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 16–17. Like a dismissal, a default judgment is also one of the more severe sanctions that a court may impose; see *Forster* v. *Gianopoulos*, 105 Conn. App. 702, 711, 939 A.2d 1242 (2008) (sanction of default judgment imposed by court is ''most severe a court may impose''); as ''[a] default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant.'' (Emphasis omitted; internal quotation marks omitted.) *Bank of New York* v. *National Funding*, 97 Conn. App. 133, 138, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), cert. denied sub nom. *Reyad* v. *Bank of New York*, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007).

In *Null* v. *Jacobs*, 165 Conn. App. 339, 341, 139 A.3d 709 (2016), after the plaintiff's counsel failed to appear for a court-ordered deposition, the trial court rendered a judgment of nonsuit as a sanction for the violation of the court's discovery order. On appeal, the plaintiff claimed, inter alia, that the sanction was not proportional to the violation. Id. The trial court in *Null* based its decision to grant the defendant's motion for a judgment of nonsuit on the fact that the failure of the plaintiff's attorney to appear for the deposition '' 'was not an isolated event' ''; id., 348; but, rather, ''was part and parcel of a pattern of noncompliance spanning several years.'' Id. The trial court also found that the noncompliance was caused by a '' 'lack of due diligence and deliberate and unwarranted disregard for the court's authority.' '' Id., 348–49. Under those circumstances, this court

determined that the trial "court did not abuse its discretion in concluding that the sanction of nonsuit was proportional to the plaintiff's violation," which "was part of ongoing discovery misconduct" and demonstrated "[a] continuing pattern of violations [that warranted] dismissal of the action." Id., 349.

The appellate courts of this state consistently have upheld nonsuits, defaults or other sanctions imposed for discovery violations where the noncomplying party has exhibited a pattern of violations or discovery abuse demonstrating a disregard for the court's authority. See *Lafferty* v. *Jones*, supra, 336 Conn. 375, 379, 380 (trial court did not abuse its discretion in sanctioning defendants for discovery violations when defendants violated four reasonably clear discovery orders and exhibited pattern of wilfulness, and sanctions imposed were measured in relation to defendants' noncompliance with limited discovery, and were "well short of a default or dismissal, insofar as they [did] not preclude the defendants from having the merits of their cases adjudicated in a conventional manner, such as by summary judgment or trial"); *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 198 Conn. App. 671, 699, 702, 234 A.3d 997 (2020) (trial court's order of sanctions did not constitute abuse of discretion when defendants habitually failed to comply with discovery orders and court found that "defendants' practice of disobeying its discovery orders was continuous," and "court's order of sanctions reimbursed the plaintiff for the attorney's fees and other litigation costs that it incurred in order to compel the defendants to provide it with certain documents that the court had ordered they disclose" (internal quotation marks omitted)); *Skyler Ltd. Partnership* v. *S.P. Douthett & Co.*, 18 Conn. App. 245, 248, 557 A.2d 927 (it was not abuse of discretion for trial court to default defendant for failure to appear for deposition when deposition was noticed to

defendant's counsel four times and it was clear from record that defendant and his counsel knew of scheduled deposition), cert. denied, 212 Conn. 802, 560 A.2d 984 (1989).

In contrast, in *Usowski* v. *Jacobson*, supra, 267 Conn. 93, our Supreme Court determined that the trial court had abused its discretion. In that case, the trial court had dismissed the action due to the plaintiff's failure to comply with three separate discovery orders, finding that the plaintiff "had engaged in a pattern of discovery abuse . . . ." Id., 92. Our Supreme Court disagreed, determining that the trial court "abused its discretion because the record [did] not establish that the failure to comply with the discovery orders constituted a continuing pattern of violations that warranted dismissal of the action." Id., 93. Specifically, our Supreme Court concluded "that the plaintiff's conduct, considered in its entirety, [did] not evince a contumacious or unwarranted disregard for the court's authority . . . that justified dismissal of the action. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16. Dismissal was not the only reasonable remedy available to vindicate the legitimate interests of the defendants in avoiding undue expense during discovery. . . . Accordingly, the plaintiff's failure to comply with the three discovery orders did not constitute a pattern of abuse so egregious as to warrant dismissal, the remedy of last resort." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, supra, 95–96.

Similarly, in *Blinkoff* v. *O & G Industries, Inc.*, 89 Conn. App. 251, 256, 259, 873 A.2d 1009, cert. denied, 275 Conn. 907, 882 A.2d 668 (2005), this court found that the trial court abused its discretion by rendering a judgment of nonsuit as a result of the plaintiff's two month delay in complying with a discovery order. Specifically, this court found that the sanction of nonsuit was not proportional to the discovery violation, as "[t]he two

month delay [did] not demonstrate a contumacious or unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) Id., 259. In *Blinkoff*, there were no other discovery violations in the record; id., 259 n.7; and, although this court recognized that the plaintiff had "demonstrated a lack of diligence and adherence to court orders regarding discovery," the plaintiff did "in fact later [comply] with the defendant's discovery requests in a fashion that the defendant [did] not claim prejudiced its ability to prepare for trial . . . ." Id., 259.

Moreover, in *Tuccio* v. *Garamella*, 114 Conn. App. 205, 206, 969 A.2d 190 (2009), this court found that the trial court abused its discretion by rendering a judgment of nonsuit against the plaintiffs as a discovery sanction for their failure to respond to interrogatories and requests for production. We noted that "[t]here [was] an insufficient record from which to conclude either that counsel was unable to respond to the interrogatories before he did, or that failure to respond was wilful or in bad faith, and the [trial] court made neither finding. There was no evidence of prejudice to the defendant except for his claim that he was prejudiced by the lawsuit against him itself." Id., 208. This court concluded that, although "[t]here was a delay and lack of diligence on the part of the plaintiffs with no real explanation for the delay in responding to the interrogatories . . . under the circumstances of [that] case . . . the ultimate sanction of nonsuit was disproportionate to the violation of the discovery request and therefore an abuse of discretion." Id., 210; see also *D'Ascanio* v. *Toyota Industries Corp.*, 309 Conn. 663, 665, 681, 683, 72 A.3d 1019 (2013) (reversal of trial court's judgment directing verdict in defendants' favor was proper where court abused its discretion in imposing sanctions because "objectionable conduct at issue was an isolated event and was not one in a series of actions in disregard

of the court's authority"); *West Haven Lumber Co.* v. *Sentry Construction Corp.*, 117 Conn. App. 465, 474–75, 979 A.2d 591 (trial court did not abuse its discretion in denying motion for judgment of nonsuit for plaintiff's failure to appear for deposition when no evidence was presented showing that plaintiff wilfully disregarded discovery order or avoided deposition out of bad faith), cert. denied, 294 Conn. 919, 984 A.2d 70 (2009).

The present case involves a single violation of a discovery order resulting from the defendant's failure to attend a duly scheduled deposition. In *Ridgaway*, our Supreme Court explained that "[o]ur appellate courts have upheld the imposition of a sanction of nonsuit when there is evidence of *repeated* refusals to comply with a court order"; (emphasis added) *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 73; but acknowledged that it "has not considered whether a *single act* of misconduct could warrant the sanction of nonsuit . . . ." (Emphasis added.) Id., 73–74. The court further explained that "courts in other jurisdictions have concluded that a single act could warrant nonsuit or dismissal if the act is sufficiently egregious, particularly when the improper conduct involves the perpetration of a deception on the court." Id., 74. The present case does not involve any such deception on the court or egregious conduct by the defendant.

Here, the information before the court regarding the defendant's failure to attend the deposition was limited. The plaintiff's motion for default simply alleged that the defendant had notice and was aware of the scheduled deposition but failed to attend. The court also had before it the representations of the plaintiff's counsel at the outset of the deposition on March 14, 2018, in which the plaintiff's counsel discussed for the record the attempts made to notify the defendant of the location of the deposition and recounted confusion on the defendant's part whereby the defendant thought the

deposition notice was for a court appearance. There was nothing before the court demonstrating any kind of pattern of behavior by the defendant, a wilful disregard of the discovery order, the cause of the defendant's noncompliance, or any "deliberate, contumacious or unwarranted disregard for the court's authority . . . ." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17.

In granting the motion for default, the court simply noted the defendant's failure to file an objection to the motion for default and his failure to attend the deposition as the grounds for its decision. The fact that the defendant did not file an objection to the motion for default, however, has no bearing on whether the sanction imposed was proportional to the violation. See, e.g., *Usowski* v. *Jacobson*, supra, 267 Conn. 87 ("argument that the plaintiff . . . did not object to the sanction . . . has no bearing on whether the sanction was proportional to the violation"). Moreover, although Practice Book § 13-14 permits the entry of a default against a party who fails to attend a duly scheduled deposition, our Supreme Court has cautioned that any sanction imposed for a discovery violation must be proportional to the violation. See *Lafferty* v. *Jones*, supra, 336 Conn. 374.

With respect to the issue of prejudice, the court made no finding of prejudice to the plaintiff in its order granting the motion for default. In his appellate brief, the plaintiff points out that the trial in this case commenced more than four and one-half years after the action was initiated. When the action was commenced, however, the defendant timely filed an answer and special defense. The plaintiff did not reply to the answer and special defense until *two years later* and has not provided any explanation for that delay. Moreover, approximately one year later, on January 29, 2018, the plaintiff

"renoticed" the defendant's deposition. Nothing in the "renotice" indicates how many times a notice of the deposition had been provided to the defendant or whether the deposition previously had to be rescheduled. Thus, with respect to at least three years of the four and one-half years since the commencement of this action to trial, there is nothing in the record to show that the delay argued by the plaintiff was in any way attributable to the defendant.

We note that our Supreme Court also "has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance with court orders." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 75. A default "was not the only option available to vindicate the legitimate interests of the [plaintiff] and the court." *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 683. In the present case, the trial court had available a variety of sanctions that it could have imposed on the defendant for his failure to attend the deposition, including a monetary sanction,[4] which would have reimbursed the plaintiff for any fees that he may have incurred with respect to the deposition that did not take place and vindicated the legitimate interests of the plaintiff in avoiding undue expense during discovery, while still ensuring that a trial on the merits of this action could take place. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 198 Conn. App. 685, 702.

Finally, we also must be mindful that the defendant was a self-represented party at the time that he failed

[4] Other sanctions that the trial court could have imposed include, inter alia, denying the motion for default without prejudice to the motion being renewed if the defendant failed to attend another properly noticed deposition within a certain period of time, or ordering the defendant to appear for a deposition within a certain period of time or a default would enter.

to appear for the deposition and when the court granted the plaintiff's motion for a default. Although self-represented parties are not excused from complying with relevant rules of procedural and substantive law, "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487–88, 189 A.3d 1232 (2018). This court "has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party." (Internal quotation marks omitted.) *Belica* v. *Administrator, Unemployment Compensation Act*, 126 Conn. App. 779, 787, 12 A.3d 1067 (2011).

Similar to *Usowski*, in which our Supreme Court found an abuse of discretion by the trial court "because the record [did] not establish that the failure to comply with the discovery orders constituted a continuing pattern of violations that warranted dismissal of the action"; *Usowski* v. *Jacobson*, supra, 267 Conn. 93; the record in the present case is devoid of any evidence regarding whether the defendant's conduct demonstrated an egregious or continuing pattern of behavior or "a contumacious or unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) Id., 95. Although "[t]rial courts should not countenance unnecessary delays in discovery"; *Osborne* v. *Osborne*, 2 Conn. App. 635, 639, 482 A.2d 77 (1984); any sanctions imposed must be "proportionate to the circumstances." Id.; see also *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18.

After examining the totality of the circumstances, as well as the factors that must be considered when reviewing the reasonableness of a sanction imposed by the trial court; see *Yeager* v. *Alvarez*, supra, 302 Conn. 787, we conclude that the sanction of default was not proportional to the defendant's single discovery violation of failing to attend the deposition. The determinative question before this court on appeal is not whether this court "would have imposed a similar sanction but whether the trial court . . . reasonably [could have] conclude[d] as it did *given the facts presented*." (Emphasis added; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 374. As in *Tuccio*, in the present case, there was an insufficient record from which the court could have determined that the defendant's conduct was wilful or in bad faith. See *Tuccio* v. *Garamella*, supra, 114 Conn. App. 208. Nor was there any evidence of prejudice before the court at the time it granted the plaintiff's motion for default. See id. Under these circumstances, the court abused its discretion in granting the plaintiff's motion for default. Because we agree with the defendant's first claim, that the court abused its discretion in granting the plaintiff's motion for default, we need not reach his other claims concerning the denial of his motions to set aside the default and for permission to file a notice as to the hearing in damages. See id., 207.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HUDEL CLIFTON GAMBLE (AC 43117)

Prescott, Clark and DiPentima, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree with a firearm, the defendant appealed from the trial court's dismissal of his motion to correct an illegal sentence. The defendant was charged with, inter alia, murder, and, at trial, the state presented evidence that the defendant and his accomplices each fired a gun at the victim. At the state's request, the judge charged the jury on all of the elements of the lesser included offense of manslaughter in the first degree with a firearm. At the hearing on the motion to correct, the defendant acknowledged that he was challenging his sentence solely on the basis of what he contended was an unconstitutional conviction of manslaughter in the first degree with a firearm. The court dismissed the motion for lack of jurisdiction on the ground that the defendant was attacking his conviction, not the sentence he received or the manner in which the sentence was imposed. On appeal, the defendant claimed that there was a colorable claim that his sentence on the underlying conviction of manslaughter in the first degree with a firearm was illegally enhanced on the basis of a fact not found by the jury. *Held* that the trial court did not err in dismissing the defendant's motion to correct for lack of jurisdiction, as the defendant challenged what transpired at trial, not at sentencing, and his claim presupposed an invalid conviction; the jury was instructed on all of the elements of the offense for which the defendant was convicted and sentenced, including the element of using a firearm, and the jury, not the judge, found the defendant guilty of that offense; moreover, to the extent that the defendant argued that the court misled the jury or incorrectly accepted its verdict, his arguments attacked his underlying conviction, not his sentence, and despite the defendant's claim that the firearm element that enhanced his manslaughter conviction was never proven to the jury, the record sufficiently demonstrated that the state presented evidence that the defendant used a gun to shoot at the victim.

Argued April 19—officially released August 24, 2021

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, possession of an assault weapon and conspiracy to possess an assault weapon, brought to the Superior Court in the

judicial district of New Haven and tried to the jury before *Holden, J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm as an accessory; thereafter, the court, *Clifford, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Hudel Clifton Gamble, self-represented, the appellant (defendant).

Thai Chhay, deputy assistant state's attorney, with whom, on the brief, were *Ronald G. Weller*, senior assistant state's attorney, *Patrick Griffin*, state's attorney, and *Reed Durham*, assistant state's attorney, for the appellee (state).

Opinion

CLARK, J. For a trial court to have jurisdiction over a defendant's motion to correct an alleged illegal sentence, the defendant must raise "a colorable claim within the scope of Practice Book § 43-22[1] that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Footnote added; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 783, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid. . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail, he must demonstrate simply

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any disposition made in an illegal manner."

that he might prevail. . . . The jurisdictional and merits inquiries are separate, whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 784.

