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CONNECTICUT REPORTS

Vol. 338

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DARIUS ARMADORE
(SC 20248)

McDonald, D'Auria, Kahn, Ecker, Keller and Vertefeuille, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The defendant and a friend, T, had driven to a café, where the victim was fatally shot, and subsequently drove to a nightclub about twelve miles away. Another individual, G,

saw T and a man who matched the defendant's description enter the nightclub about fifteen to twenty minutes after G received a phone call informing him that the victim had been shot. The defendant claimed that he was at the nightclub at the time of the shooting. After oral argument before the Appellate Court but before that court released its decision in the present case, the United States Supreme Court decided *Carpenter* v. *United States* (138 S. Ct. 2206), in which the court held that the fourth amendment requires the government to obtain a warrant supported by probable cause before acquiring historical cell site location information (CSLI), which reveals a cell phone user's past physical movements. The Appellate Court thereafter summarily denied the defendant's motion for permission to file a supplemental brief to raise a new claim, premised on *Carpenter*, challenging the admission of certain CSLI records, which the police had obtained prior to the defendant's arrest. The CSLI records of the defendant's cell phone and the two cell phones T had with him on the night of the shooting were admitted into evidence at trial without objection. Relying on the CSLI records of T's phones, the state's expert testified that T's and the defendant's cell phones were located near the café at about the time of the shooting and near the nightclub shortly thereafter. The Appellate Court upheld the defendant's conviction, and the defendant, on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court improperly had denied his motion for permission to file a supplemental brief. *Held*:

1. The defendant could not prevail on his claim that the Appellate Court improperly denied his motion for permission to file a supplemental brief after oral argument before that court so that he could raise an unpreserved claim premised on the new constitutional rule announced in *Carpenter*, as his claim failed under the fourth prong of *State* v. *Golding* (213 Conn. 233) because the Appellate Court's failure to permit the defendant to file a supplemental brief was harmless beyond a reasonable doubt: generally, an appellate court should grant a request for supplemental briefing when a party asks it to entertain an unpreserved claim premised on a newly announced constitutional rule in all but the clearest of situations in which the claim would fail under one of *Golding*'s four prongs, and principles of fairness and equity required the Appellate Court to exercise its discretion to grant the defendant's motion; nevertheless, the state sustained its burden of demonstrating that any claimed error was harmless, there having been significant evidence presented at trial that placed the defendant at the crime scene at the time of the shooting, including the historical CSLI records from T's two cell phones, which placed T at the café around the time of the shooting, T's testimony that he had the two cell phones throughout the night, admissions by both T and the defendant, to the police and at trial, that they were together that night, and testimony from other witnesses that they had seen a man fitting the defendant's description flee the scene of the shooting and enter a car that matched the appearance of the car T was

driving, and there having been significant evidence linking the defendant to the victim's murder, including DNA and ballistics evidence, and the defendant's statement to his girlfriend that he had shot someone on the night of the victim's murder; moreover, there was no merit to the defendant's claim that this court could not consider the CSLI records of T's cell phones in determining the strength of the state's case, as the defendant lacked standing to challenge the admission of T's CSLI records on the ground that such admission violated T's fourth amendment rights.

2. The trial court properly admitted G's testimony about a phone call that he had received from another individual informing him that the victim had been shot: the Appellate Court incorrectly determined that the defendant had not adequately preserved his claim that G's testimony constituted inadmissible hearsay because, although defense counsel objected when the prosecutor asked G what was said to G during the phone call without clarifying that the ground for the objection was hearsay, the state and the trial court were aware of the basis of the objection, and, thus, any failure by defense counsel to clarify the ground for the objection did not deprive the state and the trial court of fair notice of the defendant's claim; moreover, G's testimony was properly admitted as nonhearsay, as the caller's statements were not offered for their truth but, rather, to show their effect on G, specifically, that the phone call caused G to take certain actions that were relevant to establish the state's time line of events; furthermore, even if G's testimony about the call constituted inadmissible hearsay, its admission was harmless because, even if G had not been permitted to testify about what the caller told him, G's other testimony, to which defense counsel did not object, would have led a jury reasonably to infer that the victim had been shot prior to the defendant's and T's arrival at the nightclub, and because there was other evidence establishing the defendant's guilt, including the CSLI records of T's phones, which, coupled with the defendant's admission that he was with T on the night of the shooting, demonstrated that the defendant was near the café at the time of the shooting.

Argued October 20, 2020—officially released March 23, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London and tried to the jury before *A. Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court,

* March 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

which denied the defendant's motions for permission to file a late motion for rectification and to file a supplemental brief; subsequently, the Appellate Court, *Lavine*, *Sheldon* and *Harper*, *Js.*, affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Emily Graner Sexton, assigned counsel, with whom were *Julia K. Conlin*, assigned counsel, and, on the brief, *Matthew C. Eagan*, assigned counsel, *James P. Sexton*, assigned counsel, *Megan L. Wade*, assigned counsel, and *John R. Weikart*, assigned counsel, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Paul J. Narducci*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, we are again required to examine the effect of the United States Supreme Court's recent decision in *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), on a pending case. In *Carpenter*, the court held that, under the fourth amendment to the United States constitution, the government generally must obtain a warrant supported by probable cause before acquiring historical cell site location information (CSLI), which provides a comprehensive chronicle of a cell phone user's past physical movements.

The defendant, Darius Armadore, appeals from the Appellate Court's judgment affirming his conviction of murder, as either a principal or as an accessory, in violation of General Statutes §§ 53a-8 and 53a-54a (a). Specifically, he claims that the Appellate Court abused its discretion by denying him permission to file a supplemental brief to raise a new claim pursuant to *Carpenter*,

which was released while his appeal was pending before that court. He argues that the rule in *Carpenter* applies retroactively to pending cases, and, thus, his failure to raise this claim before the trial court or in his initial brief to the Appellate Court did not bar review. Additionally, he claims that the Appellate Court incorrectly determined that his hearsay claim regarding the testimony of a key state's witness, Eduardo Guilbert, was unpreserved.

We agree with the defendant that our courts should liberally grant motions seeking to file supplemental briefs to raise claims premised on new constitutional rules announced during the pendency of a case and that the Appellate Court should have granted his motion in the present case. Nevertheless, we conclude that any error was harmless because the defendant's *Carpenter* claim fails under the fourth prong of *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). Additionally, although we agree with the defendant that the Appellate Court incorrectly determined that he did not preserve his hearsay claim regarding Guilbert's testimony, we agree with the state that the trial court properly admitted the testimony as nonhearsay because it was offered to show its effect on the hearer and that, alternatively, any error was harmless. Accordingly, we affirm the Appellate Court's judgment.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. In December, 2006, Gerjuan Rainer Tyus was involved in an ongoing dispute with the victim, Todd Thomas, regarding a necklace that the victim's brother had given to Tyus but wanted returned. Tyus refused to return the necklace unless the victim paid him $10,000.

During the course of this dispute, on December 3, 2006, the victim, who was a passenger in a white Lexus registered to his wife, fired several gunshots with a .38 caliber firearm at Tyus, who was outside his apartment on Willetts Avenue in New London, striking him in the leg and the back. Tyus countered by firing five gunshots with a nine millimeter firearm at the victim. Five nine millimeter cartridge casings were recovered from the scene of the shooting. Later that day, Tyus was treated for his wounds at a hospital. The defendant, a close friend of Tyus, whom he considered to be a brother, later went to the hospital to receive news of Tyus' condition.[1] Although the defendant and Tyus were aware that the victim was the shooter, neither relayed this information to the police.

Following the Willetts Avenue shooting, on December 15, 2006, Tyus rented a silver-colored Chevrolet Impala. It was this vehicle that Tyus and the defendant used to travel to Boston, Massachusetts, at approximately 7 p.m. on December 22, 2006. While in Boston, the defendant and Tyus visited family and then picked up three women they wanted to bring back to Connecticut in the Impala. When one of the women refused to return with them, the defendant and Tyus returned to Connecticut with the other two women.

[1] At trial, Cindalee Torres, the mother of Tyus' son, testified that she also went to the hospital to check on Tyus and that, while there, overheard the defendant state that "we're gonna get them niggas . . . ." She also testified, however, that she never met or saw the defendant prior to that night in the hospital. On appeal to the Appellate Court, the defendant claimed that Torres improperly identified him as the speaker of this overheard statement for the first time in court in violation of *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). The Appellate Court agreed, holding that the identification was improper but that the error was harmless. *State* v. *Armadore*, 186 Conn. App. 140, 156–58, 198 A.3d 586 (2018). The defendant did not seek certification to appeal as to this issue. Thus, for purposes of our review, we do not consider Torres' testimony that she heard the defendant make this statement.

Later that evening, at approximately 11 p.m., the victim arrived at Ernie's Café on Bank Street in New London. Shortly after midnight, while the victim stood outside the front entrance of Ernie's Café smoking a cigarette, he was shot in the head. A light-skinned African American male wearing a hooded sweatshirt was observed fleeing the scene of the crime to a municipal parking lot, where he entered the passenger side of a silver-colored vehicle that had been waiting there with its motor running. The vehicle immediately sped away. The victim was transported to Lawrence + Memorial Hospital in New London, where he was pronounced dead upon arrival.

After the shooting, the defendant and Tyus arrived at Bella Notte, a nightclub in Norwich, approximately twelve and one-half miles from Ernie's Café. At trial, the defendant asserted an alibi defense, testifying that he and Tyus were at Bella Notte at the time the victim was shot. Tracking information contained in records produced by their cell service providers, which were admitted into evidence without objection at trial, established that their three cell phones—Tyus had two cell phones in his possession and the defendant had one—had activated cell towers near New London minutes prior to the shooting. One of Tyus' cell phones activated a cell tower in New London near Ernie's Café approximately eight times in the minutes before and after a 911 call was received reporting the shooting. Additionally, the cell phones activated cell towers north of New London, toward Norwich, from approximately 12:42 to 12:44 a.m. and activated a cell tower farther north near Bella Notte from approximately 1:12 to 1:55 a.m. A few hours later, Tyus dropped the defendant off at the apartment the defendant shared with his then girlfriend, Ritchae Ebrahimi. At trial, Ebrahimi testified that, after the defendant arrived at the apartment, they argued

over his having been with other women that night, and that he told her he had shot someone that night.

In addition to the historical CSLI, Tyus and a man matching the description of the defendant were seen entering Bella Notte by Guilbert while Guilbert was in the nightclub's bar area. Guilbert testified that the two men arrived after he received a phone call informing him that the victim had been shot. Guilbert was not sure of the precise time those events occurred, initially telling the police that it was at about 11 p.m., which would have been before the shooting occurred at Ernie's Café. See part II of this opinion.