In the present case, the self-represented defendant, Hudel Clifton Gamble, appeals from the judgment of the trial court dismissing his motion to correct an alleged illegal sentence (motion to correct) for lack of jurisdiction. On appeal, the defendant claims that the court improperly dismissed the motion to correct because it advanced a colorable claim that his sentence on the underlying conviction of manslaughter in the first degree with a firearm was illegally enhanced on the basis of a fact not found by the jury. The state counters that the court properly dismissed the defendant's motion to correct because it challenges his underlying conviction, not the legality of his sentence. We agree with the state and, therefore, affirm the judgment of the trial court.

The present appeal arises out of the defendant's conviction, following a jury trial, of manslaughter in the first degree with a firearm. *State* v. *Gamble*, 119 Conn. App. 287, 987 A.2d 1049, cert. denied, 295 Conn. 915, 990 A.2d 867 (2010). The relevant facts, which the jury reasonably could have found, and procedural history were set out in this court's opinion affirming the defendant's conviction on direct appeal.[2]

[2] On direct appeal, the defendant claimed that the court improperly "(1) accepted the jury's verdict finding him guilty of manslaughter in the first degree with a firearm under the theory of accessorial liability and not guilty of the same crime under the theory of principal liability, thereby (a) violating his right against double jeopardy, (b) resulting in his being convicted of the nonexistent crime of being an accessory, (c) resulting in a legally inconsistent verdict and (d) returning a verdict in violation of the principles of collateral estoppel, and (2) suggested in its jury instructions that defense counsel had made an improper closing argument, thereby improperly highlighting the defendant's decision not to testify." (Internal quotation marks omitted.)

On November 29, 2005, the then seventeen year old defendant gave his fifteen year old friend, Ricardo Ramos, a loaded .22 caliber gun. Id., 290. Later that day, Ramos and Daniel Smith were riding in a BMW in the "Hill" section of New Haven. Id. They picked up the defendant, who sat in the backseat while the three drove around smoking marijuana. Id. Smith was driving on Kensington Street when Ramos saw a woman with whom he was acquainted. Id. Smith stopped the vehicle, and the woman "informed Ramos that a person with whom Ramos had a 'beef' was in the area." Id. As the three men traveled down Kensington Street a second time, "Ramos observed a person, [whom] he believed had killed his cousin approximately one month earlier . . . . As Smith drove closer, the group on the sidewalk fired gunshots at the right side of the BMW. Ramos and Smith, who were both carrying weapons, returned fire through the open windows of the BMW. The *defendant fired an SKS semiautomatic assault rifle*, the barrel of which was resting on an open car window."[3] (Emphasis

State v. *Gamble*, supra, 119 Conn. App. 289. The defendant sought to prevail pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as he had failed to preserve those claims at trial. This court determined that the defendant could not prevail under *Golding* because the alleged constitutional violations did not exist and the defendant was not denied a fair trial. *State* v. *Gamble*, supra, 294–99.

The defendant also sought to prevail under the plain error doctrine. Id., 291 n.2; see Practice Book § 60-5. This court found that "[t]here is no error, plain or otherwise . . . ." *State* v. *Gamble*, supra, 119 Conn. App. 292 n.2.

[3] In August, 2016, the defendant filed a third amended petition for a writ of habeas corpus in which he alleged ineffective assistance of trial and appellate counsel. *Gamble* v. *Commissioner of Correction*, 179 Conn. App. 285, 289, 289 n.4, 179 A.3d 227, cert. denied, 328 Conn. 921, 181 A.3d 91 (2018). In his petition, the defendant alleged that his appellate counsel had rendered ineffective assistance on appeal by failing to raise a claim of insufficient evidence. Id., 289. This court found that there was sufficient evidence before the jury to support a finding that the defendant participated in the shooting of the victim. "[T]he victim's injuries indicated that shots had been fired from three different types of firearms. Ed Beaumon, a New Haven resident, testified that in the early evening of November 29, 2005, he was sitting on his neighbor's front porch on Kensington Street when he heard shots being fired, and he ran out to the victim and observed shots being fired from the front and rear passenger sides of a 'maroon' car. The

added.) Id. Ramos later learned that Marquis White (victim), whom he did not know and who did not shoot his cousin, had been shot and killed on Kensington Street. Id.

The defendant was arrested and charged with various crimes, including murder.[4] Id., 292. At trial, "[o]ver the defendant's objection, the court [*Holden*, *J.*] granted the state's request for a jury instruction on the lesser included offense of manslaughter in the first degree with a firearm under the theories of [both] principal and accessorial liability. The court so instructed the jury.[5]

[defendant] admitted in his statement to police that he was seated in the backseat of the BMW during the shooting. The jury reasonably could have inferred that the [defendant] fired one of the three weapons." Id., 297 n.9.

[4] The defendant was charged with murder, conspiracy to commit murder, possession of an assault weapon, and conspiracy to possess an assault weapon. *State* v. *Gamble*, supra, 119 Conn. App. 289 n.1. The jury found the defendant not guilty of those charges. Id.

[5] The court charged the jury in relevant part: "In order for you to find the defendant guilty of being [an] accessory to the crime of manslaughter in the first degree under [General Statutes] § 53a-55a (3) . . . you must find that the defendant . . . had the criminal intent required for the crime of manslaughter in the first degree; namely, [he] recklessly engaged in conduct which created a grave risk of death to another person, and the . . . defendant intentionally aided other persons under these circumstances. This means that the accessory as described to you in count one is applicable to this lesser included offense as well. My charge on accessory applies to . . . this lesser included offense as well.

"Now, *if you find that the state has proven all* [*of*] *the elements of manslaughter in the first degree then you must consider whether the state has proven beyond a reasonable doubt that at the time and in the commission of this crime* [*of*] *manslaughter*, the lesser included offense, the accused used, or was armed with or threatened the use or displayed or represented by his words or conduct that [he] possessed a pistol or revolver or other firearm capable of firing a shot, then you must find the defendant guilty of manslaughter . . . in the first degree with a firearm. *And if you find the state has not proven those elements of proof beyond a reasonable doubt then you would find the defendant not guilty.*

"Manslaughter, lesser included offense, a person acting with the mental state required for the commission of an offense which—in this instance that, one, under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person . . . and in the commission of the crime he used or represented by his words or

"Following deliberations, the jury reached a verdict. After the roll of jurors was called, the foreperson answered 'not guilty' as the court clerk read the following charges: murder, manslaughter in the first degree with a firearm, conspiracy to commit murder, possession of an assault weapon and conspiracy to possess an assault weapon. The court . . . accepted the verdict.

"Thereafter, the foreperson stated that '[s]omething is wrong.' The court sent the jury back to the deliberation room and informed counsel of the procedure that was to follow. The jury then returned to the courtroom, and the court asked the jury to articulate its concern in a note. The jury returned to the deliberation room and sent out a note that stated: '[W]e found [the defendant] guilty of "accessory to manslaughter" and [want] guidance. We were waiting for "accessory" to be read.' The court described the contents of the note on the record. The court stated that, as evidenced by the note, it was the jury's position that it had not been asked to provide its verdict as to manslaughter in the first degree with a firearm as an accessory. The court indicated that it would have to vacate its finding that the verdict was accepted and recorded, at least as to the manslaughter charge. The court then stated that, unless the parties had an objection, the jury would be asked to return its verdict again as to all the charges, including the lesser included offense of manslaughter in the first degree with

conduct that he possessed a pistol or revolver or a firearm . . . capable of discharging a shot, then you must find the defendant guilty of manslaughter with a firearm . . . . *If you find the state has not proven that, then you must find the defendant not guilty.* Also, applicable is the accessory as I've described to you in the charge of murder." (Emphasis added.)

The transcript of this portion of the court's jury instruction regarding the statutory citation for manslaughter in the first degree, which is an element of the offense of manslaughter in the first degree with a firearm, references "§ 53a-55a (3)." There is no § 53a-55a (3) in the General Statutes. Manslaughter in the first degree is codified at General Statutes § 53a-55 (a) (3). Manslaughter in the first degree with a firearm is codified at General Statutes § 53a-55a. See footnote 7 of this opinion.

a firearm. In an effort to ameliorate any misunderstanding, the court planned to separate the manslaughter charge into two subsets: manslaughter as previously read and manslaughter as an accessory. There was no objection.

"After the jury returned to the courtroom, the court clerk again called the jury roll and then asked for the jury's verdict as to each offense. This time, the court clerk inquired as to the offense of manslaughter in the first degree with a firearm twice: once as previously read and interpreted by the jury to encompass only liability as a principal and once as an accessory. The court clerk inquired: 'To the lesser included offense in count one, what say you to the lesser included offense of manslaughter in the first degree with a firearm in violation of [General Statutes] § 53a-55 (a) (3)[6] of the Connecticut General Statutes,' to which the foreperson responded: 'Not guilty.' The court clerk then inquired: '*For the lesser included offense in count one, what say you to the lesser included offense of manslaughter in the first degree with a firearm as an accessory in violation of the same section of the Connecticut General Statutes,' to which the foreperson responded:*

[6] The court clerk cited § 53a-55 (a) (3) for the offense of manslaughter in the first degree with a firearm. That statute governs manslaughter in the first degree. See footnotes 5 and 7 of this opinion. The defendant did not raise that error in his motion to correct or the present appeal. As a result, we deem any claims concerning the court clerk's error abandoned. Moreover, in light of this court's prior decisions in the defendant's direct appeal and petition for a writ of habeas corpus, Judge Holden's full instruction to the jury about the offense of manslaughter in the first degree with a firearm; see footnote 5 of this opinion; the court clerk's clear question to the jury about whether it found the defendant guilty "of manslaughter in the first degree with a firearm as an accessory"; and the judgment file itself, which states that the jury found the defendant guilty of manslaughter in the first degree with a firearm as an accessory, any such claim is immaterial for purposes of the present appeal because it does not give rise to a colorable claim that the defendant was convicted of anything other than manslaughter in the first degree with a firearm.

'Guilty.'[7] The jury returned a verdict of not guilty to the remaining charges. The court . . . accepted the verdict. The defendant did not object." (Emphasis added; footnotes added.) *State* v. *Gamble*, supra, 119 Conn. App. 292–94. The court sentenced the defendant to thirty-seven and one-half years of imprisonment.[8] This court affirmed the defendant's conviction on direct appeal.[9] Id., 304.

[7] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he *commits manslaughter in the first degree as provided in section 53a-55*, and in the commission of such offense he uses or is armed with . . . a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . . .

"(b) Manslaughter in the first degree with a firearm is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment in accordance with subdivision (5) of section 53a-35a of which five years of the sentence imposed may not be suspended or reduced by the court."

[8] General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment . . . shall be fixed by the court as follows . . . (5) For the class B felony of manslaughter in the first degree with a firearm under section 53a-55a, a term not less than five years nor more than forty years . . . ."

[9] In addition to a direct appeal, the record discloses that the defendant has filed several postconviction motions or petitions. In April, 2007, the defendant filed an application for sentence review, claiming that his sentence was inappropriate, disproportionate, and contradicted the jury's verdict. On January 25, 2011, the sentence review division, *Alexander*, *White* and *Dooley*, *Js.*, found that the sentence imposed was appropriate and was not disproportionate given the serious nature of the offense.

In August, 2011, the defendant filed a motion to correct an illegal sentence claiming that his sentence exceeded the relevant statutory maximum limits, violated his right against double jeopardy, was ambiguous and was internally contradictory. The court, *Fasano*, *J.*, denied the motion to correct stating that the defendant's double jeopardy and internally contradictory claims had been addressed in substance and depth by this court in the defendant's direct appeal. "The judgment, therefore, was final as to those specific issues and any other matters that might have been offered in connection with the same issues. *State* v. *Aillon*, 189 Conn. 416, 423–25, [456 A.2d 279, cert. denied, 464 U.S. 837, 104 S. Ct. 124, 78 L. Ed. 2d 122] (1983). Other legal issues raised by the [defendant] and not related to the claim of double

In January, 2019, the defendant, representing himself, filed the present motion to correct, alleging that "[p]ursuant to *State* v. *Abraham*, 152 Conn. App. 709 [99 A.3d 1258 (2014)] [the] court has jurisdiction to consider the sentencing court's decision to impose a sentence enhancement under General Statutes § 53a-55a, when the jury never intended to impose that finding. Because of that failure, the defendant's sentence exceeded the permissible statutory maximum and, thus, is illegal."

In response to the motion to correct, the court, *Clifford*, *J.*, pursuant to *State* v. *Casiano*, 282 Conn. 614, 620, 922 A.2d 1065 (2007), appointed Attorney Kelly Billings as counsel for the defendant for the limited purpose of determining whether there was a sound basis to the motion to correct. Billings subsequently moved to withdraw as counsel. At the May 15, 2019 hearing on that motion, Billings represented that the defendant was claiming that it was error for the jury to find him guilty of accessory to commit manslaughter in the first degree with a firearm, which concerns the defendant's conviction, not his sentence. Billings explained that, although the defendant contended that the court had enhanced his conviction of manslaughter in the first degree as an accessory, the defendant had never been charged "just" as an accessory to manslaughter. Rather, the defendant initially was charged with murder and, at the state's request, Judge Holden instructed the jury on the lesser included offense of manslaughter in the first degree with a firearm. The jury ultimately found the defendant guilty of manslaughter in the first degree with a firearm.

After hearing from Billings, the court explained to the defendant that it lacked jurisdiction over his motion to correct because courts generally lose jurisdiction

jeopardy fall outside the limited jurisdiction of the court with respect to motions to correct illegal sentences. *State* v. *Koslik*, 116 Conn. App. 693, 698–700, [977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916] (2009)."

over a case once a defendant is sentenced and committed to the custody of the Commissioner of Correction.[10] The defendant argued that the court had jurisdiction because he was not attacking his conviction, only his thirty-seven year sentence.[11] Specifically, the defendant claimed that there was a mistake with the "sentence enhancement" and that the court had jurisdiction pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He also argued that the court "could modify the conviction if it's only challenging the sentence."

The following colloquy transpired between the court and the defendant:

"The Court: Well, you're challenging . . . the sentence of thirty-seven years because you're saying you never should have been convicted of manslaughter in the first degree with a firearm. Right?

"[The Defendant]: Absolutely.

"The Court: Well, that's attacking the conviction.

"[The Defendant]: Well, that's permissible. On the evidence, that's permissible."

After hearing argument, and over the defendant's objection, the court granted Billings' motion to withdraw on the ground that the motion to correct lacked a sound basis. The court, nevertheless, offered the defendant a continuance to prepare for a separate hearing on the merits of his motion to correct. The defendant declined the court's invitation because he felt that the court already had indicated how it likely would rule on the jurisdictional issue. Thereafter, the court dismissed

[10] See *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019) (court loses jurisdiction upon execution of sentence).

[11] Throughout the hearing, the length of the defendant's sentence was characterized as thirty-seven years, not thirty-seven and one-half years. The difference is not relevant to the motion to correct.

the motion to correct on the grounds that it lacked jurisdiction because the defendant's claims were "attacking the conviction, not the sentence."

On appeal, the defendant claims that the court improperly dismissed his motion to correct because it raised a colorable claim that the firearm element of manslaughter in the first degree with a firearm was not proven beyond a reasonable doubt in violation of *Apprendi* v. *New Jersey*, supra, 530 U.S. 466, and *State* v. *Evans*, supra, 329 Conn. 778. The defendant's claim fails because its premise is factually flawed, and it bears no relation, factually or procedurally, to *Apprendi* or *Evans*.