Additionally, the police recovered one nine millimeter cartridge casing from the scene of the December 23, 2006 shooting. Ballistics evidence showed that this cartridge casing had been fired from the same firearm as the five nine millimeter cartridge casings that were recovered from the scene of the December 3, 2006 shooting on Willetts Avenue.

In November, 2012, the defendant and Tyus were arrested and charged with murder in violation of § 53a-54a.[2] The state thereafter filed long form informations charging the defendant and Tyus each with murder, both as a principal and as an accessory, in violation of §§ 53a-8 and 53a-54a (a). The state subsequently filed a motion to join the cases for trial, which the trial court granted over the objections of the defendant and Tyus. The defendant and Tyus were tried together before a single jury, which returned guilty verdicts as to both men without specifying whether the verdicts were based on principal or accessorial liability. The court

[2] Both the defendant and Tyus also were charged with conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, but those charges were later dismissed on the ground that they were barred by the statute of limitations.

sentenced the defendant to a term of sixty years of incarceration.

The defendant appealed from his conviction to this court, which transferred the appeal to the Appellate Court. See General Statutes § 51-199 (c); Practice Book § 65-1.[3] Before the Appellate Court, the defendant claimed that "(1) . . . the trial court abused its discretion in granting the state's motion to join his case with the case of his codefendant . . . Tyus; (2) . . . he was deprived of his constitutional right to confrontation when the state's firearms examiner was permitted to testify regarding the findings of another firearms examiner, who was deceased and thus unavailable to testify at trial; (3) . . . he was deprived of a fair trial when he was identified for the first time in court by Cindalee Torres without a prior nonsuggestive identification; and (4) . . . the court abused its discretion by admitting certain hearsay statements into evidence." *State* v. *Armadore*, 186 Conn. App. 140, 142, 198 A.3d 586 (2018). After oral argument before the Appellate Court, the United States Supreme Court released its decision in *Carpenter*.

Approximately six weeks after the release of the *Carpenter* decision but prior to the Appellate Court's release of its decision in this case, the defendant moved in the Appellate Court for permission to file a supplemental brief to raise a new claim, premised on the new rule in *Carpenter*, challenging the admission of his historical CSLI, which was obtained through an ex parte order, along with the related testimony of James J. Wines, the state's expert in historical CSLI analysis. The defendant also moved for permission to file a motion for rectification with the trial court to have the ex parte order marked as a court exhibit because it was not

[3] Tyus has filed a separate appeal, which is pending in this court under Docket No. SC 20462.

introduced or admitted at trial. The Appellate Court summarily denied both motions.

The Appellate Court affirmed the trial court's judgment of conviction,[4] and the defendant sought certification to appeal to this court, which we granted, limited to the following issues: (1) "Did the Appellate Court properly deny the defendant's motion to file a late motion for rectification and the defendant's motion for permission to file a supplemental brief, which would have allowed the defendant to present an issue before the Appellate Court that the defendant claims is controlled by the retroactive application of [*Carpenter*]?" And (2) "Did the Appellate Court properly decline to review the defendant's evidentiary claim on the basis that it was not properly preserved?"[5] *State* v. *Armadore*, 330 Conn. 965, 200 A.3d 188 (2019). Prior to the parties' filing their briefs, this court sua sponte ordered them to address the merits of the defendant's *Carpenter* claim in addition to whether the Appellate Court properly denied the defendant's motion for permission to file a supplemental brief on the *Carpenter* issue. After oral argument before this court, we sua sponte ordered the

[4] The Appellate Court held that (1) the trial court did not abuse its discretion by granting the state's motion to join the defendant's trial with that of Tyus, (2) the defendant's constitutional right to confrontation was not violated when a state firearms examiner testified about the findings and conclusions made by another firearms examiner who was unavailable to testify, (3) although the defendant was improperly identified for the first time in court by Torres as the speaker of a statement she overheard at the hospital where she went to check on Tyus after he had been shot, this error was harmless; see footnote 1 of this opinion; and (4) the defendant's general objection to the alleged hearsay testimony of Guilbert was insufficient to preserve his claim for review. See *State* v. *Armadore*, supra, 186 Conn. App. 145, 151, 156, 158, 160.

[5] We declined to grant the defendant certification to appeal as to whether the trial court violated his right to confrontation by admitting expert testimony from a state firearms examiner; see footnote 4 of this opinion; and whether this court should adopt the doctrine of cumulative error. The defendant did not seek certification to appeal on the issue of whether the trial court improperly granted the state's motion to join his trial with that of Tyus.

parties to file additional supplemental briefs on the issue of whether this court could consider historical CSLI relating to Tyus' two cell phones in assessing harmless error under *Golding*'s fourth prong. We will present additional facts and procedural history as required.

I

The defendant first claims that the Appellate Court improperly denied his motion for permission to file a supplemental brief after oral argument in that court so that he could raise an unpreserved claim premised on the new constitutional rule announced in *Carpenter*. Specifically, he argues that, because the rule announced in *Carpenter* is a new constitutional rule, it applies to all pending cases, regardless of whether the claim was preserved at trial or included in his initial brief on appeal, and, thus, the Appellate Court's failure to review the claim was "a per se abuse of discretion . . . ." The state responds that, although an unpreserved constitutional claim may be reviewed under *Golding*, the defendant still had to comply with the rules governing appellate procedure, regardless of the rules regarding retroactivity, and, thus, he abandoned his *Carpenter* claim when he failed to raise it in his initial brief in the Appellate Court. According to the state, the defendant could raise his abandoned *Carpenter* claim only if he could establish that the new constitutional rule in *Carpenter* overruled clearly established precedent, thereby rendering his procedural default excusable. The state contends that, because case law prior to *Carpenter* did not prohibit the defendant from seeking to suppress his historical CSLI under the fourth amendment, he cannot overcome his procedural default.

Before addressing this claim, we must review the pertinent facts and procedural history. Prior to the defendant's arrest, Detective Franklin S. Jarvis of the

New London Police Department prepared ex parte orders pursuant to General Statutes § 54-47aa (b), which requires only "a reasonable and articulable suspicion that a crime has been or is being committed," to obtain historical CSLI associated with the defendant's cell phone and Tyus' two cell phones, from the day of the murder to the day after the murder. Detective Richard Curcuro of the New London Police Department subsequently received those records. The records were then sent to Wines, an agent with the Federal Bureau of Investigation's cellular analysis survey team, who analyzed the records and prepared a slideshow presentation detailing his analysis. Neither the defendant nor Tyus sought to suppress these records before trial, at which the CSLI, the slideshow, and Wines' expert testimony were admitted without objection.[6]

This evidence showed that all three cell phones activated cell towers in or near New London from between approximately 12:04 and 12:15 a.m., within minutes of when a 911 call was received at 12:09 a.m. reporting the shooting. Most importantly, one of Tyus' cell phones activated a cell tower in New London close to Ernie's Café eight times from approximately 12:04 to 12:14 a.m. Additionally, this evidence showed that the cell phones activated cell towers north of New London from approximately 12:42 to 12:44 a.m. and activated a cell tower

[6] We note that there was an objection to the labeling on the printout of Wines' slideshow presentation that identified the defendant by name in relation to the cell phone numbers from which calls were made and received on the night of the shooting. The trial court sustained the objection, and the state had Wines redact the defendant's name insofar as it concerned to whom the cell phone numbers were registered or by whom they were used. The printout thus showed only which cell phone numbers were activated and where and when they were activated. However, there was other evidence admitted at trial that established that one of these phone numbers was connected to a cell phone registered to the defendant and that the other two phone numbers were connected to cell phones registered to or used by Tyus.

farther north near Bella Notte between approximately 1:12 and 1:55 a.m.

The jury found the defendant guilty on November 19, 2015. The trial court sentenced him on January 15, 2016, after denying his postverdict motions for acquittal and for a new trial, but granted his request for a fee waiver and appointment of appellate counsel. The defendant appealed on September 2, 2016, filed his Appellate Court reply brief on March 7, 2018, and that court heard oral argument on May 15, 2018.

The defendant did not raise a claim in his briefs to the Appellate Court challenging the admission of his historical CSLI. The United States Supreme Court released its decision in *Carpenter* on June 22, 2018, after oral argument in the Appellate Court in the present case. On August 3, 2018, the defendant moved for permission to file a supplemental brief in the Appellate Court to raise a new claim premised on the new constitutional rule in *Carpenter*. The Appellate Court summarily denied the motion on August 27, 2018, and, on November 13, 2018, released its decision, affirming the defendant's conviction.

In addressing this claim, it is necessary for us to clarify the standard governing our appellate courts' exercise of discretion under these circumstances. We determine that the policies underlying the requirement that new constitutional rules apply retroactively to pending cases weigh in favor of our courts' liberally permitting supplemental briefing to raise unpreserved claims premised on those new constitutional rules when they are announced during the pendency of a case. Thus, as a general rule, there is a presumption in favor of granting such motions. Only if it is clear that the claim would fail under one of the four prongs of *Golding*, thereby eliminating the need for briefing, should an appellate court deny a request for supplemental briefing

under those circumstances. Nevertheless, in the present case, although we conclude that the Appellate Court abused its discretion by denying the defendant's motion for permission to file a supplemental brief, we determine that this error was harmless because the defendant's *Carpenter* claim fails under the fourth prong of *Golding*.

A

Our rules of practice do not specifically discuss motions for permission to file a supplemental brief. Pursuant to Practice Book § 60-2, however, an appellate court may, "on its own motion or upon motion of any party . . . (5) order that a party for good cause shown may file a late appeal, petition for certification, *brief or any other document* unless the court lacks jurisdiction to allow the late filing . . . ." (Emphasis added.) Additionally, Practice Book § 60-3 provides that, "[i]n the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules on motion of a party or on its own motion and may order proceedings in accordance with its direction."

We previously have not articulated a standard of review for an appellate court's decision to grant or deny a motion for permission to file a supplemental brief. This gap in our law is hardly surprising. Although it would be an overstatement to suggest that supplemental briefing is routinely granted or ordered in appellate cases, such briefs are filed with some regularity, both before and after oral argument and upon both the court's order or a party's motion. See, e.g., *State* v. *White*, 334 Conn. 742, 769 and n.14, 224 A.3d 855 (2020) (granting parties permission to file supplemental briefs to address effect of decision released after initial briefs filed); *State* v. *McCleese*, 333 Conn. 378, 411 n.15, 215

A.3d 1154 (2019) (granting defendant's request to file supplemental brief to address effect of decision released after defendant filed initial brief); *Petrucelli* v. *Meriden*, 198 Conn. App. 838, 846 n.7, 234 A.3d 981 (2020) (court sua sponte ordered supplemental briefing after oral argument); *Nonhuman Rights Project, Inc.* v. *R.W. Commerford & Sons, Inc.*, 197 Conn. App. 353, 359, 231 A.3d 1171 (granting petitioner's request for supplemental briefing), cert. denied, 335 Conn. 929, 235 A.3d 525 (2020). Despite this regularity, our research does not reveal any cases in which a party has challenged an appellate court's decision not to permit supplemental briefing.

We have recognized repeatedly that our rules of practice vest broad authority in the Appellate Court for the management of its docket. See, e.g., *Novak* v. *Levin*, 287 Conn. 71, 80, 951 A.2d 514 (2008). Additionally, this court has applied the abuse of discretion standard of review to the Appellate Court's rulings under Practice Book § 60-2. See id. (applying abuse of discretion standard in reviewing decision to grant late motion for reconsideration, which was included within scope of "any other document" under Practice Book (2006) § 60-2 (6) (now § 60-2 (5)); *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003) (Appellate Court has discretion to determine whether party has established good cause to file late appeal under Practice Book (2003) § 60-2 (6) (now § 60-2 (5)); *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 59, 61, 727 A.2d 213 (1999) (Appellate Court's decision to deny motion for permission to file late appeal under Practice Book (1999) § 60-2 (6) (now § 60-2 (5)) subject to abuse of discretion standard of review). A supplemental brief is similarly a document filed out of time, subject to the good cause standard, and, therefore, a ruling on its filing is appropriately reviewed for abuse of discretion.

To determine whether the Appellate Court appropriately exercised this discretion in the present case, we must first review the reason that court was asked to grant supplemental briefing—the United States Supreme Court's decision in *Carpenter*—along with our recent decision in *State* v. *Brown*, 331 Conn. 258, 261–62, 202 A.3d 1003 (2019), in which we applied *Carpenter*. "In *Carpenter*, the court considered whether the state conducts a search under the [f]ourth [a]mendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements. . . . The court answered that question in the affirmative and held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. . . . Accordingly, the state must generally obtain a warrant supported by probable cause before acquiring such records." (Citations omitted; internal quotation marks omitted.) Id., 272.

Prior to the release of the decision in *Carpenter*, the defendant in *Brown* was arrested and charged with numerous offenses, including burglary, after the police obtained his historical and prospective CSLI pursuant to multiple ex parte orders. Id., 262, 268–69. Prior to trial, the defendant filed motions to suppress the CSLI on the ground that the ex parte orders violated both § 54-47aa and his rights under the fourth amendment. Id., 269. Reaching only the statutory grounds for the motions, the trial court granted the defendant's motions, holding that the ex parte orders violated § 54-47aa and that suppression was the proper remedy. Id. "Following the granting of the defendant's motions to suppress, the state entered nolles prosequi on all of the charges against the defendant in the pending cases. In response, the defendant made an oral motion to dismiss all charges, which the trial court granted." Id., 270–71. The state then appealed to this court. "In their original briefs

and arguments to this court, the parties focused primarily on whether the trial court properly granted the defendant's motions on the basis of its conclusion that the state obtained the prospective and historical CSLI in violation of § 54-47aa, and that suppression of the records was the appropriate remedy." Id., 263. "Following oral argument, however, this court stayed the appeal pending the decision of the United States Supreme Court in *Carpenter* and ordered the parties to submit supplemental briefs concerning the relevance of that decision to [the] appeal." Id.

After the decision in *Carpenter* was released, this court released its decision in *Brown*, in which we applied the new rule in *Carpenter* and concluded that the CSLI had been obtained illegally. Id., 271. Specifically, as to the ex parte order authorizing the disclosure of approximately three months of the defendant's historical CSLI,[7] we concluded that the order violated his fourth amendment rights because the records were obtained without a warrant. Id., 273. Next, we concluded that the trial court properly determined that suppression was the appropriate remedy. Id., 277.

Although, in *Brown*, this court applied the new rule from *Carpenter* retroactively to a pending case, we did not need to address any preservation issue because the defendant had moved to suppress the CSLI prior to trial. Additionally, we did not address the effect, if any, of a defendant's failure to raise a *Carpenter* claim in his initial brief on appeal because the defendant in *Brown* had prevailed in the trial court on the statutory claim and argued in his initial brief, as an alternative ground for affirming the trial court's judgment, that the

[7] As to the ex parte orders concerning the defendant's prospective CSLI, we held that "[t]he state's concession that the prospective orders were issued in violation of § 54-47aa resolves that question for the two prospective orders." *State* v. *Brown*, supra, 331 Conn. 271.

CSLI was obtained without a warrant in violation of the fourth amendment.

Yet, although the new constitutional rule in *Carpenter* was not discussed in detail in *Brown*, it is clear that we applied the rule retroactively to that pending case on appeal. In *Griffith* v. *Kentucky*, 479 U.S. 314, 322–23, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the United States Supreme Court had explained that, "at a minimum, all defendants whose cases [are] still pending on direct appeal at the time of [a law changing] decision should be entitled to invoke the new rule. . . . [F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First . . . after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. . . . If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . Second, selective application of new rules violates the principle of treating similarly situated defendants the same. . . . [T]he problem with not applying new rules to cases pending on direct review is the actual inequity that results when the [c]ourt chooses which of many similarly situated defendants should be the chance beneficiary of a new rule." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id.

This court repeatedly has recognized and applied the *Griffith* rule regarding the retroactive application of new constitutional rules to pending cases. See, e.g., *State* v. *Dickson*, 322 Conn. 410, 449–51, 141 A.3d 810 (2016) (applying new rule regarding first time, in-court identifications to pending cases under *Griffith*), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); *State* v. *Sanseverino*, 287 Conn. 608, 620 n.11,

949 A.2d 1156 (2008) (applying new rule in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), to pending cases), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), and superseded in part after reconsideration, 291 Conn. 574, 969 A.2d 710 (2009); *State* v. *Coleman*, 38 Conn. App. 531, 536, 662 A.2d 150 ("[The] Supreme Court announced a new rule under our state constitution when it declared that the [balancing test enunciated in *State* v. *Asherman*, 193 Conn. 695, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), which requires the weighing of the reasons for the unavailability of evidence against the degree of prejudice to the defendant caused by that unavailability] must be used in cases involving a claim of violation of due process because of the loss or destruction of physical evidence. Because direct review is pending as to the defendant [under *Griffith*], it is mandated that the new rule be applied in this case."), cert. denied, 235 Conn. 906, 665 A.2d 903 (1995). In these cases, however, there was no discussion of how the retroactivity rule in *Griffith* interacted with preservation and procedural requirements, which were not at issue in these cases. Rather, in these cases, the court merely had to apply the new constitutional rule to a preexisting, properly raised claim.

Additionally, when a new constitutional rule has been announced after the parties have filed their briefs on appeal, consistent with the principles underlying the *Griffith* retroactivity rule, this court has granted parties' motions for permission to file a supplemental brief to analyze the new rule at issue. See *State* v. *Ryerson*, 201 Conn. 333, 337, 339, 514 A.2d 337 (1986). In fact, our Appellate Court has recognized that supplemental briefing is most common and appropriate in this circumstance: "Perhaps most frequently, supplemental briefing is ordered when a decision in another case or a

change in law intervenes between the time of initial briefing and [an] appellate court's decision." *Gosselin* v. *Gosselin*, 110 Conn. App. 142, 153 n.4, 955 A.2d 60 (2008). In these cases, however, the litigant preserved the issue at trial and/or raised it in his initial brief on appeal; thus, the supplemental briefing on the new constitutional rule related back to a preexisting claim. See *State* v. *Ryerson*, supra, 337.

The application of the *Griffith* retroactivity rule is more complicated when the claim premised on the new rule is unpreserved. This court and the Appellate Court, both before and after *Griffith*, have allowed defendants to raise claims on appeal that were *unpreserved* at trial but were premised on a new constitutional rule that applied retroactively to the pending case.[8] Prior to 1989,

[8] We note that there is some debate among courts in some jurisdictions regarding whether the retroactivity rule in *Griffith* is meant to trump state appellate procedural rules. Some courts have held that this rule does not trump procedural rules, and, thus, a defendant may not raise a claim premised on a new constitutional rule—even if his case was pending at the time the rule was announced—if he failed to raise the claim before the trial court or in his initial appeal. See *United States* v. *McCrimmon*, 443 F.3d 454, 461–63 (5th Cir.) (defendant failed to raise claim on direct appeal), cert. denied, 547 U.S. 1120, 126 S. Ct. 1931, 164 L. Ed. 2d 679 (2006); see also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc) (request for rehearing en banc was denied because defendant failed to comply with rule requiring that all issues must be raised in initial appellate brief).

Other courts have permitted review under the federal plain error doctrine embodied in Fed. R. Crim. P. 52 (b) or rejected arguments that a defendant " 'waived' a claim based on a then-recent Supreme Court decision by failing to object at trial or advance the claim in his initial brief." *United States* v. *Levy*, supra, 1342 (Tjoflat, J., dissenting from the denial of rehearing en banc); id., 1342–43 (Tjoflat, J., dissenting from the denial of rehearing en banc) (discussing cases in which claims were considered under plain error standard); see also *United States* v. *Pree*, 408 F.3d 855, 874 (7th Cir. 2005) (claim premised on new rule announced after defendant filed original briefs on appeal reviewed for plain error despite defendant's having failed to raise claim at trial or in original appellate briefs); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001) (plain error review afforded claim raised pursuant to new rule announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when claim was first made in supplemental brief after defendant failed to object at sentencing or to raise issue in initial

we recognized as an exception to our preservation requirement "two situations that may constitute 'exceptional circumstances' such that newly raised claims can and will be considered by this court. The first is . . . where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal. . . . The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." (Citation omitted.) *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973); see *State* v. *Vars*, 154 Conn. 255, 269–72, 224 A.2d 744 (1966) (holding that new constitutional claims need not be preserved at trial to be raised on appeal but not addressing whether such claims must be raised in initial brief on appeal).

In 1989, in *State* v. *Golding*, supra, 213 Conn. 239–40, "we reformulated the guidelines for appellate review of unpreserved constitutional claims articulated in [*Evans*]," adopting the now familiar four part *Golding* standard. *State* v. *Ortiz*, 217 Conn. 648, 659, 588 A.2d

appellate brief); *United States* v. *Cernobyl*, 255 F.3d 1215, 1216, 1218 (10th Cir. 2001) (same); cf. *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (claim failed to meet requirements for review of plain error).