We begin with the standard of review governing jurisdictional claims. "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Alexander*, 269 Conn. 107, 112, 847 A.2d 970 (2004). "[J]urisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State* v. *Kelley*, 164 Conn. App. 232, 237, 137 A.3d 822 (2016), aff'd, 326 Conn. 731, 167 A.3d 961 (2017).

"It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . There are a limited number of circumstances in which the legislature has conferred on the trial courts continuing jurisdiction to act on their judgments after the commencement of sentence . . . . See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting trial court to mod-

ify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear petition for a new trial after execution of original sentence has commenced); General Statutes § 53a-39 (allowing trial court to modify sentences of less than three years provided hearing is held and good cause shown). . . . Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment." (Citations omitted; internal quotation marks omitted.) *State* v. *Lawrence*, 91 Conn. App. 765, 770–71, 882 A.2d 689 (2005), aff'd, 281 Conn. 147, 913 A.2d 428 (2007).

"Under the common law, the court has continuing jurisdiction to correct an illegal sentence. See, e.g., *Bozza* v. *United States*, 330 U.S. 160, 166, 67 S. Ct. 645, 91 L. Ed. 818 (1947) ('an excessive sentence should be corrected . . . by an appropriate amendment of the invalid sentence by the court of original jurisdiction'); *Murphy* v. *Massachusetts*, 177 U.S. 155, 157, 20 S. Ct. 639, 44 L. Ed. 714 (1900) ('in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law'); *In re Bonner*, 151 U.S. 242, 259–60, 14 S. Ct. 323, 38 L. Ed. 149 (1894) ('where the conviction is correct . . . there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected')." *State* v. *Lawrence*, supra, 91 Conn. App. 772.

"In Connecticut, that grant of jurisdiction is recognized and the procedure by which it may be invoked is regulated by Practice Book § 43-22. . . . Rules of practice, however, merely regulate the procedure by which the court's jurisdiction may be invoked; they do not and cannot confer jurisdiction on the court to

consider matters otherwise outside the court's jurisdiction. For the court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review.

"Connecticut has recognized two types of circumstances in which the court has jurisdiction to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, namely, when the sentence either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within the relevant statutory limits but was imposed in a way which violates [the] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises. . . . Both types of illegal sentence claims share the requirement that the sentencing proceeding, and not the trial leading to conviction, be the subject of the attack." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 773–75.

In the present case, the defendant was charged with murder and, at trial, the state presented evidence that the defendant and his accomplices each fired a gun at the victim. At the state's request, and over the defendant's objection, Judge Holden charged the jury on all of the elements of the lesser included offense of manslaughter in the first degree with a firearm. The jury found the defendant guilty of that crime beyond a reasonable doubt. At the hearing on the motion to correct before Judge Clifford, the issue was whether the defendant was attacking his conviction or his sentence. The

defendant acknowledged that he was challenging his sentence solely on the basis of what he contends was an unconstitutional conviction of manslaughter in the first degree with a firearm. Judge Clifford, therefore, properly dismissed the motion to correct for lack of jurisdiction because the defendant was attacking his conviction, not the sentence he received or the manner in which the sentence was imposed.

The defendant argues that the trial court had jurisdiction to consider his motion to correct because he raised a colorable claim under both *Apprendi* and *Evans*. We disagree because neither of those cases bears any relation to the claims the defendant raised in his motion to correct.

In *Apprendi*, the defendant was arrested for firing shots at the home of an African-American family and was charged by a grand jury with multiple crimes, including possession of a firearm for an unlawful purpose punishable by a term of imprisonment of between five and ten years. *Apprendi* v. *New Jersey*, supra, 530 U.S. 469–70. New Jersey had a hate crime statute that provided "for an extended term of imprisonment *if the trial judge finds*, by a preponderance of the evidence, that [t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals" on a discriminatory basis. (Emphasis added; internal quotation marks omitted.) Id., 468–69. None of the charges lodged against the defendant referred to the hate crime statute and none alleged that he acted with a racially biased purpose. Id., 469. Pursuant to a plea agreement, the defendant agreed to plead "guilty to two counts . . . of second-degree possession of a firearm for an unlawful purpose" and a third-degree offense. Id., 469–70. Following a hearing, the judge found by a preponderance of the evidence that the defendant's actions were taken with a purpose to intimidate and that the hate crime statute applied. Id., 471. The judge

therefore enhanced the defendant's sentence on the possession of a firearm for an illegal purpose by several years. Id., 471. The United States Supreme Court reversed the defendant's conviction, holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 490.

In the present case, the defendant contends that, as in *Apprendi*, the firearm element that enhanced his manslaughter conviction was never proven to the jury. The record does not support his claim. At trial, the state presented evidence that the defendant used a gun to shoot at the victim. See footnote 4 of this opinion. Judge Holden charged the jury on the elements of manslaughter in the first degree with a firearm, which is a distinct and separate criminal offense under Connecticut law. See footnote 5 of this opinion. The jury returned a guilty verdict against the defendant for manslaughter in the first degree with a firearm. The court sentenced the defendant to thirty-seven and one-half years of incarceration, which is a permissible sentence for that offense. See footnote 8 of this opinion. To the extent that the defendant claims that there was insufficient evidence to convict him of manslaughter in the first degree with a firearm or that the court improperly instructed or accepted the jury's verdict, those claims attack his underlying conviction, not the sentence, and are beyond a court's jurisdiction on a motion to correct. Moreover, *Apprendi* does not apply because the defendant cannot make a colorable claim that the court, not the jury, found him guilty of any of the elements of the offense for which he was convicted and ultimately sentenced.

Because the defendant does not state a colorable claim under *Apprendi*, *State* v. *Evans*, supra, 329 Conn. 770, also is inapposite. In *Evans*, the defendant was charged with one count of possession of narcotics,

among other things. Id., 774. The defendant pleaded guilty under the *Alford* doctrine[12] to possession of narcotics. Id. During the plea negotiations, the defendant's drug dependency, if any, was not addressed and no fact finder determined whether he was drug-dependent. A finding of drug dependency would have favorably limited the defendant's sentence. Id. The defendant was sentenced to five years of imprisonment and five years of special parole, which sentence was permissible only if he was not drug-dependent at the time he committed the underlying drug possession offense. Id., 775. The defendant moved to correct an illegal sentence pursuant to Practice Book § 43-22, claiming that, under *Apprendi* and *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), his sentence was illegal because it "exceeded the statutory time limits and that the fact triggering the mandatory minimum [sentence] was not found by a proper [fact finder] or admitted by the defendant . . . ." *State* v. *Evans*, supra, 775.

The trial court denied the defendant's motion for lack of jurisdiction and the defendant appealed. Id., 773. In resolving the defendant's appeal, our Supreme Court concluded that the trial court had jurisdiction to consider the claim, and affirmed the judgment of the trial court. Id., 774. In concluding that the trial court had jurisdiction to consider the defendant's claim, our Supreme Court stated that "a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying conviction, such as for double jeopardy challenges." Id., 781.

In the present case, the jury was instructed on all of the elements of the offense for which the defendant

[12] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

was convicted and sentenced, including the element of using a firearm. The jury, not the judge, found the defendant guilty of that offense. To the extent that the defendant argues that the court misled the jury or incorrectly accepted its verdict, his arguments attack his underlying conviction, not his sentence. *Evans*, therefore, has no application.

We agree with the state that our Supreme Court's decision in *State* v. *Lawrence*, 281 Conn. 147, 913 A.2d 428 (2007), is controlling. In *Lawrence*, the defendant was charged with one count each of murder, carrying a pistol without a permit, and tampering with evidence. Id., 150. "The murder charge alleged that the defendant caused the death of a person by use of a firearm. At trial, the defendant presented a defense of extreme emotional disturbance with respect to the murder charge. The court instructed the jury regarding that defense with the following instruction as the defendant had requested: If you unanimously find that the state has proven each of said elements of the crime of murder beyond a reasonable doubt, and if you also unanimously find that the defendant has proven by the preponderance of the evidence each of the elements of the affirmative defense of extreme emotional disturbance, you shall find the defendant guilty of manslaughter in the first degree with a firearm by reason of extreme emotional disturbance and not guilty of murder." (Internal quotation marks omitted.) Id. The jury found the defendant guilty of manslaughter in the first degree with a firearm. Id. The court rendered judgment in accordance with the verdict and sentenced the defendant to thirty-five years of incarceration. Id.

The defendant in *Lawrence* filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. Id., 151. He claimed that his conviction for manslaughter in the first degree with a firearm was improper because the jury had acquitted him of murder on the basis of

the affirmative defense of extreme emotional disturbance and that the proper conviction was manslaughter in the first degree, which carries a maximum sentence of twenty years of imprisonment. Id. The trial court dismissed the motion to correct for lack of jurisdiction. Id. This court framed the question on appeal as "whether Practice Book § 43-22 is an appropriate procedural vehicle by which to challenge an allegedly improper conviction or whether the finality of the defendant's conviction, subject to any collateral challenges the defendant may raise via a petition for a writ of habeas corpus, has left the court without jurisdiction to entertain his claim." *State* v. *Lawrence*, supra, 91 Conn. App. 769. This court concluded that the "essence of [his] claim is that he was convicted of the wrong crime. He did not claim, nor could he, that the sentence he received exceeded the maximum statutory limits for the sentence prescribed for the crime for which he was convicted." Id., 775–76. "Because the defendant's claim falls outside that set of narrow circumstances in which the court retains jurisdiction over a defendant once that defendant has been transferred into the custody of the [C]ommissioner of [C]orrection to begin serving his sentence, the court cannot consider the claim pursuant to a motion to correct an illegal sentence under Practice Book § 43-22." Id., 776.

Upon the grant of certification, the defendant appealed to our Supreme Court, which concluded that this court "properly determined that, because the defendant's claim did not fall within the purview of [Practice Book] § 43-22, the trial court lacked jurisdiction." *State* v. *Lawrence*, supra, 281 Conn. 150. The Supreme Court reasoned that a "challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the [trial] court to have jurisdiction over the motion to correct an illegal

sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction must be the subject of the attack. . . . [T]he defendant's claim by its very nature, presupposes an invalid conviction." Id., 158–59.

The Supreme Court's decision in *State* v. *Lawrence*, supra, 281 Conn. 147, is directly on point, and compels us to affirm the trial court's judgment dismissing the defendant's motion to correct. The defendant in this case claims that the jury intended to find him guilty of manslaughter in the first degree, not manslaughter in the first degree with a firearm. Like the defendant in *Lawrence*; id.; he challenges what transpired at trial, not at sentencing, and his claim presupposes an invalid conviction. We therefore conclude that the court properly dismissed the motion to correct for lack of jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

LIFT-UP, INC., ET AL. *v.* COLONY INSURANCE COMPANY ET AL.
(AC 43755)

Bright, C. J., and Elgo and Clark, Js.

Syllabus

The substitute plaintiffs, D and A, sought a declaratory judgment to determine the rights and obligations of the parties under a certain insurance policy that had been issued to the plaintiff L Co., a wheelchair accessible van seller and van modifying company, by the defendant C Co. In an underlying personal injury action, D, a paraplegic confined to a motorized wheelchair, sought damages for injuries he sustained in connection with a confrontation with K, an employee of L Co. During an argument D had with K about modifications L Co. made to D and A's van, the confrontation turned physical when K slapped a baseball cap off D's head. When K saw that A, D's wife, had recorded the incident on her cell phone, he grabbed the phone from her and threatened in crude

terms to break it. As D moved his wheelchair toward K in order to retrieve the cell phone, K grabbed D's arm and the wheelchair and altered its path, which caused D to fall from his wheelchair and sustain serious injuries. D and A settled an underlying personal injury action against L Co. and K by means of a stipulation for judgment. L Co. and K commenced an action against C Co. seeking a legal declaration that, under their insurance policy, C Co. had a duty to defend and indemnify them for the claims alleged in the personal injury action. As part of the stipulated settlement of the personal injury action, L Co. assigned its rights under the policy to D and A, and D and A were substituted as party plaintiffs. The trial court granted a motion for summary judgment filed by C Co. as to D and A's complaint and its counterclaim, from which D and A appealed to this court. *Held*:

1. The trial court did not err in holding that the exclusion provisions under the insurance policy pertaining to an assault or battery applied to D's and A's claims and that there was no coverage under the policy because D's injuries were not caused by an accident that resulted from garage operations, and properly determined that C Co. had no duty to provide a defense to L Co. pursuant to the exclusion provisions: the policy excluded claims for injuries that arose out of an assault or battery or both, and K's slapping D's baseball cap and grabbing A's cell phone and threatening to break it constituted actual harmful or offensive contact and verbal abuse from which D's injuries arose because if K had not escalated the verbal argument into verbal abuse and engaged in offensive contact with both D and A, D would not have moved his wheelchair in K's direction and K would not have had the opportunity to grab D or his wheelchair to divert D's path; accordingly, D's injuries grew out of, flowed from, had their origins in, and were connected with K's intentional acts, which by themselves, constituted an assault, battery, or assault and battery within the meaning of the policy.
2. The trial court did not improperly confine its analysis to the operative complaint and refuse to consider certain pieces of extrinsic evidence that allegedly supported C Co.'s duty to defend: at the time the court heard oral arguments on the motion for summary judgment, it stated that it had reviewed "everything," and the documents at issue were attached to D and A's objection to the motion for summary judgment, and, without evidence to the contrary, this court concluded that the trial court reviewed those documents; moreover, even if the court had not reviewed the documents, they were insufficient to support D and A's claim that C Co. had a duty to defend, as there were no meaningful factual differences between the documents and the operative complaint.

Argued April 5—officially released August 24, 2021

Procedural History

Action seeking a declaratory judgment determining, inter alia, the rights of the parties under a certain insurance policy issued to the named plaintiff by the named

defendant concerning the underlying claims of the defendant Dennis Kinman brought against the plaintiffs, and for other relief, brought to the Superior Court in the judicial of Danbury, where the named defendant filed a counterclaim; thereafter, the defendant Dennis Kinman and Amy Kinman were substituted as the plaintiffs; subsequently, the court, *D'Andrea, J.*, granted the named defendant's motion for summary judgment on the complaint and on the counterclaim and rendered judgment thereon, from which the substitute plaintiffs appealed to this court. *Affirmed.*

Brian Kluberdanz, with whom was *David M. Cohen*, for the appellants (substitute plaintiffs).

Melicent B. Thompson, with whom, on the brief, was *Elizabeth O. Hoff*, for the appellee (named defendant).

Opinion

CLARK, J. In this declaratory judgment action, the substitute plaintiffs, Dennis Kinman (Kinman) and Amy Kinman (jointly, Kinmans), appeal from the summary judgment rendered by the trial court in favor of the defendant Colony Insurance Company (Colony)[1] on the Kinmans' amended complaint and Colony's counterclaim. The litigation centers on whether Colony had a duty to defend the original plaintiffs, Lift-Up, Inc. (Lift-Up) and its president, Bruce Kutner,[2] in a personal injury action that the Kinmans had brought against them.[3] On appeal, the Kinmans' principal claim is that in granting Colony's motion for summary judgment, the court improperly construed the allegations of the operative

[1] Dennis Kinman was originally named as a defendant in the declaratory judgment action.

[2] Lift-Up and Kutner were defendants in the personal injury action and plaintiffs in the declaratory judgment action, but they have not participated in the present appeal.