Thus, courts in some jurisdictions have held that a defendant's failure to preserve a *Carpenter* claim at trial prevents review of that claim, despite the fact that the new rule was not announced until after the defendant's trial but while the case remained pending. See *State* v. *Lewis*, Docket Nos. A-2411-15T3, A-2550-15T1 and A-2551-15T3, 2019 WL 149907, *6 (N.J. App. Div. January 7, 2019) (declining to review unpreserved *Carpenter* claim even though appeal was pending when *Carpenter* was released), cert. denied, 238 N.J. 432, 211 A.3d 723 (2019), and cert. denied, 238 N.J. 433, 211 A.3d 724 (2019), and cert. denied, 238 N.J. 437, 211 A.3d 726 (2019); *People* v. *Crum*, 184 App. Div. 3d 454, 455, 126 N.Y.S.3d 7 (holding that failure to preserve *Carpenter* claim at trial precluded appellate review even though *Carpenter* was decided after defendant's conviction), appeal denied, 35 N.Y.3d 1065, 152 N.E.3d 1206, 129 N.Y.S.3d 404 (2020).

In light of this court's *Golding* jurisprudence, which permits review of unpreserved constitutional claims, we need not join the fray to determine whether *Griffith* was intended to trump state procedural rules.

127 (1991). Under *Golding*, a party's failure to preserve a constitutional claim before the trial court does not prevent review as long as the record is adequate for review and the claim is not waived.[9] See *State* v. *Fabricatore*, 281 Conn. 469, 482, 915 A.2d 872 (2007) (waived constitutional claims are not reviewable under third prong of *Golding*). Nevertheless, the state argues that the defendant is not entitled to review of his unpreserved *Carpenter* claim unless it was unforeseeable at the time of trial.[10] The state's argument presumes that the first exceptional circumstance articulated in *Evans* remains the standard that is applicable when a defendant seeks to raise an unpreserved constitutional claim premised on a new constitutional rule. This is incorrect.

It is true that, in a footnote in *Golding*, this court explained that, only the second, not the first, excep-

[9] The state does not argue that the defendant waived his unpreserved *Carpenter* claim under *Golding*'s third prong. See, e.g., *State* v. *Foster*, 293 Conn. 327, 337–38, 977 A.2d 199 (2009) ("For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel [such as consenting to or expressing satisfaction with the ruling at issue]." (Internal quotation marks omitted.)).

[10] As part of this argument, the state contends that, because the defendant failed to raise a *Carpenter* claim in his initial appeal, the claim is abandoned and that, under our procedural default rule, he has no right to review unless he establishes that prior law made the claim unavailable to him. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 71, 136 A.3d 596 (2016) (discussing procedural default standard applied in habeas corpus cases); see also *United States* v. *David*, 83 F.3d 638, 644–45 (4th Cir. 1996) (as exception to procedural default rule, defendant may raise unpreserved claim based on new constitutional rule if claim would have been implausible before new rule).

The state appears to conflate our procedural default rule and the first exceptional circumstance articulated under *Evans*. To the extent that the state conflates these doctrines, as we explain in this opinion, the *Golding* standard fully replaced the *Evans* standard, and, thus, to be entitled to *Golding* review, the defendant is not required to establish that his unpreserved constitutional claim was not readily foreseeable. To the extent that the state attempts to apply the procedural default rule to the circumstances of this case, we note that this court normally applies the procedural default rule on collateral review. We have been unable to find any cases in which we have applied this rule on direct review, and, thus, we decline to do so now.

tional circumstance stated in *Evans* was at issue in that case. See *State* v. *Golding*, supra, 213 Conn. 239 n.8. We did not indicate, however, that the new standard applied *only* to the second exceptional circumstance but, instead, stated that we were articulating "guidelines designed to facilitate a less burdensome, more uniform application of the present *Evans* standard in future cases involving alleged constitutional violations that are raised for the first time on appeal." Id., 239. We made the *Golding* standard applicable to *all* future cases involving alleged constitutional violations, not just to future cases raising constitutional violations pursuant to the second exceptional circumstance of *Evans*. Thus, the standard articulated in *Golding* fully replaced the exceptional circumstances standard articulated in *Evans*.

We recognize, however, that there has been apparent confusion over whether the *Golding* standard applies only to the second exceptional circumstance articulated in *Evans* and, thus, whether the *Evans* standard remains for unpreserved constitutional claims premised on new constitutional rules announced during the pendency of a case. See *State* v. *Shinn*, 47 Conn. App. 401, 408–409, 704 A.2d 816 (1997) (although defendant asserted that unpreserved claim, which was based on new rule announced while case was pending, was reviewable under both *Golding* and *Evans* standards, court reviewed claim under *Golding* without addressing *Evans*), cert. denied, 244 Conn. 913, 713 A.2d 832 (1998), and cert. denied, 244 Conn. 914, 713 A.2d 833 (1998); id., 419 (*Foti*, *J.*, dissenting) (stating that defendant argued that his claim satisfied first exceptional circumstance in *Evans*); see also *State* v. *Correa*, 185 Conn. App. 308, 322 and 322–23 n.10, 197 A.3d 393 (2018) (holding that unpreserved claim based on new rule announced in *State* v. *Kono*, 324 Conn. 80, 152 A.3d 1 (2016), was reviewable under first two prongs of *Golding* but failed

to satisfy third prong, and that claim would fail for same reasons under *Evans* exception for new constitutional rules that were not readily foreseeable), cert. granted, 330 Conn. 959, 199 A.3d 19 (2019); cf. *State* v. *Adams*, 139 Conn. App. 540, 545–46, 56 A.3d 747 (2012) ("there is no basis in our case law for the proposition that, following *Golding*, *Evans* provides an independent or distinct avenue for review for unpreserved claims of error"), cert. denied, 308 Conn. 928, 64 A.3d 121 (2013); *State* v. *Clark*, 48 Conn. App. 812, 827 n.13, 713 A.2d 834 ("[b]ecause *Golding* encompasses the exceptional circumstances of *Evans*, it is not necessary for us to review the defendant's claims under *Evans*"), cert. denied, 245 Conn. 921, 717 A.2d 238 (1998). To the extent that *Golding* leaves any doubt, we clarify that the *Golding* standard fully replaced the *Evans* standard. This is the only rational reading of *Golding* for three reasons.

First, as explained previously, the plain language of our opinion in *Golding* makes clear that this court intended to replace completely the *Evans* standard with a more uniform standard that would apply to *all* unpreserved claims of constitutional violations. Second, replacing the *Evans* standard with the *Golding* standard is in conformance with the policies underlying the retroactivity rule in *Griffith*. The *Griffith* rule would be rendered practically meaningless if it applied only when a claim premised on the new rule had been preserved at trial, a challenging—albeit not impossible—task when the new constitutional rule did not exist. Third, under the *Golding* standard, unpreserved constitutional claims premised on settled law—which are clearly foreseeable—are granted review as long as the record is adequate. It would be illogical to afford review to those claims, but not to unpreserved constitutional claims premised on new constitutional rules, regardless of whether the new rule was foreseeable.

This reading of *Golding* is consistent with this court's and the Appellate Court's application of *Golding* under these circumstances. Since *Golding*, when a new constitutional rule has been announced after a defendant's trial, but while his case remains pending, the Appellate Court has allowed the defendant to raise an unpreserved claim that was premised on the new rule. See *State* v. *Correa*, supra, 185 Conn. App. 322–23 and n.10 (holding that unpreserved claim based on new rule in *State* v. *Kono*, supra, 324 Conn. 80, was reviewable under first two prongs of *Golding* but failed under third prong); *State* v. *William L.*, 126 Conn. App. 472, 480, 11 A.3d 1132 ("new constitutional claims are reviewable under [*Golding*]"), cert. denied, 300 Conn. 926, 15 A.3d 628 (2011); *State* v. *Shinn*, supra, 47 Conn. App. 408–409 (unpreserved claim based on new rule announced while case was pending was reviewable under *Golding*).[11]

We note, however, that, in cases in which an appellate court has reviewed under *Golding* an unpreserved claim

[11] Although none of these cases explicitly addresses whether the new rule at issue had to be "not readily foreseeable" to entitle a litigant to review under *Golding*, two of these cases involved unpreserved claims that were at least arguably foreseeable. See *State* v. *Correa*, supra, 185 Conn. App. 322–23 n.10 (unpreserved claim based on recent rule announced in *State* v. *Kono*, supra, 324 Conn. 93, which did not reverse any established precedent but, rather, followed existing case law from United States Court of Appeals for Second Circuit); *State* v. *Shinn*, supra, 47 Conn. App. 408–409 (affording *Golding* review to unpreserved claim, which was based on new rule that arguably was not unforeseeable or that applied established rule to new set of facts); *State* v. *Shinn*, supra, 419–20 (*Foti*, *J.*, dissenting) (concluding that, contrary to defendant's claim, new constitutional right was not created while his case was pending and that right that defendant claimed was violated was readily foreseeable to him).

We note that, although this court granted certification to appeal in *Correa* on the issue of whether, under *Kono*, article first, § 7, of the Connecticut constitution prohibits the police from conducting a warrantless canine sniff of the exterior door to a motel room for the purpose of detecting the presence of illegal drugs inside the room; see *State* v. *Correa*, 330 Conn. 959, 959–60, 199 A.3d 19 (2019); no party challenges the applicability of *Golding* to the unpreserved claim in *Correa*.

premised on a new constitutional rule, the defendant raised the issue in the initial brief on appeal, which the defendant did not do here. See *State* v. *William L.*, supra, 126 Conn. App. 480; cf. *State* v. *Vars*, supra, 154 Conn. 269–72. The state concedes that, if the defendant had done so, he would have been entitled to review under *Golding*, as long as the record was adequate.

Less clear is how the rule in *Griffith* interacts with our rules of appellate procedure that deem a claim abandoned if it is not raised in a party's initial brief on appeal. See *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014) ("to receive review, a claim must be raised and briefed adequately in a party's principal brief, and . . . the failure to do so constitutes the abandonment of the claim"); *State* v. *Thompson*, 98 Conn. App. 245, 248, 907 A.2d 1257 ("[o]ur practice requires an appellant to raise claims of error in his original brief" (internal quotation marks omitted)), cert. denied, 280 Conn. 946, 912 A.2d 482 (2006). A claim otherwise reviewable under *Golding* may be abandoned if it is improperly briefed. Although, in *Evans*, this court stated that our procedural rules "must yield to the authority" of new constitutional rules if, "at the time of trial, [the claim] appeared to lack semblance of merit because it was clearly contrary to settled state law," thereby excusing any noncompliance with procedural rules; *State* v. *Evans*, supra, 165 Conn. 67–68; it is not clear whether an unpreserved claim premised on a new constitutional rule that arguably was foreseeable must satisfy our appellate procedural rules.

Although, generally, we are not bound to review claims that were not raised in a party's initial brief on appeal, "[w]e have never held . . . that we are precluded from doing so." *State* v. *Joyce*, 229 Conn. 10, 17, 639 A.2d 1007 (1994). Rather, appellate courts have discretion to consider a claim that was not raised in a party's initial brief, as long as "concerns regarding unfair surprise and inadequate argumentation can be

alleviated by an order requiring the parties to file supplemental briefs." *State* v. *Elson*, supra, 311 Conn. 766. This is consistent with the discretion our appellate courts have to suspend appellate procedural rules for good cause and to permit supplemental briefing of a claim that was not raised in the initial brief on appeal. See Practice Book §§ 60-2 and 60-3. Thus, both this court and the Appellate Court have exercised this discretion to permit supplemental briefing of a claim that was not raised initially on appeal when that claim was premised on a new constitutional rule announced during the pendency of the appeal. See *State* v. *Hampton*, 293 Conn. 435, 457–58, 988 A.2d 167 (2009) (permitting defendant to file supplemental brief raising new claim in light of new constitutional rule announced in *Salamon*, which was released after defendant filed initial brief on appeal); *State* v. *Sanders*, 54 Conn. App. 732, 743, 738 A.2d 674 (permitting defendant to file supplemental brief raising unpreserved claim in light of new constitutional rule announced in *State* v. *Schiappa*, 248 Conn. 132, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999), which was released after initial briefing in *Sanders*), cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999)). Such an exercise of discretion is reasonable in light of the policies underlying *Griffith*'s retroactivity rule. Specifically, as explained previously, under *Griffith*, applying new constitutional rules to pending cases promotes both judicial integrity and equity. See *Griffith* v. *Kentucky*, supra, 479 U.S. 322–23. Not to do so may violate "basic norms of constitutional adjudication."[12] Id., 322. Because these policies require

[12] Additionally, as noted previously, the retroactivity rule in *Griffith* ensures that similarly situated defendants are treated equally. *Griffith* v. *Kentucky*, supra, 479 U.S. 323. This principle is particularly important in the present case, as Tyus, likewise, has an appeal pending before this court under Docket No. SC 20462, in which this court granted certification to appeal regarding the merits of his *Carpenter* claim; see *State* v. *Tyus*, 335 Conn. 907, 227 A.3d 77 (2020); although he, too, raised this claim after oral argument in the Appellate Court in a motion for permission to file a supplemental brief, which was denied.

retroactive application of new constitutional rules, a newly announced constitutional rule provides good cause for a party to seek permission to file a supplemental brief raising a claim premised on that new constitutional rule.

Thus, in the present case, not only did the Appellate Court have discretion to grant the defendant's motion for permission to file a supplemental brief,[13] but principles of fairness weighed heavily in favor of granting the motion, as it was premised on a new constitutional rule announced during the pendency of the appeal. In such cases, it is difficult to imagine a situation in which supplemental briefing should not be granted.

Nevertheless, even in cases in which a court has allowed supplemental briefing to raise a claim that was based on a new constitutional rule, the defendant must establish that the unpreserved claim is entitled to review under *Golding*'s first two prongs and merits relief under *Golding*'s second two prongs. See *State* v. *Sanders*, supra, 54 Conn. App. 743 n.9, 743–44 (supplemental briefing was permitted for purpose of raising unpreserved claim premised on new constitutional rule, and claim was reviewable under *Golding*'s first two prongs but failed under *Golding*'s third prong); see also *State* v. *Davis*, 269 So. 3d 1123, 1134–35 (La. App.) (holding that, even if unpreserved claim premised on new constitutional rule in *Carpenter* was not waived and was reviewable, claim failed, as any error was harmless), cert. denied, 282 So. 3d 229 (La. 2019); *People* v. *Crum*, 184 App. Div. 3d 454, 455, 126 N.Y.S.3d 7 (holding that *Carpenter* claim was not preserved and was, thus,

[13] The defendant also argues that the Appellate Court abused its discretion by denying his motion to supplement the record. Because the defendant's claim would fail under the fourth prong of *Golding* even if we were to assume that the record was adequate for review, we hold that, to the extent that the Appellate Court abused its discretion by denying the defendant's request to supplement the record, the error was harmless.

unreviewable but, alternatively, holding that, "regardless of the admissibility of the [CSLI], there was overwhelming evidence, including [the] defendant's confession, as well as videotapes that independently established his guilt"), appeal denied, 35 N.Y.3d 1065, 152 N.E.3d 1206, 129 N.Y.S.3d 404 (2020). As a result, even if supplemental briefing is granted, the defendant's claim ultimately may be unreviewable or fail on the merits.

Because a defendant raising an unpreserved constitutional claim premised on a new constitutional rule must satisfy all four prongs of *Golding*, in limited circumstances, an appellate court may consider a defendant's clear inability to satisfy one of these prongs in determining whether it should exercise its discretion to permit supplemental briefing to raise this claim. See *State* v. *Watson*, 47 Conn. App. 771, 772, 706 A.2d 1368 (1998) (defendant denied permission to file supplemental brief to raise unpreserved claim premised on new federal interpretation of jury instruction language because, even if claim were allowed, it clearly would fail on merits, as it was settled law that state law controlled defendant's claim). We presume, however, that such cases are rare, as a determination of whether a claim satisfies the four prongs of *Golding* usually requires considerable reference to the record and relevant case law, thereby necessitating briefing.

Therefore, as a general rule, an appellate court ought to grant a request for supplemental briefing when a party asks it to entertain an unpreserved claim premised on a newly announced constitutional rule. The briefing should address both the merits of the new constitutional rule and whether it applies to the defendant, as well as whether the claim fails under one of the four prongs of *Golding*. We imagine that briefing would be appropriate in all but the clearest of situations in which the

claim would fail under one of *Golding*'s four prongs. See id.

In the present case, because the Appellate Court summarily denied the defendant's motion for permission to file a supplemental brief, we do not know whether it exercised its discretion on the basis of its belief that the defendant's *Carpenter* claim clearly would fail under *Golding*. This case does not clearly fall within the limited category of cases in which the new rule clearly does not apply because it would fail under one of *Golding*'s four prongs. It is not the kind of case that does not require briefing to flesh out the record and unresolved legal issues in light of this new constitutional rule. This is made clear by the fact that this court had to request supplemental briefing regarding the fourth prong of *Golding* after oral argument. Additionally, there is the unresolved legal issue of whether *Carpenter* applies when the CSLI covers a period of less than seven days, which could apply to both the merits of the claim and the third prong of *Golding*. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 n.3; id., 2224, 2233 (Kennedy, J., dissenting).

Thus, we conclude that principles of fairness and equity required the Appellate Court to exercise its discretion to grant the defendant's motion for permission to file a supplemental brief. Nevertheless, we conclude that the Appellate Court's erroneous denial of the defendant's motion was harmless, because, even if we assume, without deciding, that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding*, it fails under the fourth prong.

B

A defendant may prevail on an unpreserved claim under *Golding* when "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fun-

damental 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." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781. "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

Even if we assume that the defendant's *Carpenter* claim is reviewable under the first two prongs of *Golding* and that a constitutional violation exists that deprived him of a fair trial under the third prong, we nevertheless conclude that the state has sustained its burden of demonstrating that any claimed error was harmless beyond a reasonable doubt. "It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis." *State* v. *Esarey*, 308 Conn. 819, 832, 67 A.3d 1001 (2013). Whether any error "is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless."

(Internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 993 (2008).

Both to determine whether the defendant's historical CSLI was cumulative and to evaluate the strength of the state's case, we must examine the other evidence admitted at trial. The defendant, however, argues that we cannot consider certain admitted evidence in undertaking this analysis, specifically, Tyus' historical CSLI, the admission of which, he claims, violated Tyus' fourth amendment rights. When codefendants are tried jointly,[14] the defendant contends, and there is harm to one codefendant, the court also may consider the effect of that harm on the other codefendant.[15]

1

The defendant's argument is premised on an alleged violation of Tyus' fourth amendment rights. A defendant

[14] We note that, in his petition for certification to appeal, the defendant did not seek to challenge the trial court's granting of the state's motion to join his trial with that of Tyus.

[15] In his supplemental brief concerning whether this court may consider Tyus' historical CSLI in determining harm under *Golding*'s fourth prong, the defendant, for the first time, raises a claim that this court, in determining harm, also cannot consider Ebrahimi's testimony that, on the night of the shooting, the defendant told her that he had shot someone because Ebrahimi's testimony constituted a fruit of the poisonous tree.

Specifically, the defendant contends that Ebrahimi made this statement only years later, after Detective Curcuro showed her his case file, which would have included the defendant's historical CSLI, thereby reminding her that the defendant had been with other women that night and giving her motive to fabricate her testimony. The state has moved to strike this portion of the supplemental brief, arguing that it went beyond the scope of the question on which this court requested supplemental briefs from the parties. We agree with the state that this claim is beyond the scope of any of the questions we certified for review or our request for supplemental briefs, and we decline to address it.

Nevertheless, we note that the connection between the defendant's historical CSLI and Ebrahimi's statement inculpating the defendant is so attenuated as to dissipate any taint. Ebrahimi already knew that the defendant had been with other women that night; it was not news to her. And, at the time of her statement, Detective Curcuro's file had significant other evidence showing that the defendant was with other women that night. See *State* v.

must have a reasonable expectation of privacy in the property that was unlawfully searched to have standing to challenge the admission of evidence obtained during that search. See, e.g., *State* v. *Davis*, 283 Conn. 280, 323–24, 929 A.2d 278 (2007). Both this court and the United States Supreme Court repeatedly have explained that, "[t]he rights guaranteed by the fourth amendment are personal rights, and, therefore, only one whose own protection was infringed by a search and seizure may enforce those rights." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018); accord *Rawlings* v. *Kentucky*, 448 U.S. 98, 106, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Because a party must have a reasonable expectation of privacy in the property searched, a party generally lacks standing to challenge an illegal search of a third party's property. See, e.g., *State* v. *Houghtaling*, supra, 352 (defendant lacked reasonable expectation of privacy in property he owned but leased to third party); *State* v. *Iban C.*, 275 Conn. 624, 665, 881 A.2d 1005 (2005) ("a party is precluded from asserting the constitutional rights of another" (internal quotation marks omitted));[16] *State* v. *Castle*, 161 Conn. 570, 572, 287 A.2d 744 (1971) ("the defendant had no standing to object to the use of the evidence taken from his brother's room since the defendant had no possessory interest in either the room searched or the evidence seized and was not present when his brother's room was searched and the seizure [was] made"); see also *State* v. *Davis*, supra, 321 (rejecting automatic standing doctrine under state constitution, in part because defendant may not raise

Spencer, 268 Conn. 575, 599–600, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004).

[16] We note that there are certain limited exceptions to this rule, such as third-party standing, but that none has been asserted in the present case. See *State* v. *Bradley*, 195 Conn. App. 36, 51, 223 A.3d 62 (2019), cert. granted, 334 Conn. 925, 223 A.3d 379 (2020).

constitutional right of third party). "[S]uppression of the product of a [f]ourth [a]mendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." (Internal quotation marks omitted.) *United States* v. *Padilla*, 508 U.S. 77, 81–82, 113 S. Ct. 1936, 123 L. Ed. 2d 635 (1993).