[3] See *Kinman* v. *Kutner*, Superior Court, judicial district of Danbury, Docket No. CV-17-6021988-S.

complaint and the terms of the garage liability policy that Colony had issued to Lift-Up. More to the point, the Kinmans claim that the court improperly concluded as a matter of law that their injuries were not caused by an accident that resulted from Lift-Up's garage operations but, rather, arose out of Kutner's assault, battery, or assault and battery, for which the policy provides no coverage.[4] The Kinmans also claim that the court improperly (1) ignored extrinsic evidence that they argue supported their claim that Colony had a duty to defend and (2) predicated its ruling on allegations of intentional and/or reckless conduct that were properly pleaded in the alternative. We affirm the judgment of the trial court.

The following facts underlie the appeal. Lift-Up is a business located in Bethel that rents and sells wheelchair accessible vans and specializes in modifying such vans to meet the needs of its customers. On or about March 4, 2016, Colony issued a garage liability insurance policy (policy) to Lift-Up, which provided coverage[5]

[4] The Kinmans listed the following issues in their appellate brief: whether the court erred in "(1) determining that the negligent conduct described in counts one and two of the operative complaint could not, even possibly, be considered an accident that arose out of Lift-Up's garage operations; (2) determining that all of the negligent conduct described in counts one and two of the operative complaint constitutes either an assault, a battery, or an assault and battery; (3) restricting its analysis to the allegations in the operative complaint and rejecting the evidentiary significance of two pieces of extrinsic evidence that support Colony's duty to defend Lift-Up; (4) determining that no allegation in the operative complaint falls even possibly within Colony's insurance coverage thus triggering its duty to defend Lift-Up; [and] (5) basing its ruling on allegations of intentional and/or reckless conduct—properly pleaded in the alternative in counts three through five of the operative complaint and irrelevant to Colony's duty to defend its insured—to determine that allegations in the negligence counts fall outside Colony's insurance coverage."

[5] The coverage provision of the policy is in Section II and states in relevant part:

"A. Coverage

"1. 'Garage Operations'—Other Than Covered 'Autos'

"a. We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies caused

from March 4, 2016, to March 4, 2017. The policy contains coverage and exclusion provisions that are at issue in this appeal.

The facts alleged in the underlying personal injury action may be summarized as follows. Kinman is a paraplegic confined to a motorized wheelchair. In October, 2016, he purchased a new van through Lift-Up and entered into a contract with Lift-Up and Kutner to modify the van for his use. Kinman was dissatisfied with the modifications Lift-Up made, and he returned the van several times for repair. On December 3, 2016, the Kinmans went to Lift-Up to retrieve the van. While they were there, Kinman and Kutner had an argument that turned physical when Kutner slapped the baseball cap Kinman was wearing from his head. When Kutner saw that Amy Kinman had recorded the dispute on her cell phone, he grabbed the cell phone from her and threatened in crude terms to break it. Kinman moved his wheelchair toward Kutner in order to retrieve the cell phone. As Kinman moved toward Kutner, Kutner grabbed Kinman's arm and the wheelchair and altered the path of the wheelchair, which caused Kinman to fall from his wheelchair and sustain serious injuries.[6]

In March, 2017, Kinman commenced the personal injury action against Lift-Up and Kutner seeking dam-

by an 'accident' and resulting from 'garage operations' other than the ownership, maintenance or use of covered 'autos.'

"We have the right and duty to defend any 'insured' against a 'suit' asking for these damages. However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may investigate and settle any claim or 'suit' as we consider appropriate. Our duty to defend or settle ends when the applicable Liability Coverage Limit of Insurance—'Garage Operations'—Other Than Covered 'Autos' has been exhausted by payment of judgment or settlements."

[6] The Kinmans do not allege a motive or reason for why Kutner grabbed Kinman to alter the path of the wheelchair. At oral argument in this appeal, counsel for both parties agreed that self-defense had not been alleged and that separate provisions of the policy pertaining to claims arising from the use of force in defense of persons or property do not apply.

ages for the injuries he had sustained.[7] See footnote 3 of this opinion. In May, 2017, he filed an application for a prejudgment remedy. That application was granted in the amount of $250,000 in August, 2017. On February 2, 2018, Kutner executed an affidavit in connection with a criminal proceeding related to the December 3, 2016 incident.[8] In his affidavit, Kutner attested that he did not expect or intend to harm Kinman when he diverted the path of Kinman's wheelchair. Amy Kinman subsequently intervened in the personal injury action, and, on March 5, 2018, the Kinmans filed an amended complaint (operative complaint in the personal injury action) [9] to conform to the "new" evidence in Kutner's affidavit.

[7] The March, 2017 complaint alleged negligence, intentional assault, reckless and wanton misconduct, intentional infliction of emotional distress, negligent infliction of emotional distress, and breach of warranty.

[8] In his affidavit, Kutner attested that he was a defendant in a criminal matter and in a civil matter that arose out of the same occurrence. He further attested to the verbal disagreement between him and Kinman that he escalated by slapping Kinman's baseball cap from his head. Amy Kinman was recording the incident on her cell phone, which he grabbed and threatened to " 'break this fucking thing right now.' " Kinman attempted to retrieve the cell phone from him and moved his wheelchair toward him. He attempted to alter the course of the wheelchair by grabbing Kinman and his wheelchair and moving them to the side. He further attested that he caused Kinman to fall from his wheelchair. More particularly Kutner attested:

"As someone who performs services for disabled customers on a regular basis, I knew or should have known of [Kinman's] limitations and susceptibility to injury, and I should have considered this factor when I pushed him and his wheelchair, but I did not do so. I *did not expect or intend any harm* to [Kinman] when I diverted his wheelchair, but I knew or should have known of a serious risk of injury resulting from [Kinman's] inability to stabilize or brace himself when I pushed his wheelchair. I regret the injuries suffered by [Kinman] and the distress to Amy Kinman.

"As a condition of my application for and completion of the Accelerated Pretrial Rehabilitation Program, I agree to make . . . restitution to [Kinman] for the injuries that resulted from my careless conduct." (Emphasis added.)

[9] The operative complaint sounded in eight counts: Kinman's claim of negligence as to Lift-Up; Kinman's claim of negligence as to Kutner; Kinman's claim of intentional assault as to Kutner; Kinman's claim of reckless and wanton misconduct as to Kutner; Kinman's claim of intentional infliction of emotional distress as to Kutner; Kinman's claim of negligent infliction of emotional distress as to Kutner and Lift-Up; Amy Kinman's claim of bystander emotional distress as to Kutner and Lift-Up; and Amy Kinman's claim of loss of consortium as to Kutner and Lift-Up.

On November 16, 2018, the Kinmans settled the personal injury action by means of a stipulation for judgment.[10] The stipulation for judgment provided that (1) the Kinmans were awarded $850,000 in compensatory damages against Lift-Up and $175,000 in exemplary damages against Kutner;[11] (2) Kutner was to pay the $175,000 judgment rendered against him "as partial consideration toward the satisfaction of the [s]tipulated [j]udgment"; (3) Lift-Up was to pay nothing toward the $850,000 judgment rendered against it, and instead assigned to the Kinmans its rights under the Colony policy; and (4) the Kinmans were only to pursue Colony, and not Lift-Up or Kutner, for payment of the $850,000 judgment for compensatory damages entered against Lift-Up.

The following facts are alleged in the declaratory judgment action. As previously stated, Colony had agreed to provide Lift-Up with liability insurance coverage for bodily injury caused by an accident resulting from garage operations. See footnote 5 of this opinion. In June, 2017, approximately six months after the December 3, 2016 incident and several months after Kinman had commenced the personal injury action, Lift-Up submitted Kinman's claim to Colony for a defense and indemnification under the policy. Colony informed Lift-Up that it was reserving its rights under the policy pending receipt of the "legal papers" and conducting an investigation. On June 22, 2017, Colony informed Lift-Up that, on the basis of the allegations in the personal injury action for intentional assault, intentional infliction of emotional distress and negligent assault and battery, specific exclusion provisions in

[10] The court, *Mintz, J.*, rendered judgment in accordance with the stipulation.

[11] We note that exemplary damages are not available for simple negligence claims. See *Berry* v. *Loiseau*, 223 Conn. 786, 811, 614 A.2d 414 (1992) (award of exemplary damages requires evidence of reckless indifference to rights of others or intentional and wanton violation of those rights).

the policy may preclude coverage and that Colony was handling the matter under a reservation of rights. On June 28, 2017, Colony informed Lift-Up that there was no coverage available under the policy.

In December, 2017, Lift-Up and Kutner commenced an action against Colony that sought a legal declaration that, under the policy, Colony had a duty to defend and indemnify them for the claims alleged in the personal injury action. As part of the November, 2018 stipulated settlement of the personal injury action, Lift-Up assigned its rights under the policy to the Kinmans. As a result of the assignment of Lift-Up's claim against Colony in the stipulated settlement in the personal injury action, in January, 2019, the Kinmans moved to be substituted as the plaintiffs in the declaratory judgment action and thereafter filed an amended complaint against Colony pursuant to the direct action statute, General Statutes § 38a-321.[12] The Kinmans sought from Colony satisfaction of their $850,000 compensatory damages stipulated judgment against Lift-Up.

In response, on March 29, 2019, Colony filed an answer, special defenses, and a counterclaim. The multicount counterclaim sought declarations that (1) Colony had no duty to defend or indemnify Lift-Up under the policy as to the underlying claims against Lift-Up because (a) the policy's assault and battery exclusion endorsement applied to bar coverage for such claims and (b) the damages for which coverage was sought were not

[12] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury . . . if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

caused by an "accident resulting from 'garage operations,' " and (2) because Colony had no duty to defend Lift-Up as to the underlying claims against Lift-Up, Colony was not liable for any portion of the $850,000 stipulated judgment entered against Lift-Up in the underlying action.[13] On April 1, 2019, Colony moved for summary judgment as to the Kinmans' complaint and its own counterclaim.

Following argument on the motion for summary judgment, the court, *D'Andrea, J.*, issued a memorandum of decision granting Colony's motion for summary judgment as to the Kinmans' complaint and Colony's counterclaim. In its memorandum of decision, the court reviewed all counts of the operative complaint in the personal injury action to determine whether "at least one allegation of the complaint falls even possibly within the coverage"; (internal quotation marks omitted) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 739, 95 A.3d 1031 (2014); as the Kinmans claimed, or "the only causes reasonably construed from the [operative] complaint . . . that do not unreasonably contort the meaning of the language of the complaint, are for injury arising out of assault and battery"; *Clinch* v. *Generali-U.S. Branch*, 110 Conn. App. 29, 39, 954 A.2d 223 (2008), aff'd, 293 Conn. 774, 980 A.2d 313 (2009); as Colony contended. In doing so, the court noted that "an insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the complaint." *Flint* v. *Universal Machine Co.*, 238 Conn. 637, 646, 679 A.2d 929 (1996).

Although the court parsed all counts of the operative complaint in the personal injury action, our resolution

[13] The March 29, 2019 counterclaim omitted any counts with respect to Kutner because, in accordance with the terms of the stipulated judgment, the Kinmans' amended complaint sought to recover from Colony only the $850,000 stipulated judgment entered against Lift-Up.

of the appeal focuses on the allegations in counts one and two of that complaint, each titled negligence.[14] Count one, which purports to assert a negligence claim against Lift-Up, alleges that Kinman attempted to pick up the vehicle at least five times between October 16 and December 3, 2016. Each time Kinman drove the vehicle, he discovered that several modifications had not been completed properly and that the vehicle was not safe for him to operate. When Kinman returned the vehicle to Lift-Up, Kutner "often became *enraged* with [Kinman] and threatened to cancel the modification contract." (Emphasis added.)

On December 3, 2016, the Kinmans attempted to pick up the vehicle. Shortly after they arrived, "a verbal *argument* between [Kutner] and [Kinman] began . . . . [Kutner] . . . *escalated* the verbal dispute *into a physical one by slapping* [*Kinman's*] *baseball cap off his head*. [Amy] Kinman was recording the altercation with her [cell] phone and . . . [Kutner] *grabbed the cell phone* away from her and *threatened to 'break this fucking thing* right now.' " (Emphasis added.) Kinman "attempted to retrieve [Amy Kinman's] cell phone . . . and . . . moved his wheelchair in [Kutner's] direction," and "[Kutner] . . . *grabb*[*ed*] Kinman] and his wheelchair and *mov*[*ed*] *it* to the side." (Emphasis added.) In "*moving* or *pushing* [*Kinman*] *and his wheelchair*," Kutner caused Kinman to fall from his wheelchair and sustain bodily injuries. (Emphasis added.)[15]

[14] In their appellate brief, the Kinmans state that counts three through five of the operative complaint in the personal injury action, which allege intentional and wanton acts, are not relevant to the issues on appeal. We consider any claims as to those counts abandoned.

[15] Count two of the operative complaint in the personal injury action, titled "Plaintiff Dennis Kinman's Claim of Negligence as to Bruce Kutner," is similar to count one, but omits the allegations concerning the events preceding the date on which the Kinmans sustained injuries. It also omits the allegation that Kutner slapped Kinman's baseball cap off his head.

The court found Kutner's conduct was "clearly aggressive and uncontrolled behavior [that] sounds more in intentional conduct than negligence. The starting point of 'slapping the baseball cap off [Kinman's] head' is, at best, an attempted assault if Kutner only struck the cap, and at worst, an assault and battery by the definitions in the . . . policy . . . ."

Applying the policy language to the facts of the operative complaint in the personal injury action, the court found that, notwithstanding the titles assigned to counts one and two, each count alleged facts amounting to an assault, a battery, or an assault and battery, and were therefore barred under the policy's unambiguous exclusions provision.[16] It also concluded that the injuries Kinman sustained on December 3, 2016, were not caused by an "accident" that resulted from "garage operations."[17] Colony, therefore, had no duty to defend, and thus no duty to indemnify. Thus, the court granted the motion for summary judgment as to the Kinmans'

[16] The exclusions provision of the policy is set forth in Section II of the policy and an endorsement. The endorsement states: "This endorsement modifies insurance provided under the following . . . GARAGE COVERAGE FORM . . . ."

"SECTION II—LIABILITY COVERAGE, B. Exclusions is amended and the following added . . .

"19. Assault, Battery, or Assault and Battery

" 'Bodily injury,' 'property damage' or 'personal and advertising injury' *arising out of*:

"a. 'Assault', 'Battery' or 'Assault and Battery' caused, directly or indirectly, by you, any 'insured', any person, any entity or by any means whatsoever . . . ." (Emphasis added.)

[17] Section II.A.1.a. of the policy provides in relevant part that Colony "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies caused by an 'accident' and resulting from 'garage operations' . . . ." Section VI.A. provides that " 'Accident' includes continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.' " Section VI.H. of the policy defines " 'Garage operations' " as "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. 'Garage operations' includes the ownership, maintenance or use of the 'autos' indicated in Section I of this

March 12, 2019 complaint and Colony's counterclaim. The Kinmans appealed that judgment to this court.

We first set forth the well established standard of review of a court's granting a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, 60 Conn. App. 257, 259–60, 759 A.2d 114 (2000). "The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 164, 204 A.3d 717 (2019).

"The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012).

Because there are no factual issues in dispute in the present case, the legal question is whether Colony had a duty to defend its insureds. "The question of whether an insurer has a duty to defend its insured is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the

coverage form as covered 'autos'. 'Garage operations' also include all operations necessary or incidental to a garage business."

insurance policy." (Internal quotation marks omitted.) *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 599 n.7, 840 A.2d 1158 (2004). "[O]ur review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, supra, 60 Conn. App. 260.

"[T]he duty to defend means that the insurer will defend the suit, if the injured party states a claim, which, qua claim, is for an injury covered by the policy; it is the claim which determines the insurer's duty to defend . . . ." (Internal quotation marks omitted.) *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 464, 876 A.2d 1139 (2005). Our Supreme Court repeatedly has stated that the duty to defend is considerably broader than the duty to indemnify. "[A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint. . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 711–12, 826 A.2d 107 (2003).

"Where . . . an insured alleges that an insurer improperly has failed to defend and provide coverage for underlying claims that the insured has settled the insured has the burden of proving that the claims were

within the policy's coverage . . . ." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 55, 730 A.2d 51 (1999); see also *Griswold* v. *Union Labor Life Ins. Co.*, 186 Conn. 507, 517–18, 442 A.2d 920 (1982) (insured entitled to coverage under policy if it can demonstrate it qualifies under terms and conditions). Only after the insured has demonstrated that claims fall within a policy's coverage does the insurer then have "the burden of proving that the claim for which coverage is sought falls within a policy's exclusion." *Lancia* v. *State National Ins. Co.*, 134 Conn. App. 682, 690, 41 A.3d 308, cert. denied, 305 Conn. 904, 44 A.3d 181 (2012).

I

On appeal, the Kinmans claim that the court erred in holding that the policy's exclusions provision pertaining to an assault or battery apply to their claims and that there was no coverage under the policy because Kinman's injuries were not caused by an "accident" that resulted from "garage operations." They argue that the operative complaint in the personal injury action alleges that Kinman's injuries arose solely out of a business dispute between the parties and were the result of an "accident" within the meaning of the policy. They essentially argue that the court erroneously failed to focus exclusively on the very specific and discrete acts that were alleged to be the proximate cause of Kinman's injuries, i.e., Kutner's allegedly unintentional and "careless" use of force in diverting Kinman's wheelchair as it moved toward him. As a result, they claim that this case is distinguishable from cases Colony and the court relied on because in each of those cases the injuries sustained were alleged to have been proximately caused by intentional conduct. They further argue that the policy does not bar the claims because (a) the exclusion provisions are ambiguous insofar as they purport to exclude claims arising out of an "unintentional" assault

or battery,[18] and (b) the negligent conduct alleged in the complaint does not meet the definition of a negligent assault or battery under Connecticut law. We disagree and conclude that, even if we assume arguendo that coverage was triggered because Kinman's injuries were caused by an accident resulting from garage operations, the claims are nevertheless barred by the policy's exclusions provision because Kinman's injuries "*arose out of*" conduct constituting an *intentional* assault or battery as those terms are defined in the policy.

Resolution of the claims requires us to examine the allegations of the operative complaint in the personal injury action and the language of the policy to determine whether Colony is required to defend Lift-Up. See *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 41, 801 A.2d 752 (2002). We look first at the language of the policy.

Construction of a contract of insurance is a question of law for the court to review de novo. *Hansen* v. *Ohio Casualty Ins. Co.*, 239 Conn. 537, 543, 687 A.2d 1262 (1996). "The [i]nterpretation of an insurance policy, like the interpretation of other written contracts, involves a determination of the intent of the parties as expressed by the language of the policy. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . It is axiomatic that a contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the

[18] In their brief, the Kinmans argue that because the policy defines a battery as " 'an intentional or unintentional act, including . . . any actual harmful or offensive contact between two or more persons' " but fails to define the terms " 'harmful or offensive contact,' " the entire definition of a battery is ambiguous "because no reasonable insured would believe that his taking steps to avoid a collision . . . could possibly constitute 'harmful or offensive contact.' "

four corners of the policy. . . . The policy words must be accorded their natural and ordinary meaning . . . [and] any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . A necessary predicate to this rule of construction, however, is a determination that the terms of the insurance policy are indeed ambiguous. . . . The fact that the parties advocate different meanings of the [insurance policy] does not necessitate a conclusion that the language is ambiguous. . . . Moreover, [t]he provisions of the policy issued by the [insurer] cannot be construed in a vacuum. . . . They should be construed from the perspective of a reasonable layperson in the position of the purchaser of the policy." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 399–400, 757 A.2d 1074 (2000).

The original exclusions provision in the policy states in relevant part: "This insurance does not apply to any of the following . . . Bodily injury or property damage expected or intended from the standpoint of the insured. But for garage operations other than covered autos this exclusion does not apply to bodily injury resulting from the use of a reasonable force to protect persons or property."[19] (Internal quotation marks omitted.)

The policy's exclusions provision was modified by an endorsement that added an exclusion titled "Assault, Battery, or Assault and Battery." That provision excludes from coverage claims for " '[b]odily injury' . . . *arising out of* . . . 'Assault', 'Battery' or 'Assault and Bat-

[19] As set forth in footnote 6 of this opinion, counsel for both parties agreed that self-defense was not alleged as a motive for Kutner's act of grabbing Kinman and the wheelchair.

tery' caused, directly or indirectly, by you, any 'insured', any person, any entity or by any means whatsoever . . . ." (Emphasis added.) The endorsement contains the following definitions: "Assault means . . . an *intentional or unintentional act*, including . . . *intimidation* . . . *verbal abuse*, or any *threatened harmful or offensive contact* between two or more persons creating an *apprehension in another* of immediate harmful or offensive contact . . . . Battery means an *intentional or unintentional act*, including . . . any *actual harmful or offensive contact between two* . . . *persons which brings about harmful or offensive contact* to another or *anything connected to another*. Assault and [b]attery means the combination of an [a]ssault and a [b]attery." (Emphasis added; internal quotation marks omitted.) Thus, the policy excludes liability coverage for any bodily injury *arising out of* an assault, battery, or assault and battery caused directly or indirectly by anyone by any means whatsoever.

With respect to the complaint, "[t]he interpretation of pleadings is always a question of law for the court. . . . In addition, [t]he allegations of the complaint must be given such reasonable construction as will give effect to [it] in conformity with the general theory which it was intended to follow, and do substantial justice between the parties. . . . It is axiomatic that the parties are bound by their pleadings." (Citation omitted; internal quotation marks omitted.) *O'Halloran* v. *Charlotte Hungerford Hospital*, 63 Conn. App. 460, 463, 776 A.2d 514 (2001).

The operative complaint in the personal injury action alleges that on prior occasions Kutner became enraged with Kinman when he returned the van for repairs. During the December 3, 2016 incident resulting in Kinman's injuries, Kutner argued with Kinman, slapped the baseball cap from his head, grabbed Amy Kinman's cell

phone and threatened in crude terms to break it. As Kinman moved his wheelchair toward Kutner to retrieve Amy Kinman's cell phone, Kutner, for no alleged reason, grabbed Kinman's arm and wheelchair to divert its path, which caused Kinman to fall to the ground and sustain injuries. On the basis of those allegations, we conclude that the Kinmans' claim falls within the policy's exclusion for bodily injuries *arising out of* an assault or battery.

We agree with the trial court that Kutner's "slapping the baseball cap off [Kinman's] head is, at best, an attempted assault if Kutner only struck the cap, and at worst, an assault and battery by the definitions in the . . . policy . . . ." (Internal quotation marks omitted.) Kutner also committed an assault, battery and/or assault and battery when he intentionally grabbed Amy Kinman's cell phone from her and threatened in crude terms to break it. Those acts constituted "actual harmful or offensive contact" and "verbal abuse" between Kutner and Amy Kinman.

We also conclude that Kinman's injuries *arose out of* those acts. This is true even if we accept, *without deciding*, the Kinmans' claims that the complaint must be read to allege that (a) Kutner did not intend to harm Kinman when he engaged in the discrete act of grabbing Kinman and his wheelchair, (b) the policy's exclusions are ambiguous to the extent they purport to define unintentional acts as an "assault" or "battery," and (c) the discrete acts that proximately caused Kinman's injuries were unintentional and do not meet the elements of a common-law negligent assault or battery under Connecticut law.[20]

[20] The Kinmans also argue that the court did not properly consider in isolation their allegations of negligence, but rather focused on their alternative allegations of intentional or reckless conduct and, as a result, deprived them of their right to plead in the alternative and to have their negligence claim decided by a jury. These arguments warrant little further discussion. Pursuant to our plenary review, we have read the operative complaint broadly with attention to the general theory on which the Kinmans proceeded

The policy at issue does not exclude just those claims for injuries "caused" by an assault or battery. Rather, the policy excludes claims for injuries that *arise out of* such conduct. As the Kinmans themselves note in their brief, our courts have given an expansive meaning to the phrase "*arising out of*" when used in an insurance policy. (Emphasis added.) In *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975), our Supreme Court held that "it is generally understood that for liability for an accident or an injury to be said to '*arise out of*' the 'use' of an automobile for purpose of determining coverage under the appropriate provisions of a liability insurance policy, it is sufficient to show only that the accident or injury 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile." (Emphasis added.) More recently in *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, supra, 261 Conn. 48, our Supreme Court held that an injury or accident may be said to arise out of the use of an automobile if the injury or accident " 'was connected with,' " " 'had its origins in,' " " 'grew out of,' " " 'flowed from,' " or " 'was incident to' " the use of the automobile. "*Under this standard of causation, it need not be shown that the incident in question was proximately caused by the vehicle for coverage to attach.*" (Emphasis added.) Id.

against Lift-Up and Kutner. We cannot say that the court "cherry-picked" the allegations of the operative complaint looking only for nonnegligent and/or assaultive types of behavior and ignored the claimed negligent acts. The theory and language of *each* count of the operative complaint broadly read demonstrates that Kinman's injuries *arose out of* Kutner's progressively more aggressive acts of hostility toward the Kinmans. Consequently, the court did not deny the Kinmans their right to plead alternative causes of action or the right to have the case decided by a jury. Our law provides that it is not the label affixed to the cause of action that controls an insurer's duty to defend. Rather, the duty to defend is predicated on the underlying facts alleged in the complaint. See *Smedley Co.* v. *Employers Mutual Liability Ins. Co. of Wisconsin*, 143 Conn. 510, 516, 123 A.2d 755 (1956). We conclude that there is no disputed material fact for a jury to resolve.

It is thus well settled that an injury need not be "proximately caused" by an act or occurrence in order to *arise out of* such an act or occurrence within the meaning of an insurance contract. It is sufficient to show more broadly that an accident or injury "was connected with," "had its origins in," "grew out of," "flowed from," or "was incident to" an incident or occurrence. (Internal quotation marks omitted.) Id. Applying that meaning to the phrase "*arising out of*" as it appears in the policy at issue in the present case, it is clear that Kinman's injuries *arose out of* an assault or battery or both. The operative complaint alleges that immediately preceding Kutner's contact that allegedly caused Kinman to fall and sustain bodily injuries, an argument had ensued during which Kutner slapped the baseball cap off Kinman's head. Upon observing Amy Kinman recording the incident on her cell phone, Kutner then grabbed Amy Kinman's cell phone and threatened in crude and offensive terms to break it. Kinman then moved his wheelchair in Kutner's direction in an effort to retrieve his wife's phone at which point Kutner grabbed Kinman and the wheelchair causing Kinman to fall to the ground and sustain injuries.

If not for Kutner escalating the verbal argument into verbal abuse and engaging in offensive contact with both of the Kinmans, Kinman would not have moved his wheelchair in Kutner's direction and Kutner would not have had the opportunity to grab Kinman or his wheelchair to divert Kinman's path. While the Kinmans claim that Kutner acted negligently when he grabbed Kinman and the wheelchair and that those negligent acts proximately caused Kinman's injuries, those acts and Kinman's injuries nevertheless *arose out of* Kutner's instigating intentional acts of slapping the baseball cap off Kinman's head and grabbing Amy Kinman's cell phone and threatening to break it. Kinman's injuries, therefore, "grew out of," "flowed from," "had [their]

origins in" and "[were] connected with" Kutner's intentional acts; (internal quotation marks omitted) id.; which by themselves, constituted an "[a]ssault," "[b]attery" or "[a]ssault and [b]attery" within the meaning of the policy. In this respect, the intentional conduct was "tied inextricably by the language of the complaint to assault and battery." *Clinch* v. *Generali-U.S. Branch*, supra, 110 Conn. App. 39.

As a result, we conclude that the trial court properly determined that Colony had no duty to provide a defense to Lift-Up pursuant to the exclusions provisions of the policy.

II

The Kinmans second claim is that when deciding Colony's motion for summary judgment, the court improperly restricted its analysis to the operative complaint and refused to consider two pieces of extrinsic evidence that support Colony's duty to defend. We do not agree.

The Kinmans' claim is premised on the rule that "the duty to defend must be determined by the allegations set forth in the underlying complaint itself, with reliance on extrinsic facts being permitted only if those facts support the duty to defend." *Misti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 161, 61 A.3d 485 (2013) (*Misti*).[21] The Kinmans argue that the court failed to consider the affidavit Kutner signed as part of his application for an accelerated pretrial rehabilitation program related to the criminal charges lodged against him as a result of the December 3, 2016 incident. In addition, they argue that the court did not

[21] The procedural posture in *Misti* is distinguishable from the present case. In *Misti*, the parties "stipulated to a number of undisputed facts regarding the circumstances surrounding [the victim's] injuries . . . ." *Misti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 162. In the present case, the parties have not stipulated to any facts underlying Kinman's injury.

consider the log Colony created during its investigation of the incident, which contains a statement Kutner gave to a claims investigator.

Colony disagrees with the Kinmans' factual representation that the court failed to consider the documents on the basis of the statement the court made at the time it heard oral arguments on the motion for summary judgment: "All right, so, I have reviewed everything." The affidavit and Colony's log were attached to the Kinmans' objection to the motion for summary judgment. We agree with Colony and conclude, without evidence to the contrary, that the court reviewed the documents.

Moreover, for the sake of argument only, even if the court had not reviewed the documents, they are insufficient to support the Kinmans' claim that Colony had a duty to defend. There are no meaningful factual differences among Kutner's affidavit, Colony's log, and the operative complaint. The log created on June 13, 2017, is written in the third person by a Colony claims examiner and states: "[A]s [Kinman] attempted to take the phone [Kutner] grabbed [Kinman's] wrist and he fell out of his wheelchair because he was not wearing a seatbelt." In his February 2, 2018 affidavit, Kutner attested in part: "I attempted to alter [Kinman's] wheelchair's course by grabbing [Kinman] and his wheelchair and moving them to the side." The essential conduct described in each of the documents is similar to that alleged in the complaint. As set forth in part I of this opinion, however, we have determined that the claims nevertheless fall within the policy's exclusions provision. As a result, we conclude that the court did not improperly confine its analysis to the operative complaint and that, even if it did, the documents at issue would not alter the outcome in this matter.

The judgment is affirmed.

In this opinion the other judges concurred.

KENMORE ROAD ASSOCIATION, INC. *v.* TOWN OF BLOOMFIELD (AC 43141)

Elgo, Cradle and Pellegrino, Js.