Although neither this court nor our Appellate Court has had the opportunity to apply these principles in relation to the new rule in *Carpenter*, federal courts consistently have held that a defendant may not raise a *Carpenter* claim concerning the historical CSLI of a third party unless he can establish his own reasonable expectation of privacy in the cell phone. See *United States* v. *Beverly*, 943 F.3d 225, 238 (5th Cir. 2019) ("[The defendant] lacks standing to assert that the search of [the alleged coconspirator's] phone records was unconstitutional. [The defendant] had no expectation of privacy in [the alleged coconspirator's] phone data, even if the search was unconstitutional as to [the alleged coconspirator]."), cert. denied, U.S. , 140 S. Ct. 2550, 206 L. Ed. 2d 485 (2020); *United States* v. *Brewer*, 708 Fed. Appx. 96, 99 (3d Cir. 2017) (holding that defendant lacked standing to suppress cell phone records obtained from phone that was in codefendant's possession and control), cert. denied, U.S. , 139 S. Ct. 1395, 203 L. Ed. 2d 625 (2019); see also *United States* v. *Dore*, 586 Fed. Appx. 42, 46 (2d Cir.) (in decision released prior to *Carpenter*, court held that defendant failed to establish legitimate expectation of privacy in cell phone and, thus, lacked standing to move to suppress CSLI records), cert. denied, 574 U.S. 1002, 135 S. Ct. 505, 190 L. Ed. 2d 380 (2014); cf. *United States* v. *Lauria*, Docket Nos. 19-CR-449-01 (NSR), 19-CR-449-02 (NSR) and 19-CR-449-03 (NSR), 2020 WL 5743523, *5 (S.D.N.Y. September 25, 2020) ("the defendant must

establish ownership or another possessory interest in the phone at the time for which the data [are] searched"); *United States* v. *Serrano*, Docket No. 13 CR. 58 (KBF), 2014 WL 2696569, *7 (S.D.N.Y. June 10, 2014) ("The defendant has not proffered an affidavit that he has a privacy interest in that phone or the data on that phone. . . . Accordingly, the defendant's motion to preclude or suppress the cell site data is denied on the basis that the defendant has not established the requisite standing to bring the motion."). But see *United States* v. *Herron*, 2 F. Supp. 3d 391, 400–401 (E.D.N.Y. 2014) (defendant had legitimate expectation of privacy in cell phone registered to another individual but used exclusively by defendant and, thus, had standing to move to suppress historical CSLI obtained from that phone), aff'd, 762 Fed. Appx. 25 (2d Cir. 2019), petition for cert. filed (U.S. November 17, 2020) (No. 20-6428).

These courts have extended this rule to cases in which the defendant challenged the search of property belonging to a codefendant, even when the codefendants were tried jointly, explaining that "[coconspirators] and codefendants have been accorded no special standing." (Internal quotation marks omitted.) *United States* v. *Padilla*, supra, 508 U.S. 82; see *United States* v. *Turner*, 781 F.3d 374, 382 (8th Cir. 2015) ("[The defendant] has failed to establish that he has standing to challenge the issuance of the warrants for [precise location information] for phones belonging to [two coconspirators]. [He] does not assert that he owned, possessed, or used either of these cell phones; nor does he describe any other legitimate expectation of privacy in these phones or in the [precise location information] obtained from them."), cert. denied, 577 U.S. 889, 136 S. Ct. 208, 193 L. Ed. 2d 160 (2015), and cert. denied, 577 U.S. 912, 136 S. Ct. 280, 193 L. Ed. 2d 204 (2015), and cert. denied, 577 U.S. 980, 136 S. Ct. 493, 193 L. Ed.

2d 359 (2015); *United States* v. *Forest*, 355 F.3d 942, 948 (6th Cir.) (defendant lacked standing to challenge admission of codefendant's CSLI, even though defendant was in vehicle with codefendant during time period reflected in CSLI), vacated and remanded sub nom. *Garner* v. *United States*, 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005); *United States* v. *Anthony*, 354 F. Supp. 3d 607, 619–20 (E.D. Pa. 2018) ("[d]efendant . . . has not demonstrated that he had the reasonable expectation of privacy in the CSLI data of [codefendants]"), appeal filed (3d Cir. December 28, 2018) (No. 18-3812); *DeMartino* v. *United States*, Docket No. 07 CV 1412 (NG), 2010 WL 3023896, *9 (E.D.N.Y. August 2, 2010) (defendant had no expectation of privacy and thus no standing to challenge admission of information from codefendant's cell phone, despite having been tried jointly with codefendant); *United States* v. *Grissom*, 760 Fed. Appx. 448, 454 (7th Cir. 2019) (defendant did not have legitimate expectation of privacy in codefendant's CSLI); *United States* v. *Wilford*, 689 Fed. Appx. 727, 730 (4th Cir. 2017) (defendant lacked standing to challenge use of cell site stimulator to show location of coconspirator's cell phone), cert. denied, U.S. , 138 S. Ct. 2707, 201 L. Ed. 2d 1100 (2018);[17] see also *United States* v. *Capra*, 501 F.2d 267, 281 (2d Cir. 1974) (applying rule that "[c]oconspirators and codefendants have been accorded no special standing to enforce the exclusionary rule" when codefendants sought to suppress records of wiretapped calls on which only other codefendants were participants), cert. denied, 420 U.S. 990, 95 S. Ct. 1424, 43 L. Ed. 2d 670 (1975).

Although our Appellate Court has not yet addressed whether a defendant may challenge a *Carpenter* violation relating to a codefendant, it has ruled consistent

[17] See General Statutes § 54-47aa (a) (3) (defining cell site stimulator device).

with this federal precedent on similar issues. See *State* v. *Bethea*, 187 Conn. App. 263, 277, 202 A.3d 429 (even if defendant's unpreserved challenge to warrant for search of girlfriend's cell phone were reviewed, claim would fail because defendant lacked standing to move to suppress girlfriend's cell phone records), cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019); *State* v. *Stanley*, 161 Conn. App. 10, 29, 125 A.3d 1078 (2015) (defendant lacked standing to suppress victim's cell phone records), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). In the present case, consistent with these lines of cases, we conclude that the defendant lacked standing to challenge the admission of Tyus' historical CSLI and, thus, cannot successfully argue that we cannot consider the evidence these records yielded when considering the strength of the state's case for purposes of our harmless error analysis under *Golding*'s fourth prong.

Nevertheless, the defendant contends that prior case law supports his contention that, in determining harm, this court must not consider the evidence from the illegally obtained records of Tyus' historical CSLI. Specifically, he argues that he does not need to establish standing to challenge the admission of Tyus' historical CSLI "because, [when] there is harm to one codefendant, federal jurisdictions, including the United States Supreme Court, have considered the harm of that error on the other codefendant." In support of his argument, the defendant cites cases stemming from the United States Supreme Court's holding in *McDonald* v. *United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L. Ed. 153 (1948). We find these cases to be not only distinguishable, but of questionable validity.

In *McDonald*, the petitioners, Earl McDonald and Joseph Washington, were tried jointly on charges of carrying on a lottery known as "the numbers game . . . ." Id., 452. Before trial, McDonald moved to sup-

press unlawfully seized evidence that included adding machines found during a warrantless search of his room inside a rooming house.[18] Id., 452–53. McDonald also sought the return of the adding machines. Id., 456. The trial court denied McDonald's motion, and, after both petitioners were convicted, they appealed, challenging the denial of the motion to suppress. Id. In a five to three decision, the United States Supreme Court held that "McDonald's motion for suppression of the evidence and the return of the property to him should have been granted." Id. As to Washington, the opinion announcing the judgment noted that "the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence, there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was [invaded] when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well . . . [because] the unlawfully seized materials were the basis of evidence used against [Washington, and] [i]f] the property had been returned to McDonald, it would not have been available for use at the trial." (Citations omitted.) Id. Two justices, however, did not agree that the court had to address whether the denial of McDonald's motion to suppress was harmful to Washington. Rather, they reasoned that Washington also had a privacy interest in the property searched because he was a guest in McDonald's room in the rooming house at the time of the search. See id., 461 (Jackson, J., concurring).

Although some courts since *McDonald* have held that its holding meant that a defendant may challenge the

[18] At the time of the warrantless search, McDonald was inside his room, along with Washington, who was his guest. *McDonald* v. *United States*, supra, 335 U.S. 456.

admission of evidence illegally obtained from a codefendant when tried jointly; see, e.g., *Rosencranz* v. *United States*, 334 F.2d 738, 740 (1st Cir. 1964); the United States Court of Appeals for the Second Circuit has limited *McDonald*'s holding to its unique facts. Specifically, in *United States* v. *Lee Wan Nam*, 274 F.2d 863 (2d Cir.), cert. denied, 363 U.S. 803, 80 S. Ct. 1236, 4 L. Ed. 2d 1147 (1960), the defendant sought to suppress heroin seized in violation of his codefendant's fourth amendment rights, arguing that *McDonald*'s holding trumped any standing requirement. Id., 865–66. The court in that case disagreed, holding that the defendant lacked standing to object to the admission of the heroin because he had no possessory interest in it. Id. The court distinguished the case before it from *McDonald* because the codefendant never moved to suppress the heroin, as McDonald had, and because the holding in *McDonald* "hinged upon the fact that the trial court committed error in failing to return the evidence to McDonald." Id., 866. Thus, the Second Circuit ruled that *McDonald* applied only if there was a timely motion to suppress by a party with standing and if the evidence at issue would not have been available for the government to use against all codefendants had the court granted the motion to suppress and returned the evidence. See id.; see also *United States* v. *Serrano*, 317 F.2d 356, 356–57 (2d Cir. 1963) (because neither defendant made timely motion to suppress or had standing to do so, narcotics evidence seized from codefendant, who later was severed from case, was properly admitted). As in *Lee Wan Nam*, in the present case, Tyus, the only person with standing, made no timely motion to suppress, and, thus, the present case is distinguishable from *McDonald*.

Moreover, in *Alderman* v. *United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), a case the defendant did not cite to us, the United States Supreme Court explicitly questioned the validity of the holding in

McDonald. See id., 173 n.7. In *Alderman*, the petitioners, William Israel Alderman and Felix Antonio Alderisio, were tried jointly and convicted of conspiring to transmit murderous threats in interstate commerce. Id., 167. The record included evidence collected by illegal electronic surveillance of Alderisio's place of business. Id., 167–68. On appeal, "each petitioner demand[ed] retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose [f]ourth [a]mendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator." Id., 171. The court, however, explained that evidence may be inadmissible against one defendant but not against another, even if they were tried jointly. Id., 172–74. The court explained that, to challenge the legality of a search, the defendant must establish that "he himself was the victim of an invasion of privacy." (Internal quotation marks omitted.) Id., 173. "Fourth [a]mendment rights are personal rights which . . . may not be vicariously asserted. . . . There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." (Citations omitted.) Id., 174.