Syllabus

The plaintiff corporation, which had acquired title to a certain private road in 1966, sought, inter alia, a judgment declaring that the defendant town had accepted the road as a public road. Following a trial, the trial court rendered judgment in favor of the defendant, concluding that the road had not been dedicated to public use by the plaintiff or accepted by the defendant or the public for such use. On the plaintiff's appeal to this court, *held* that the trial court's findings that the plaintiff had not impliedly dedicated the road to public use nor had the defendant or the public impliedly accepted the road for such use were supported by the record and, therefore, were not clearly erroneous.

Argued May 25—officially released August 24, 2021

Procedural History

Action seeking a judgment declaring that the defendant has accepted a certain road as a public road, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. A. Susan Peck*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Mark S. Shipman, with whom was *C. Scott Schwefel*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom were *Marc N. Needelman*, and, on the brief, *Adam J. DiFulvio*, for the appellee (defendant).

Opinion

PER CURIAM. In this declaratory judgment action, the plaintiff, Kenmore Road Association, Inc., appeals from the judgment of the trial court, rendered after a court trial, in favor of the defendant, the town of

Bloomfield. On appeal, the plaintiff claims that the trial court erred in concluding that Kenmore Road had neither been impliedly dedicated to public use nor impliedly accepted as a public road by the defendant or the public.[1] We affirm the judgment of the trial court.

The plaintiff is a Connecticut corporation, which took title to Kenmore Road, as a private road, in 1966. The plaintiff is not a common interest community. The members of the plaintiff are residents whose properties abut the road, which is the sole means of ingress and egress to those properties. On October 29, 2015, the plaintiff filed this action by way of a one count complaint seeking a declaratory judgment that the defendant has accepted Kenmore Road as a public road. Following a brief trial, the court issued a written memorandum of decision in which it concluded that Kenmore Road had been neither dedicated to the defendant, nor accepted by the defendant or the public, for public use. This appeal followed.

"[U]nder the common law, highways have been established in this state by dedication and acceptance by the public. . . . Dedication is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by and in behalf of the public. . . . Both the owner's intention to dedicate the way to public use and acceptance by the public must exist, but the intention to dedicate the way to public use may be implied from the acts and conduct of the owner, and public acceptance may be shown by proof of the actual use of the way by the public. . . . Thus, two elements are essential to a valid dedication: (1) a manifested intent by the owner to dedicate the land involved for the use of the public; and (2) an acceptance by the proper authorities or by the general public." (Internal

[1] The trial court also concluded that Kenmore Road had neither been expressly dedicated by the plaintiff, nor expressly accepted by the defendant, as a public road. The plaintiff does not challenge these aspects of the trial court's decision.

quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 11, 48 A.3d 107, cert. denied, 307 Conn. 932, 56 A.3d 715 (2012).

As noted, the plaintiff does not challenge on appeal the trial court's determinations that Kenmore Road was not expressly dedicated or accepted for public use. Our review is therefore limited to the trial court's rejection of the plaintiff's claims that Kenmore Road was impliedly dedicated by the plaintiff and impliedly accepted by the defendant and the public for public use.

"An implied dedication may arise . . . where the conduct of a property owner unequivocally manifests his intention to devote his property to a public use; but no presumption of an intent to dedicate arises unless it is clearly shown by the owner's acts and declarations, the only reasonable explanation of which is that a dedication was intended." *A & H Corp.* v. *Bridgeport*, 180 Conn. 435, 439–40, 430 A.2d 25 (1980).

"To determine whether the public has accepted a [road] through actual use, the use need not necessarily be constant or by large numbers of the public, but it must continue over a significant period of time . . . and be of such a character as to justify a conclusion that the way is of common convenience and necessity. . . . While the public's actual use of the property dedicated to a municipality can, under appropriate circumstances, constitute an implied acceptance on the part of the public, there are municipal actions that may also constitute acceptance of such property. . . . Where a municipality grades and paves a street, maintains and improves it, removes snow from it, or installs storm or sanitary sewers, lighting, curbs, or sidewalks upon it there exists a factual basis for finding an implied acceptance of the street by the municipality. . . . Such municipal acts are factors to be weighed in the ultimate factual determination of acceptance. Another factor is

the municipality's levy and collection of general and special taxes and assessments on the property." (Citation omitted; internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 18.

"The questions of whether there have been dedication [and] acceptance . . . generally are recognized as questions of fact. . . . Our review of the factual findings of the trial court is limited to a determination of whether they are clearly erroneous. . . . To the extent that the . . . claim regarding the acceptance of the [road] challenges the legal basis of the court's conclusions, however, our review is plenary. . . . The question of acceptance, therefore, is better understood as one of mixed law and fact. It is one of law [insofar] as it involves questions as to the nature of this acceptance, the source from which it must come, and the acts and things which may be indicative of it. It is one of fact [insofar] as it involves inquiries as to whether . . . the requisite acts and things have been done so that legal requirements have been met." (Citations omitted; internal quotation marks omitted.) Id., 8–9. Here, because the plaintiff challenges the trial court's determination that the requisite acts and things have not been done to constitute dedication and acceptance, this appeal involves questions of fact, which we review to determine whether they are clearly erroneous.

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and [to] determine credibility, we give great deference to its findings." (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere*

Reserve, LLC, 205 Conn. App. 299, 333, A.3d (2021).

In rejecting the plaintiff's claims that it had impliedly dedicated Kenmore Road for public use and that Kenmore Road had been impliedly accepted for such use by the public, the court reasoned, inter alia: "Kenmore Road has no access to any other road of the town other than Simsbury Road. Without question, it primarily exists to serve its residents. Thus, the public benefit to be derived from public use of the road is not readily apparent. At the top, of the road, it abuts the [Metropolitan District Commission (MDC)] reservoir property. At some point in time, the MDC constructed a fence, which served as a barrier to enter onto the MDC property. Residents of Kenmore Road testified that, at least in recent time, they have taken no action to bar the public's use and entry onto the road. Occasionally, members of the public have been spotted by witnesses walking on the road. In the past, however, residents have sought to restrict access by the general public. Members of the [plaintiff] prevailed upon the MDC to install a gate in the fence that had a combination lock, the combination for which was provided to [the plaintiff's] members.

"Significantly, there is no specific evidence as of what date, or period of time, the [plaintiff] claims the road may be deemed to have been impliedly dedicated by it to public use. The lack of evidence on this point makes it even more challenging for the court to find implied acceptance by the general public. To the extent there has been use by the public, it has been sparse and irregular. Also, there is scant evidence of continuity of use by the general public. Further, assuming there has been use of Kenmore Road by the unorganized public over time, it is not clear from the evidence how beneficial that use has been. As noted, there is only one access point to and from Kenmore Road. There is no public parking on Kenmore Road for folks seeking access to

the reservoir. The MDC reservoir property has a large public entrance with substantial public parking within a mile of Kenmore Road on Route 44 in Avon. . . .

"Essentially, the plaintiff has failed to establish that, at any time prior to the filing of this [action], it unequivocally manifested an intention to devote Kenmore Road to public use. . . . In fact, the weight of the evidence demonstrates that, until the present time, the [plaintiff] has consistently exhibited private control of the road. Thus, the court finds that the plaintiff has failed to prove by a preponderance of the evidence the dedication of Kenmore Road by implication. . . .

"Even assuming, however, implied dedication by the plaintiff, the evidence of use by the general public is scant, of unclear benefit to the public, and generally insufficient. Basically, there is little or no evidence that the use of Kenmore Road by the unorganized public . . . i.e., that the use by members of the public who are not residents of the road or their invitees, has continued over a significant period of time, and can be said to be of such a character as to justify a conclusion that the way is of common convenience and necessity. . . . In addition, as stated, implied acceptance by public use must occur within a reasonable time after dedication. . . . Because the timing of both the plaintiff's purported dedication and acceptance is unclear from the evidence, the court cannot justifiably make this determination. . . .

"[Moreover], [a]s illustrated by the testimony of the residents of Kenmore Road, evidence of the actual use of the road by the unorganized public is weak, uncertain and of unclear benefit. For these reasons, the use of Kenmore Road to the general public, as shown by the plaintiff, cannot be said to be of common convenience and necessity, and therefore beneficial to them." (Citations omitted; footnote omitted; internal quotation marks omitted.)

The trial court also disagreed with the plaintiff's contention that the provision of certain services by the defendant constituted an implied acceptance of Kenmore Road as a public road. The trial court found that the defendant had provided "trash pickup, snow removal, oiling, sanding and sweeping of sand off the road to be stored in an environmentally secure area, per order of the [Department of Energy and Environmental Protection], trimming tree limbs, clearing downed trees, which would interfere with the efforts of first responders from getting to residents in need of emergency assistance, and transportation services for schoolchildren and the elderly." The court nevertheless rejected the plaintiff's argument that, in providing those services, the defendant impliedly accepted Kenmore Road for public use. The court reasoned: "[T]he provision of these services alone to members of the [plaintiff] on a voluntary or contractual basis cannot reasonably be said to constitute an implied acceptance of the roadway by the [defendant] as a public [road] particularly in light of the substantial evidence indicating that the [defendant] has consistently and repeatedly rejected the residents' historical requests to accept the road for public use absent substantial improvements. Thus, the weight of the evidence is that the [defendant] cannot be said to have impliedly accepted Kenmore Road for public use."

The plaintiff argues on appeal that the trial court erred in finding that it had not impliedly dedicated Kenmore Road to public use, nor had Kenmore Road been impliedly accepted for such use by the defendant or the public. The trial court's findings are amply supported by the record and, therefore, are not clearly erroneous. The plaintiff asks this court to substitute its judgment for that of the trial court. It is not the role of this court to do so. See *Wolk* v. *Wolk*, 191 Conn. 328, 330, 464 A.2d 780 (1983) ("[u]nless there were no facts [on] which

the [trial] court could base its finding, we as an appellate body cannot retry the case or substitute our judgment for that of the trial court").

The judgment is affirmed.

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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.

Gutierrez *v.* Mosor. 818
Negligence; whether trial court abused its discretion in granting plaintiff's motion for default as sanction for defendant's single discovery violation for failure to attend scheduled deposition; whether trial court abused its discretion by failing to grant defendant's motion to set aside default; whether trial court's sanction of default was proportional to defendant's violation of discovery order.

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.

Kenmore Road Assn., Inc. *v.* Bloomfield 877
Declaratory judgment; action seeking judgment declaring that defendant town had accepted certain private road as public road; whether trial court's findings that plaintiff had not impliedly dedicated road to public use nor had defendant or public impliedly accepted road for such use were supported by record and, therefore, were not clearly erroneous.

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 foreclo-

sure action that was later dismissed to satisfy its own notice requirements in separate foreclosure action.

Lift-Up, Inc. *v.* Colony Ins. Co.. 855

Declaratory judgment; summary judgment; claim that trial court erred in holding that exclusion provisions under insurance policy pertaining to assault or battery applied to plaintiffs' claims and that there was no coverage under policy; whether certain conduct constituted assault or battery or both; whether certain injuries arose out of assault or battery or both; claim that trial court improperly confined its analysis to operative complaint and refused to consider certain pieces of extrinsic evidence; whether certain documents were sufficient to support plaintiffs' claims that defendant insurance company had duty to defend.

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.

Nussbaum *v.* Dept. of Energy & Environmental Protection 734

Administrative appeal; whether trial court properly dismissed appeal from decision of Commissioner of Energy and Environmental Protection affirming decision of Department of Energy and Environmental Protection denying application for permit to maintain fences on certain real property adjacent to Long Island Sound and ordering removal of fences; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

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.

Rockstone Capital, LLC *v.* Caldwell. 801

Foreclosure; claim that trial court improperly determined that settlement agreement secured by defendants' real property was procedurally and substantively unconscionable with respect to one defendant; whether defendant received consideration for her agreement to mortgage her interest in her jointly owned residence to secure debt of another defendant.

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.* Felimon C. 727

Sexual assault in second degree; risk of injury to child; motion to correct illegal sentence; mootness; claim that sentencing court lacked authority pursuant to statute (§ 53a-30) to impose condition of probation prohibiting defendant from contesting adoption of child conceived as result of sexual assault; whether appeal was rendered moot by termination of defendant's parental rights and adoption of child.

State *v.* Gamble 837

Motion to correct illegal sentence; manslaughter in first degree with firearm; whether trial court improperly dismissed motion to correct for lack of jurisdiction on ground that motion attacked conviction, and not sentence; claim that defendant's sentence was illegally enhanced on basis of fact not found by jury.

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.

State *v.* Quintiliano 712
Criminal mischief in first degree; claim that there was insufficient evidence to support defendant's conviction of criminal mischief in first degree; easement law, discussed; claim that trial court failed to recognize right of dominant estate holder of right-of-way easement, appurtenant to his land, to remove obstructions placed in right-of-way that materially interfered with his reasonable enjoyment thereof; claim that trial court erred by not finding it credible that attorney would advise client to remove obstructions in right-of-way.

State *v.* Stephanie U. 754
Operating motor vehicle while under influence of intoxicating liquor or drugs; operating motor vehicle while operator's license was suspended; attempt to commit risk of injury to child; whether prosecutor violated defendant's state constitutional rights to confront witnesses against her and to testify on her own behalf by improperly attacking her credibility during cross-examination and in closing rebuttal argument by suggesting that she had tailored her testimony to conform to evidence she overheard during trial; whether prosecutor denied defendant due process of law under either federal or state constitution when she asked, during cross-examination, whether defendant had interest in outcome of trial and when she told jury during rebuttal argument that it could consider defendant's vested interest in outcome of trial; whether prosecutorial impropriety deprived defendant of fair trial when prosecutor argued that defendant had tailored her testimony and that she had motive to lie; claim that this court should have ordered new trial after employing its supervisory authority to prohibit questions and arguments that amount to generic tailoring or imply that jury could discredit defendant's testimony because she had interest in outcome of her trial; claim that defendant's conviction of attempt to commit risk of injury to child should be vacated because it was not cognizable crime.

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-115l).
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.

NOTICES

Notice of Amendment

At its meeting on July 9, 2021, the Connecticut Bar Examining Committee voted to amend Article IV-1 of its Regulations to clarify when an applicant for admission without examination is required to take the MPRE or a course in professional responsibility.

Lisa Valko
Director
Connecticut Bar Examining Committee

ARTICLE IV

Multistate Professional Responsibility Examination

Art. IV-1.

(A) All persons seeking admission to the practice of law in Connecticut by examination or by UBE score transfer or a military spouse seeking a temporary license to practice as an attorney in Connecticut shall, prior to being recommended for admission to the bar, produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

(B) Applicants for admission without examination without any history of discipline or ineligibility ~~including administrative discipline,~~ in any jurisdiction in which he or she is licensed or has been licensed shall not be required to produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination, but shall be required to provide evidence that he or she does not have any history of discipline or ineligibility, ~~including administrative discipline,~~ in any jurisdiction in which he or she is licensed or has been licensed.

(C) Applicants for admission without examination with any history of discipline or ineligibility, ~~including administrative discipline,~~ in any jurisdiction in which he or she is licensed or has been licensed shall, prior to being recommended for admission to the bar, produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

(D) For purposes of this article, ''discipline or ineligibility'' shall include but not be limited to disbarment, suspension, revocation, public or private reprimand, resignation in lieu of impending or anticipated disciplinary action, or ineligibility to practice law for any disciplinary or administrative reason.