The court in *Alderman* went on to explain that *McDonald* "is not authority to the contrary. It is not at all clear that the *McDonald* opinion would automatically extend standing to a codefendant. Two of the five [j]ustices joining the majority opinion did not read the opinion to do so and found the basis for the codefendant's standing to be the fact that he was a guest on the premises searched." Id., 173 n.7.

Although *Alderman* did not explicitly overrule *McDonald*, multiple courts since *Alderman* have treated *Alderman* as controlling, and the few courts that continue to apply *McDonald* have limited its scope to its unique facts. See, e.g., *United States* v. *Palazzo*, 488 F.2d 942, 947 (5th Cir. 1974); *Bretti* v. *Wainwright*, 439 F.2d 1042, 1047 (5th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 293, 30 L. Ed. 2d 257 (1971); *United States* v. *Parrott*, 434 F.2d 294, 296 (10th Cir. 1970), cert. denied, 401 U.S. 979, 91 S. Ct. 1211, 28 L. Ed. 2d 330 (1971); *United States* v. *Nasse*, 432 F.2d 1293, 1302–1303 (7th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 928, 28 L. Ed. 2d 217 (1971), and cert. denied sub nom. *Tocco* v. *United States*, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971), and cert. denied sub nom. *David* v. *United States*, 402 U.S. 983, 91 S. Ct. 1657, 29 L. Ed. 2d 148 (1971); *United States* v. *James*, 432 F.2d 303, 306 (5th Cir. 1970), cert. denied, 403 U.S. 906, 91 S. Ct. 2214, 29 L. Ed. 2d 682 (1971); *State* v. *Wallen*, Docket No. 9-09-22, 2010 WL 529864, *4 (Ohio App. February 16, 2010), appeal denied, 125 Ohio St. 3d 1463, 928 N.E.2d 738 (2010); see also *United States* v. *Tortorello*, 533 F.2d 809, 814 n.5 (2d Cir.) ("the Supreme Court has rejected a reading of *McDonald* which would automatically extend standing to a [codefendant]"), cert. denied, 429 U.S. 894, 97 S. Ct. 254, 50 L. Ed. 2d 177 (1976); *United States* v. *Graham*, 391 F.2d 439, 445 (6th Cir. 1968) (*McDonald* applies only if defendant with standing made timely motion to suppress that was improperly denied), cert. denied, 393 U.S. 941, 89 S. Ct. 307, 21 L. Ed. 2d 278 (1968), and cert. denied sub nom. *Tucker* v. *United States*, 390 U.S. 1035, 88 S. Ct. 1433, 20 L. Ed. 2d 294 (1968). Thus, under *Alderman*, the defendant cannot challenge the admission of Tyus' historical CSLI, and, to the extent that *McDonald* remains good law, it is distinguishable and, thus, inapplicable to the present case. Accordingly, we may consider Tyus' historical CSLI in determining harm.

2

We now turn to the evidence presented at trial and conclude that the Appellate Court's failure to permit the defendant to file a supplemental brief was harmless beyond a reasonable doubt. There was significant evidence admitted at trial that placed the defendant at the crime scene at the time of the shooting. The historical CSLI from Tyus' two cell phones was admitted into evidence and relied on by Wines, who testified that these cell phones were located near Ernie's Café in New London at approximately the time of the shooting and then were located near Bella Notte in Norwich at approximately 12:45 a.m. Tyus admitted at trial that he had these cell phones with him throughout the night of the shooting. Additionally, both the defendant and Tyus admitted, to the police and at trial, that they were together on the night the victim was shot and killed.

There was other evidence as well from which the jury reasonably could have inferred that Tyus and the defendant arrived at Bella Notte after the shooting, thereby contradicting the defendant's alibi. Specifically, Guilbert testified that he saw Tyus and a man matching the defendant's description—a thinner, taller, lighter-skinned, African American male—enter Bella Notte together approximately fifteen to twenty minutes after Guilbert received a phone call informing him that the victim had been shot. See part II of this opinion. Thus, the records of the defendant's historical CSLI were cumulative of this other evidence showing that the defendant was near Ernie's Café at approximately midnight.

Moreover, there was significant other evidence of the defendant's guilt, either as a principal or as an accessory. There was evidence that the defendant and Tyus went to Boston on the night of the shooting in a silver-colored Impala that Tyus previously had rented. Multi-

ple witnesses testified that, immediately after the shooting, a man fitting the defendant's general description—a light-skinned, African American man wearing a hooded sweatshirt—ran from the scene of the shooting and entered the passenger side of a silver-colored vehicle matching the appearance of Tyus' rented Impala. The defendant's DNA was retrieved from the Impala's passenger side. As to motive, there was evidence that the victim shot Tyus three weeks prior to the victim's death, that both the defendant and Tyus were aware that the victim had been the shooter, and that the defendant was upset over this attack on his friend, whom he considered a brother. Further, the firearms evidence the state presented showed that the gun that Tyus used to fire back at the victim on December 3, 2006, was the same weapon used to shoot and kill the victim three weeks later. And perhaps most damaging to the defendant was Ebrahimi's testimony that, hours after the shooting, he confessed to her that he had shot someone that night.[19] See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 323 n.70, 112 A.3d 1 (2015) ("[t]his court has long recognized that confessions represent the most damaging evidence of guilt" (internal quotation marks omitted)).

[19] Although defense counsel on cross-examination tried to show that Ebrahimi had fabricated this confession years after the shooting in response to Detective Curcuro's threats, Ebrahimi responded affirmatively to the prosecutor's question as to whether, "notwithstanding anything that Detective Curcuro may have said" to her, she heard the defendant tell her that he had shot someone.

Additionally, the state rehabilitated her testimony in two ways. First, on redirect examination, the state established that Ebrahimi feared the defendant when he had been drinking or had been mad at her, and that the defendant previously had hit her, which provided an alternative reason for why she did not inform the police sooner about his confession. Second, Ebrahimi testified that, two months after the victim's death, she told her mother that the defendant had shot someone. The state also elicited testimony from Ebrahimi's mother that, near the end of 2006, Ebrahimi told her that the defendant had shot someone and that Ebrahimi "was a mess" about it.

Because the admission of the defendant's historical CSLI was cumulative of other evidence establishing that the defendant was near Ernie's Café at the time of the shooting, and because the state presented other significant evidence of guilt, we conclude that the admission of these records was harmless beyond a reasonable doubt. Therefore, the defendant's unpreserved *Carpenter* claim fails under the fourth prong of *Golding*, thereby rendering harmless the Appellate Court's improper denial of the defendant's motion for permission to file a supplemental brief.

II

We next address whether the Appellate Court correctly determined that the defendant did not adequately preserve his hearsay objection to Guilbert's testimony about having received a phone call from Charlene Thomas informing him that the victim had been shot. He argues that both the state and the trial court understood his general objection to be based on hearsay and treated it as such. Additionally, he argues that, if the Appellate Court had reviewed his claim, it would have determined that the trial court improperly admitted the contested statement as nonhearsay and that this error was harmful. The state agrees that the defendant adequately preserved his hearsay objection but contends that the trial court properly admitted the statement to show the effect on Guilbert's subsequent actions, which were relevant because they established the time line as to when the defendant and Tyus arrived at Bella Notte. The state also argues that, to the extent there was error, it was harmless. We agree with the state that the trial court properly admitted the statement to show its effect on the hearer and that, regardless, any error was harmless.

A

The following additional facts and procedural history are relevant to our review of whether the defendant's

hearsay objection to the statement at issue sufficed to preserve this issue. At trial, Guilbert testified that he was at Bella Notte on the night when the victim was shot and that, while there, he received a phone call from Charlene Thomas, who has no relation to the victim. The prosecutor then asked: "And what was relayed to you on that phone call?" Both the defendant's counsel and Tyus' counsel objected, stating only, "[o]bjection." The prosecutor immediately responded: "Your Honor, I'm going to claim it on the effect of the hear[er]—and will explain what . . . Guilbert then did." Without hearing further argument, the trial court ruled: "All right. Given that claim, I'm going to overrule the objections and allow the testimony."

Once the court overruled the objections, Guilbert testified as follows: Charlene Thomas told him that the victim had been shot and that he should call the victim's wife to let her know. After talking with Charlene Thomas, he called the victim's wife and told her that she should go to the hospital. No objection was made to Guilbert's testifying as to what he told the victim's wife. Guilbert then testified that, after talking with the victim's wife, he remained sitting at the bar at Bella Notte for approximately fifteen to twenty minutes when he saw Tyus and a taller, lighter-skinned, African American man come in from the front entrance. Guilbert had not seen them in Bella Notte prior to that moment. Tyus approached Guilbert, greeted him, and offered to buy him a drink. Guilbert responded that he was getting ready to leave and did not want a drink. Guilbert then left Bella Notte and went to the hospital to see the victim.

"[T]o preserve an evidentiary ruling for review, trial counsel must object properly by articulat[ing] the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose . . . . [T]he determination of whether a claim has been

properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 317 n.1, 253 A.3d 458 (2020). Appellate review of the record may show that opposing counsel's response to the objection clarified whether counsel and the trial court understood the basis of the objection. See id. A party may " 'functionally preserve' " a claim even if the objection at trial did not incorporate the precise wording of the claim on appeal. Id.; see also *State* v. *Santana*, 313 Conn. 461, 467, 97 A.3d 963 (2014) ("this court has expressed a willingness to review claims that a party did not explicitly raise to the trial court if it is clear from the record that the substance of the claim was raised"). A hearsay objection is adequately preserved as long as the parties and the court had " 'fair notice' " that a hearsay objection was being raised. *State* v. *Benedict*, 313 Conn. 494, 505–506, 98 A.3d 42 (2014).

In the present case, although defense counsel merely stated, "[o]bjection," without clarifying that the ground for it was that Guilbert's testimony was hearsay, the prosecutor's response that he "claim[ed] it on the effect of the hear[er]," a recognized exclusion from the rule against hearsay; see part II B of this opinion; shows that the state was aware that the objection was premised on hearsay. Similarly, the fact that the trial court then ruled that, "[g]iven that claim [by the state], I'm going to overrule the objections," shows that the court, too, was aware of the basis for the objection. Considering that both the state and the trial court were aware of the basis of the defendant's objection, any failure to clarify the basis of the objection did not deprive the state or the trial court of fair notice of his claim. Thus,

we conclude that the defendant functionally preserved his hearsay claim.