Art. IV-2. In lieu of the Multistate Professional Responsibility Examination an applicant may, prior to being recommended for admission to the bar, submit evidence

of satisfactory completion of a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum. To be acceptable, the course must be completed with a grade of either ''C'' or ''Pass'' within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

Art. IV-3. In lieu of the requirements set forth in Articles IV-1(C) and IV-2, an applicant for admission without examination who is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school may, prior to being recommended for admission to the bar, submit evidence of a scaled score of eighty (80) on the Multistate Professional Responsibility Examination or a grade of either ''C'' or ''Pass'' in a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum.

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in June and July 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Baratta, Maria Isabella Patricia of Armonk, NY
Cesario, Ryan James of Cranston, RI
Cimbol, Lauren Rachel of New York, NY
DiGennaro, Michael Allen of Boulder, CO
Hill, Vanessa Alexandra of Ridgefield, CT
Khalid, Muryum Khrysteen Erevia of Farmington, CT
Konganda, Chinthana Poovamma of San Diego, CA
Laris, Elias of Stamford, CT
Sakovits, Alanna Rose of Stamford, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in June and July 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Babbs, Eric P. of Carmel, IN
Barrett, David William of Ponte Vedra Beach, FL
Contratto, Justin McDevitt of Fairfield, CT
Drew, Kathleen of Brick, NJ
Simon, Stuart Ross of New York, NY

NOTICE OF HEARING

The Standing Committee on Recommendations for Admissions to the Bar Middlesex County hereby serves notice that it intends to hold a hearing on Josephine Smalls Miller's Application for Reinstatement (Docket # DBD-CV-17-6022075-S) at the Superior Court, Judicial District of Middlesex at Middletown, 1 Court Street, Middletown, CT, 06457 on Wednesday, September 1, 2021 at 9:30 am.

ASSIGNMENT OF JUDGES

September 6, 2021 – September 4, 2022

Pursuant to Section 51-164t of the General Statutes, the Chief Court Administrator has made the following assignments to the Divisions and Parts thereof established in Chapter 1 of the Practice Book.

Divisions and Parts

The Divisions, Parts thereof, and abbreviation of each Part are:

Division	Part	Abbreviation of Part in Assignments
Family Division	Part J (Juvenile matters including neglect, dependency, delinquency, families with service needs and termination of parental rights.)	juvenile
	Part S (Support and paternity actions.)	support
	Part D (All other family relations matters, including dissolution of marriage or civil union cases.)	dissolution
Civil Division	Part H (Summary process cases and all other landlord and tenant matters returnable to the judicial districts.)	summary process
	Part S (Small claims actions.)	small claims
	Part A (Administrative appeals.)	adm. appeals
	Part J (Jury matters.)	jury
	Part C (Court matters.)	G.A. court or J.D. court
Criminal Division	Part A (Capital felonies, class A felonies, and unclassified felonies punishable by sentences of more than twenty years.)	A

	Part B (Class B felonies and unclassified felonies punishable by sentences of more than ten years but not more than twenty years.)	B
	Part C (Class C felonies and unclassified felonies punishable by sentences of more than five years but not more than ten years.)	C
	Part D (Class D felonies and all other crimes, violations, motor vehicle violations, and infractions.)	D
Housing Division* (in judicial districts specified by statute)	Part H (Housing matters as defined by Section 47a-68 of the General Statutes.)	H

*NOTE: Housing matters (including certain civil actions, summary process actions, and certain small claims) in those judicial districts without a Housing Session, as specified by a statute, must be made returnable to a judicial district and not to a geographical area.

Family Division

All judges assigned to geographical area (G.A.) courthouses are authorized to adjudicate Family Division Part S (support) actions, notwithstanding the omission of any such specific assignment.

Civil Division

In addition to the specific assignments hereinafter made, all judges may adjudicate civil short calendar matters, administrative appeals, and small claims.

Criminal Division

The Presiding Judges in the judicial district (J.D.) and the associated geographical area court locations shall be exclusively responsible for the transfer of cases from G.A. to J.D. court locations in accordance with the following general policy.

1. All cases involving charges which are to be heard by judges assigned to the Criminal Division at the J.D. courthouse shall be ordered transferred from the G.A. to the J.D. as soon as possible after arraignment. At the time of transfer, the court shall set a date for the appearance of the defendant in the J.D. courthouse.

2. All cases charging factually supported class A or class B felonies, Part A Failure to Appear charges or Part A Violation of Probation charges shall be automatically ordered transferred by the court to the J.D. court location.

- Exceptions to the automatic transfer of these cases may be made by agreement of the Presiding Judges based upon local custom and criteria (e.g., cases involving larceny of a motor vehicle, welfare or agency fraud, etc.).

3. All other cases charging any unclassified felony offense, class C felony, class D felony, misdemeanor offense, motor vehicle charge and infraction shall be retained for disposition in the G.A. courthouse.

- Exceptions to the foregoing shall be considered by the Presiding Judges based upon the severity and nature of the crime, the past record of the defendant, etc., as well as particular local considerations (e.g., narcotics cases involving substantial quantities of narcotics, weapons, cash or other aggravating factors). The transfer of these cases shall not be ordered unless the Presiding Judges (J.D. and G.A.) have previously agreed upon any such transfer.

4. Cases involving defendants with simultaneous pending charges in both the J.D. and G.A. court locations shall be retained for final disposition in each respective courthouse unless a transfer of all cases to the J.D. is otherwise agreed upon by the J.D. Presiding Judge. In the absence of the transfer of all such files to the J.D. court location, the Presiding Judges shall confer and coordinate any ultimate disposition, taking into consideration all pending charges.

5. Any case not otherwise qualifying for transfer, for which prior approval of the Presiding Judges (J.D. and G.A.) has not been given, shall be returned to the forwarding G.A.

6. Preliminary hearings under Section 54-46a of the General Statutes to determine probable cause for crimes punishable by death, life imprisonment without the possibility of release or life imprisonment shall be heard, unless waived, at judicial district court locations.

Chief Administrative Judge

There are four Chief Administrative Judges: one each for the Criminal Division, Civil Division, Family Division, and Juvenile Division. They have the following responsibilities:

- Represent the Chief Court Administrator on matters of policy affecting their respective divisions.
- Solicit advice and suggestions from the judges and others on matters affecting their respective divisions, including legislation, and advise the Chief Court Administrator on such matters.
- Advise and assist Administrative Judges in the implementation of policies and caseflow programs.

- Periodically meet and confer with judges assigned to their divisions to discuss and exchange information and developments affecting the operations of the division.

- Solicit from Administrative Judges information on the assignment of judges and advise and participate with the Chief Court Administrator in the assignment of judges.

- Coordinate with the Education Committee annual orientation programs for judges as assignments change.

Administrative Judge

Administrative Judges (A.J.s) have the following responsibilities and powers:

- Assign judges within the judicial district as necessary.
- Assume, as necessary, any assignment within the judicial district.
- In the event it is necessary to cover for vacation, illness, or an emergency, reassign any judge assigned within the judicial district to another division, part or court location. Such reassignment shall be temporary and shall not exceed two weeks. Prompt notice of the assignment shall be given to the Office of the Chief Court Administrator.
- Keep informed on the policies of the Judicial Branch.
- Subject to the prior approval of the Chief Court Administrator, determine the courthouse(s) to which jurors shall be initially summoned within the judicial district.
- When required, order that the trial of any case, jury or non-jury, be held in any courthouse facility within the judicial district.

- Represent the Chief Court Administrator in the efficient management of their respective judicial districts on matters affecting the fair administration of justice and the disposition of cases (C.G.S. § 51-5a (3)).
- Solicit advice and suggestions from the judges and others on matters affecting their respective judicial districts, including legislation, and advise the Chief Court Administrator on such matters.
- Implement and execute programs and methods for disposition of cases and administrative matters within their respective judicial districts in accordance with policies and directives of the Chief Court Administrator.
- Ensure nondiscriminatory treatment of all persons affected by the court's operations.
- Promote the overall well-being of the judges and be mindful of their needs.
- Provide information to Chief Administrative Judges regarding their assignment needs.
- Keep Chief Court Administrator advised of unusual activity or problems within the judicial district.
- Oversee the daily assignment of a judge to address jurors. This important daily appearance by a judge underscores the importance of citizen participation in the system and serves to reinforce positive public perceptions about the Judicial Branch.
- Oversee the activities of the Judicial Marshal Services.

Assistant Administrative Judge

An Assistant Administrative Judge (A.A.J.) shall have all of the aforementioned responsibilities and powers of the Administrative Judge for such judicial district, provided the A.A.J., in exercising powers, shall not issue orders contravening the orders of the Administrative Judge.

Presiding Judge

Presiding Judges (P.J.s) have the following responsibilities and powers:

- Expediting the disposition, fairly, of the court business to which such judge has been entrusted.
- Reporting to the Administrative Judge and conferring with the Administrative Judge and the appropriate Chief Administrative Judge concerning problems and accomplishments in achieving the aforementioned objective.
- Apportioning among the judges the judicial business to which such judge and other judges have been assigned.

COURT SESSIONS

Court will be in session five days per week except as otherwise directed by the Chief Court Administrator and as hereinafter set forth. Civil Division short calendars will commence at 9:30 a.m. on Monday of each week unless they are rescheduled due to a holiday or an exception is granted by the Chief Court Administrator. All other court sessions shall begin promptly at 10:00 a.m. or earlier.

HOLIDAYS

Monday, September 6, 2021	Labor Day
Monday, October 11, 2021	Columbus Day
Thursday, November 11, 2021	Veterans' Day
Thursday, November 25, 2021	Thanksgiving Day
Friday, December 24, 2021	Christmas Day
Friday, December 31, 2021	New Year's Day
Monday, January 17, 2022	Martin Luther King, Jr. Day
Friday, February 11, 2022	Lincoln's Birthday
Monday, February 21, 2022	Washington's Birthday
Friday, April 15, 2022	Good Friday
Monday, May 30, 2022	Memorial Day
Monday, July 4, 2022	Independence Day

Dates When Trials May Be Suspended

X The day of the Connecticut Bar Association Legal Conference in June 2022.

X Days Judicial Branch educational programs are scheduled.

September 6, 2021 – September 4, 2022

JUDGES	ASSIGNMENT
AARON	Waterbury Courthouse for Juvenile Matters
ABRAMS (C.A.J. for Civil Division Parts H (Summary Process); S (Small Claims); J (Jury Matters) and C (Court Matters))	New Haven J.D. Courthouse
AGATI	Waterbury J.D.
ALANDER	New Haven J.D. Courthouse
ALBIS (C.A.J. for Family Division Parts S (Support) and D (Dissolution))	Middlesex J.D.
ALLARD	Hartford Courthouse for Juvenile Matters
ARMATA	Tolland J.D.
AUGER	Windham J.D.
BAIO	Hartford J.D. Housing and New Britain J.D. Housing
BALDINI	New Britain J.D.
BELLIS	Waterbury – Complex Litigation Docket
BHATT	Middletown Courthouse for Juvenile Matters
BLAWIE	Stamford-Norwalk J.D.
BOZZUTO	Deputy Chief Court Administrator
BRAZZEL-MASSARO	Danbury J.D.
BRILLANT	Bridgeport Courthouse for Juvenile Matters
BROWN	Ansonia-Milford J.D.
BRUNO	Waterbury J.D.
BUDZIK	Hartford – Land Use Litigation Docket
BURGDORFF	Middletown – Regional Child Protection Session

CALISTRO	New Haven G.A. 23
CALMAR	New London J.D.
CARON	New Britain J.D.
CARRASQUILLA	Manchester G.A. 12
CARROLL	Chief Court Administrator
CHAPLIN	Windham J.D.
CIRELLO	New Haven J.D. Housing and Waterbury J.D. Housing
CLARK, W.	Stamford-Norwalk J.D.
COBB	Hartford J.D. Courthouse
CONNORS	New Haven J.D. Courthouse
CONWAY	New Haven Courthouse for Juvenile Matters
CORDANI	New Britain J.D. (UAPA & State Tax Appeals)
D'ANDREA	Danbury J.D.
DANNEHY	Hartford Courthouse for Juvenile Matters
DAYTON	Bridgeport G.A. 2
DENNIS	Ansonia-Milford J.D.
DIANA	Hartford J.D. Courthouse
DOYLE	Hartford J.D. and G.A. 14 Courthouse
DRONEY	Hartford J.D. and G.A. 14 Courthouse
EGAN	Bridgeport J.D. Courthouse
FARLEY	Hartford – Complex Litigation Docket
FICETO	Waterbury J.D.
FISCHER, J.	Windham J.D.
FRECHETTE	Ansonia-Milford J.D.
GEATHERS	New Britain J.D.
GENUARIO	Stamford-Norwalk J.D.

GOLD (C.A.J. for Criminal Division Parts A, B, C and D)	Hartford J.D. and G.A. 14 Courthouse
GOODROW	New London J.D.
GORDON	Tolland J.D.
GOULD	Meriden J.D. and G.A. 7 Courthouse
GREEN, E.	Windham J.D.
GROGINS	Waterbury Courthouse for Juvenile Matters
GROSSMAN	New Haven J.D. Courthouse
GUSTAFSON	New Haven G.A. 23
HALL	Ansonia-Milford J.D.
HARMON	New Haven J.D. Courthouse
HELLER	Stamford-Norwalk J.D.
HERNANDEZ	Bridgeport J.D. Courthouse
HOFFMAN	Waterford Courthouse for Juvenile Matters
HUDDLESTON	New Britain Courthouse for Juvenile Matters
HUDOCK	Stamford-Norwalk J.D.
IANNOTTI	Waterbury J.D.
JACOBS	Ansonia-Milford J.D.
JOHNSON	Hartford J.D. and G.A. 14 Courthouse
JONGBLOED	New Haven J.D. Courthouse
KAMP	New Haven J.D. Courthouse
KAVANEWSKY	Stamford-Norwalk J.D.
KEEGAN	New Britain J.D.
KLATT	Tolland J.D.
KLAU	Hartford J.D. Courthouse
KNOX	New Britain J.D.
KOWALSKI	Stamford-Norwalk J.D.
KWAK	New London J.D.
LOBO	Litchfield J.D.

LYNCH	Litchfield J.D.
MACIEROWSKI	Tolland J.D.
MARCUS	New Haven Courthouse for Juvenile Matters
MARONICH	Bridgeport Courthouse for Juvenile Matters
MASSICOTTE	Hartford J.D. and G.A. 14 Courthouse
McLAUGHLIN	Stamford-Norwalk J.D.
McNAMARA	Tolland J.D.
McSHANE	Bridgeport G.A. 2
MEDINA	Danbury J.D.
MOORE, J.	Litchfield J.D.
MOORE, M.	Bridgeport J.D. Courthouse
MORGAN	New Britain J.D.
MOSES	Bridgeport G.A. 2
MOUKAWSHER	Middletown – Regional Family Trial Docket
MURPHY, K.	New London J.D.
MURPHY, M.	Tolland J.D.
MURPHY, S.	New London J.D.
NASCIMENTO	Danbury J.D.
NASTRI	Hartford J.D. Courthouse
NEWSON	Windham J.D.
NGUYEN-O'DOWD	Hartford J.D. Courthouse
NIEVES	Waterbury J.D.
NOBLE	Hartford – Complex Litigation Docket
O'HANLAN	New London J.D.
OLEAR	Middlesex J.D.
OLIVER	Middlesex J.D.
OZALIS	Stamford – Complex Litigation Docket

PAPASTAVROS	Waterbury J.D.
PARKINSON	Tolland J.D.
PAVIA	Danbury J.D.
PELOSI	Litchfield J.D.
PIERSON	Waterbury J.D.
PRATS	Manchester G.A. 12
PRICE-BORELAND	New Haven J.D. Courthouse
RANDOLPH	Stamford-Norwalk J.D.
RICHARDS, E.	Bridgeport J.D. Courthouse
RICHARDS, S.	New Haven J.D. Courthouse
RORABACK	Waterbury J.D.
ROSEN	Hartford J.D. Courthouse
RUSSO	Bridgeport J.D. Courthouse
SANCHEZ-FIGUEROA	Middlesex J.D.
SCHUMAN	Waterbury J.D.
SCHWARTZ	Meriden J.D. and G.A. 7 Courthouse
SEELEY	Hartford J.D. and G.A. 14 Courthouse
SHABAN	Danbury J.D.
SHAH	Middlesex J.D.
SHERIDAN	Hartford J.D. Courthouse
SHLUGER	New London J.D.
SICILIAN	Hartford J.D. Courthouse
SIZEMORE	Meriden J.D. and G.A. 7 Courthouse
SPADER	Bridgeport J.D. Housing and Norwalk G.A. 20 Housing

SPALLONE	New London J.D.
STEVENS	Bridgeport J.D. Courthouse
STEWART	Bridgeport J.D. Courthouse
STRACKBEIN	New London J.D.
TAYLOR, C.	New Britain Courthouse for Juvenile Matters
TAYLOR, M.	Hartford J.D. Courthouse
TINDILL	Ansonia-Milford J.D.
TORRES	Torrington Courthouse for Juvenile Matters
TRUGLIA	Bridgeport J.D. Courthouse
TYMA	Bridgeport J.D. Courthouse
VITALE	New Haven J.D. Courthouse
WELCH	Bridgeport J.D. Courthouse
WESTBROOK (C.A.J. for Family Division Part J (Juvenile))	Tolland J.D. (subject to Rockville Courthouse for Juvenile Matters)
WHITE	Stamford-Norwalk J.D.
WIESE	New Britain J.D.
WILLIAMS	Hartford J.D. and G.A. 14 Courthouse
WILSON	New Haven J.D. Courthouse
WU	Hartford Community Court
YOUNG	New London J.D.

SENIOR JUDGES	**ASSIGNMENT**
ABERY-WETSTONE	New Britain J.D.
AURIGEMMA	New Britain J.D.
BENTIVEGNA	Litchfield J.D.
CARBONNEAU	Willimantic Courthouse for Juvenile Matters
D'ADDABBO	Hartford J.D. and G.A. 14 Courthouse
DEWEY	Middlesex J.D.
FISCHER, B.	New Haven J.D. Courthouse
MATASAVAGE	Litchfield J.D.
MOORE, S.	Waterbury J.D.
SWIENTON	New London J.D.

Unless otherwise specifically assigned below, all Judge Trial Referees are assigned to their resident district to perform such responsibilities as may be assigned to them by their respective Administrative Judge.

JUDGE TRIAL REFEREES	ASSIGNMENT
ADELMAN	Middletown – Regional Family Trial Docket
BERGER	Hartford – Land Use Litigation Docket
CLIFFORD	New Haven J.D. Courthouse
COHN	New Britain J.D. (UAPA and State Tax Appeals)
COLEMAN	Waterbury J.D.
CREMINS	Waterbury Courthouse for Juvenile Matters
DEVINE	New London J.D.
DOLAN	New Britain J.D.
DRISCOLL	Waterford Courthouse for Juvenile Matters
FRAZZINI	Hartford Courthouse for Juvenile Matters
GILLIGAN	Hartford Courthouse for Juvenile Matters
GRAZIANI	Windham J.D.
HADDEN	New London J.D.
KAPLAN	New Haven Courthouse for Juvenile Matters
KENEFICK	New Haven J.D. Courthouse
LAGER	Waterbury – Complex Litigation Docket
O’KEEFE	Meriden J.D. and G.A. 7 Courthouse
PECK	Hartford J.D. Courthouse
POVODATOR	Stamford-Norwalk J.D.
QUINN	Middletown – Regional Child Protection Session

RODRIGUEZ	Bridgeport J.D. Courthouse
SHORTALL	New Britain J.D.
SWORDS	Windham J.D.
TURNER	Waterbury Courthouse for Juvenile Matters

ASSIGNMENTS

FAMILY DIVISION PARTS S (SUPPORT) AND D (DISSOLUTION), CIVIL DIVISION AND CRIMINAL DIVISION

ANSONIA-MILFORD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Milford J.D. and G.A. 22 Courthouse (14 West River Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division: Derby G.A. 5 (106 Elizabeth Street) Civil Division Part C (G.A. court); Criminal Division:	Brown (A.J.) (P.J. for Criminal & Family Divisions) Dennis (A.A.J.) Frechette (P.J. for Civil Division) Jacobs Tindill Hall

DANBURY JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Danbury J.D. and G.A. 3 Courthouse (146 White Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:	Pavia (A.J.) (P.J.) Brazzel-Massaro (A.A.J.) Shaban D'Andrea Medina Nascimento

FAIRFIELD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Bridgeport J.D. Courthouse (1061 Main Street)

Family Division Parts S (support) and D (dissolution):	Truglia (P.J.) M. Moore Egan Rodriguez, Judge Trial Referee
Civil Division Parts A (adm. appeals), J (jury), C (J.D. court) and S (small claims):	Welch (A.J.) Stevens (A.A.J.) (P.J.) Tyma Stewart
Bridgeport J.D. Courthouse (1061 Main Street) Criminal Division:	Russo (P.J. for Part A) E. Richards Hernandez
Bridgeport G.A. 2 (172 Golden Hill Street) Civil Division Part C (G.A. court); Criminal Division:	Dayton (P.J.) McShane Moses

HARTFORD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Location / Division	Judges
Hartford J.D. Courthouse (90 Washington Street)	
Family Division Parts S (support) and D (dissolution):	Diana (P.J.) Nastri Nguyen-O'Dowd Klau
Hartford J.D. Courthouse (95 Washington Street) Civil Division, except Part H (summary process):	Sheridan (A.J.) Cobb (P.J.) M. Taylor Rosen Sicilian Peck, Judge Trial Referee
Hartford J.D. and G.A. 14 Courthouse (101 Lafayette Street) Criminal Division:	Seeley (A.A.J.) (P.J. for Part A) Droney (P.J. for G.A. 14) Gold Johnson Doyle Williams Massicotte D'Addabbo, Senior Judge
Community Court (80 Washington Street)	Wu (P.J.)
Manchester G.A. 12 (410 Center Street) Civil Division Part C (G.A. court); Criminal Division:	Prats (P.J.) Carrasquilla
Enfield G.A. 13 (111 Phoenix Avenue) Civil Division Part C (G.A. court); Criminal Division:	Enfield G.A. 13 matters being heard in Hartford.

LITCHFIELD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Litchfield J.D. and G.A. 18 Courthouse (50 Field Street, Torrington) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:	J. Moore (A.J.) (P.J.) Lobo (A.A.J.) Lynch Pelosi Bentivegna, Senior Judge Matasavage, Senior Judge

MIDDLESEX JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Middlesex J.D. & G.A. 9 Courthouse (One Court Street, Middletown) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:	Oliver (A.J.) (P.J. for Criminal & Civil Divisions) Albis (A.A.J.) (P.J. for Family Division) Olear Shah Sanchez-Figueroa Dewey, Senior Judge

NEW BRITAIN JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New Britain J.D. and G.A. 15 Courthouse (20 Franklin Square)

Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process); Criminal Division: (G.A. 15 handles motor vehicle cases for the towns of Avon, Berlin, Bristol, Burlington, Canton, East Granby, Farmington, Granby, Hartford, New Britain, Newington, Plainville, Plymouth, Rocky Hill, Simsbury, Southington, Suffield, West Hartford, Wethersfield, Windsor and Windsor Locks.)	Morgan (A.J.) (P.J. for Civil Division) Keegan (A.A.J.) (P.J. for Criminal Division) Caron (P.J. for Family Division) Wiese Baldini Geathers Knox Abery-Wetstone, Senior Judge Aurigemma, Senior Judge Dolan, Judge Trial Referee Shortall, Judge Trial Referee

NEW HAVEN JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New Haven J.D. Courthouse (235 Church Street)

Family Division Parts S (support) and D (dissolution):	Grossman (P.J.) Connors Price-Boreland Kenefick, Judge Trial Referee
Civil Division, except Part H (summary process):	Abrams (A.J.) Kamp (A.A.J.) (P.J.) Jongbloed Wilson S. Richards
New Haven J.D. Courthouse (235 Church Street) Criminal Division:	Harmon (P.J. for Part A) Alander Vitale B. Fischer, Senior Judge Clifford, Judge Trial Referee
New Haven G.A. 23 (121 Elm Street) Civil Division Part C (G.A. court); Criminal Division:	Calistro (P.J.) Gustafson
Meriden J.D. and G.A. 7 Courthouse (54 West Main Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division: (All contested motor vehicle and criminal infractions and violations from G.A. 7 are handled at 165 Miller Street.)	Schwartz (P.J.) Gould Sizemore O'Keefe, Judge Trial Referee

NEW LONDON JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New London J.D. Courthouse (70 Huntington Street) Civil Division Parts A (adm. appeals), J (jury), H (summary process), C (J.D. court) and S (small claims); Criminal Division: New London G.A. 10 (112 Broad Street) Civil Division Part C (G.A. court); Criminal Division: Norwich J.D. and G.A. 21 Courthouse (1 Courthouse Square) Family Division Parts S (support) and D (dissolution); Civil Division Parts H (summary process) and C (court matters); Criminal Division: (G.A. 21 handles motor vehicle cases for the towns of Bozrah, Colchester, East Lyme, Franklin, Griswold, Groton, Lebanon, Ledyard, Lisbon, Lyme, Montville, New London, North Stonington, Norwich, Old Lyme, Preston, Salem, Sprague, Stonington, Voluntown, and Waterford.)	Calmar (A.J.) (P.J. for Civil Division) Goodrow (A.A.J.) Strackbein (P.J. for Criminal Division) Shluger (P.J. for Family Division) Young Kwak K. Murphy S. Murphy Spallone O'Hanlan Swienton, Senior Judge Devine, Judge Trial Referee Hadden, Judge Trial Referee

STAMFORD-NORWALK JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Stamford J.D. and G.A. 1 Courthouse (123 Hoyt Street) Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process); Criminal Division:	Blawie (A.J.) Heller (A.A.J.) (P.J. for Family Division) White (P.J. for Criminal Division) Genuario (P.J. for Civil Division) Kavanewsky Hudock Randolph Kowalski McLaughlin W. Clark Povodator, Judge Trial Referee
Norwalk G.A. 20 (17 Belden Avenue) Civil Division Parts J (jury), C (G.A. & J.D. court) and S (small claims); Criminal Division; Family Division Part S (support):	Norwalk G.A. 20 matters being heard in Stamford.

TOLLAND JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Tolland J.D. Courthouse (69 Brooklyn Street, Rockville) Family Division Parts S (support) and D (dissolution); Civil Division: Rockville G.A. 19 (20 Park Street) Criminal Division: (G.A. 19 handles motor vehicle cases for the towns of Andover, Bloomfield, Bolton, Columbia, Coventry, East Hartford, East Windsor, Ellington, Enfield, Glastonbury, Hebron, Manchester, Mansfield, Marlborough, Somers, South Windsor, Stafford, Tolland, Union, Vernon and Willington.)	Westbrook (A.J.) (P.J.) (subject to Rockville Courthouse for Juvenile Matters) Macierowski (A.A.J.) Klatt McNamara Gordon M. Murphy Armata Parkinson

WATERBURY JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Waterbury J.D. Courthouse (300 Grand Street) Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process): Waterbury J.D. and G.A. 4 (400 Grand Street) Criminal Division:	Ficeto (A.J.) (P.J. for Family Division) Roraback (A.A.J.) Iannotti (P.J. for Criminal Division) Agati (P.J. for Civil Division) Schuman Bruno Pierson Nieves Papastavros S. Moore, Senior Judge Coleman, Judge Trial Referee

WINDHAM JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Windham J.D. Courthouse (155 Church Street, Putnam) Family Division Parts S (support) and D (dissolution); Civil Division Parts A (adm. appeals), J (jury), C (J.D. court), H (summary process) and S (small claims): Danielson G.A. 11 (120 School Street) Civil Division Part C (G.A. court); Criminal Division:	J. Fischer (A.J.) (P.J.) Auger (A.A.J.) Newson E. Green Chaplin Graziani, Judge Trial Referee Swords, Judge Trial Referee

ASSIGNMENTS

FAMILY DIVISION PART J (JUVENILE) AT FOLLOWING COURTHOUSES FOR JUVENILE MATTERS

Courthouse	Judges
Bridgeport (60 Housatonic Avenue)	Maronich (P.J.) Brillant
Hartford (920 Broad Street)	Dannehy (P.J.) Allard Frazzini, Judge Trial Referee Gilligan, Judge Trial Referee
Middletown (One Court Street)	Bhatt (P.J.)
New Britain (20 Franklin Square)	C. Taylor (P.J.) Huddleston
New Haven (239 Whalley Avenue)	Marcus (P.J.) Conway Kaplan, Judge Trial Referee
Rockville (25 School Street)	Westbrook (P.J.) (subject to Tolland J.D.)
Torrington (50 Field Street)	Torres (P.J.)
Waterbury (7 Kendrick Avenue)	Aaron (P.J.) Grogins Cremins, Judge Trial Referee Turner, Judge Trial Referee
Waterford (978 Hartford Turnpike)	Hoffman (P.J.) Driscoll, Judge Trial Referee
Willimantic (81 Columbia Avenue)	Carbonneau, Senior Judge (P.J.)

ASSIGNMENTS

HOUSING DIVISION PART H

Bridgeport (1061 Main Street) Norwalk (17 Belden Avenue)	Spader (P.J.)
Hartford (80 Washington Street) New Britain (20 Franklin Square)	Baio (P.J.)
Meriden (54 West Main Street)	All Judges assigned to such Courthouse
New Haven (121 Elm Street) Waterbury (300 Grand Street)	Cirello (P.J.)

ADMINISTRATIVE APPEALS UNDER THE UNIFORM ADMINISTRATIVE PROCEDURE ACT AND APPEALS FROM DECISIONS OF COMMISSIONER OF REVENUE SERVICES (C.G.S. § 12-39*l*)

New Britain (20 Franklin Square)	Cordani (P.J.) Cohn, Judge Trial Referee

ASSIGNMENTS

COMPLEX LITIGATION DOCKETS

Hartford (95 Washington Street)	Farley Noble
Stamford (123 Hoyt Street)	Ozalis
Waterbury (400 Grand Street)	Bellis Lager, Judge Trial Referee

LAND USE LITIGATION DOCKET

Hartford J.D. Courthouse (95 Washington Street)	Budzik (P.J.) Berger, Judge Trial Referee

REGIONAL CHILD PROTECTION SESSION

Middletown J.D. Courthouse (One Court Street)	Burgdorff (P.J.) Quinn, Judge Trial Referee

REGIONAL FAMILY TRIAL DOCKET

Middletown J.D. Courthouse (One Court Street)	Moukawsher (P.J.) Adelman, Judge Trial Referee