B

Next, we turn to the merits of the defendant's claim that Guilbert's testimony regarding what Charlene Thomas told him over the phone was impermissible hearsay. The defendant argues that the statement was hearsay because it was relevant only if it was true—specifically, whether the defendant and Tyus entered Bella Notte after the phone call was relevant only if the victim already had been shot; otherwise, the phone call did not relate to the timing of the shooting or to the defendant's alibi, which was that he was already at Bella Notte at the time of the shooting. The state responds that it did not offer Guilbert's testimony to establish its truth—that the victim had been shot, which already had been established by other evidence admitted at trial—but to show its effect on Guilbert—namely, that this phone call caused him to take certain actions, which were relevant to establish the state's time line of events. We agree with the state.

"To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evi-

dence under which admission is being sought." (Citation omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 571–72, 46 A.3d 126 (2012).

"Hearsay means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted. Conn. Code Evid. § 8-1 (3). The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Citation omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, supra, 305 Conn. 572.

Although "[s]tatements admitted to show the effect on the hearer are not hearsay . . . they should not be admitted for that purpose unless it is clear that the hearer's state of mind or subsequent conduct is relevant." (Internal quotation marks omitted.) *O'Shea* v. *Mignone*, 35 Conn. App. 828, 833–34, 647 A.2d 37 (although statement was offered to show effect on hearer—police officer—it was not relevant, as officer's subsequent actions were not at issue and did not tend to show whether defendant was operating vehicle that struck plaintiff), cert. denied, 231 Conn. 938, 651 A.2d 263 (1994). "Because . . . the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial; C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 8.8.2, pp. 472–73; courts have an obligation to ensure that a party's purported nonhearsay purpose is indeed a legitimate one."[20] *State* v. *Miguel C.*, supra, 305 Conn. 574. To be

[20] Although defense counsel functionally objected to the contested statement on hearsay grounds, not on relevancy grounds, because we have held that trial courts have an obligation to ensure that statements offered for the effect on the hearer are relevant, and because the prosecutor specified on the record before the trial court why he believed the statement was relevant—to show the effect on Guilbert's subsequent actions—we review both whether the statement was hearsay and whether it was relevant.

relevant, evidence must "[tend] to establish a fact in issue or . . . corroborate other direct evidence in the case. . . . Accordingly, an out-of-court statement is admissible to prove the effect on the hearer only when it is relevant for the specific, permissible purpose for which it is offered." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id. "The proffering party bears the burden of establishing the relevance of the offered testimony." (Internal quotation marks omitted.) *Farrell* v. *Johnson & Johnson*, 335 Conn. 398, 408, 238 A.3d 698 (2020). Nevertheless, "[t]he trial court has broad discretion on questions of relevance." *State* v. *Watson*, 26 Conn. App. 151, 156, 599 A.2d 385 (1991), cert. denied, 221 Conn. 907, 600 A.2d 1362 (1992).

The crux of the defendant's hearsay claim is that Guilbert's testimony was relevant only if Charlene Thomas' statement was true. We disagree. Charlene Thomas' statement to Guilbert that the victim had been shot was not offered to establish that the victim had been shot—a fact that was not disputed and that the state had established through other evidence. Rather, the purpose of Guilbert's testimony was to show how Charlene Thomas' statement to him affected his subsequent actions, i.e., that he called the victim's wife and then decided to leave Bella Notte to go to the hospital to check on the victim. From Guilbert's testimony that the defendant and Tyus arrived at Bella Notte after the two phone calls and that Guilbert thereafter decided to go to the hospital to visit the victim, the jury reasonably could have inferred that the defendant and Tyus arrived at Bella Notte after the victim had been shot. This, in turn, tended to corroborate other direct evidence admitted at trial, such as the defendant's testimony that he was with Tyus that night and Tyus' historical CSLI showing that he did not arrive at Bella Notte until after the shooting. Thus, Guilbert's testimony was relevant

both to establish when the defendant and Tyus arrived at Bella Notte, which was central both to the state's case and to the defendant's alibi, and to show the effect on the hearer's subsequent actions, which also were relevant. Accordingly, this evidence was properly admitted as nonhearsay.

C

Finally, even if we assume that Guilbert's statement that Charlene Thomas told him that the victim had been shot was hearsay, we agree with the state that its admission was harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016). In determining the harm of an erroneous evidentiary ruling, we examine the same factors as we do in determining the harm of an erroneous constitutional ruling. Id.

The defendant argues that, without Guilbert's testimony about what he was told by Charlene Thomas, the state had no means to establish its proposed time line of events and to contradict his alibi because the jury would have heard only Guilbert's testimony that he saw Tyus and a man matching the defendant's description arrive at Bella Notte at about 11 p.m. Thus, Guilbert's testimony would have supported the defendant's alibi, rather than contradicting it, and would thereby establish that it is more probable than not that the contested statement affected the verdict. We disagree.

We first note that, even if Guilbert had not been allowed to testify as to what Charlene Thomas told him, there was no objection to the other portions of Guilbert's testimony—namely, that he received a call, that because of that call he called the victim's wife and decided to leave Bella Notte to go to the hospital to check on the victim, and that, approximately fifteen to twenty minutes after those calls, he saw Tyus and another man matching the defendant's description enter Bella Notte. From this evidence, the jury reasonably could have inferred that the victim had been shot prior to the defendant's and Tyus' entering Bella Notte. See, e.g., *State* v. *Weinberg*, 215 Conn. 231, 255, 575 A.2d 1003 (jury is permitted to draw inferences from evidence admitted at trial as long as those inferences are reasonable), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). Even without the contested statement, the jury nevertheless would have been able to reasonably infer that Tyus and the defendant arrived at Bella Notte after the victim was shot because Guilbert consistently stated that, although he thought the two men arrived at about 11 p.m., he was not looking at his watch, but they arrived after the two phone calls.

We recognize that, although reasonable, these inferences would not be as strong if the jury had heard Charlene Thomas' statement that the victim had been shot. Contrary to the defendant's contention, however, Charlene Thomas' statement to Guilbert was not the only evidence that established the state's time line of events. The defendant's argument presumes that the records of Tyus' historical CSLI should have been suppressed. But, as discussed in part I B 1 of this opinion, those records may be considered in determining whether any error, constitutional or evidentiary, harmed the defendant. Those records, coupled with the defendant's own admission that he was with Tyus on the night of the shooting, establish that the defendant was near

Ernie's Café at the time of the shooting and that only then did he and Tyus travel north to Norwich, arriving near Bella Notte at approximately 12:45 a.m. Additionally, as discussed in part I B 2 of this opinion, there was substantial other evidence admitted at trial that established the defendant's guilt. Thus, even if the contested statement was inadmissible hearsay, it did not substantially affect the jury's verdict.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* BROCK DAVIS
(SC 20335)

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

Syllabus

Convicted of the crime of murder in connection with the stabbing death of the victim, the defendant appealed to this court, claiming, inter alia, that the trial court had violated his sixth amendment right to the effective assistance of counsel by denying his written motion to dismiss defense counsel without adequately inquiring into certain grounds for his motion and without conducting any inquiry into defense counsel's alleged conflict of interest. During a pretrial hearing, the defendant informed the trial court that he no longer wanted to be represented by defense counsel. The court ruled that there was no basis to dismiss defense counsel but that the defendant could file a written motion to dismiss counsel and provide reasons why counsel should be dismissed. Thereafter, the defendant filed his written motion to dismiss counsel, in which he asserted four grounds for the dismissal, including that a conflict of interest had arisen. Following a hearing, the court denied the defendant's motion without inquiring into defense counsel's alleged conflict of interest. Two years later, at the defendant's sentencing hearing, the sentencing court asked the defendant if he wanted to address the court. In response, the defendant again raised the issue of defense counsel's alleged conflict of interest, stating that counsel was also representing the victim's son. The court proceeded to sentence the defendant without inquiring into the alleged conflict of interest. On appeal from the judgment of conviction, *held*:

1. Contrary to the defendant's claim, the trial court adequately inquired into the grounds asserted by the defendant in support of his written motion to dismiss defense counsel, other than the alleged conflict of interest; the defendant's claims that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, that she allowed her investigator to advise him to plead guilty, and that she violated unspecified professional and ethical standards were not substantial complaints, and, therefore, they did not warrant further inquiry by the court, much less the dismissal of defense counsel.
2. The defendant having clearly brought to the attention of both the court presiding over the pretrial hearing and the sentecning court the possiblilty of defense counsel's conflict of interest, both courts had an affirmative duty to conduct further inquiry into the alleged conflict of interest by investigating the surrounding facts and questioning the defendant and defense counsel to determine whether counsel had an actual conflict of interest and whether that conflict had adversly affected her representation of the defendant; moreover, because both courts failed to conduct such an inquiry, this court could not determine, on the basis of the record before it, whether the defendant's allegation of a conflict of interest had any merit, and, accordingly, this court remanded the case for further proceedings to determine whether defense counsel had an actual conflict of interest that adversly affected her performance.

Argued November 24, 2020—officially released March 26, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey*, *J.*, denied the defendant's motion to dismiss counsel; thereafter, the case was tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Further proceedings*.

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 *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

* March 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

KELLER, J. Following a jury trial, the defendant, Brock Davis, was convicted of one count of murder in violation of General Statutes § 53a-54a. The trial court, *Gold*, *J.*, rendered judgment in accordance with the jury's verdict and sentenced the defendant to fifty years of imprisonment. On appeal,[1] the defendant claims that the trial court violated his right to the effective assistance of counsel as guaranteed by the sixth amendment to the United States constitution by (1) denying his motions to dismiss defense counsel, Kirstin B. Coffin, without first adequately inquiring into certain bases for his motions, namely, that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her; that, during a meeting with her investigator and the defendant, she allowed her investigator to recommend that he plead guilty; and that she violated unspecified professional and ethical legal standards; and (2) failing to conduct any inquiry into defense counsel's alleged conflict of interest.[2] We disagree that the trial court inadequately inquired into the bases for the defendant's motions to dismiss defense counsel. We agree, however, that the trial court improperly failed to inquire into defense counsel's alleged conflict of interest, and, accordingly, we remand the case to the trial court for further proceedings in accordance with this opinion.

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] The defendant does not assert an inadequate inquiry claim under article first, § 8, of the Connecticut constitution. The defendant also claims that the trial court improperly admitted into evidence testimony from three lay witnesses identifying him in a surveillance video recording in violation of *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005), and § 7-3 (a) of the Connecticut Code of Evidence. Because we agree with the defendant that the trial court was required but failed to inquire into a possible conflict of interest and remand the case to the trial court to conduct such an inquiry, we conclude that it is premature to address the defendant's remaining claim at this time.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our analysis of the defendant's claims. On the morning of December 9, 2015, the defendant stabbed the victim, Joseph Lindsey, multiple times at the corner of Albany Avenue and Baltimore Street in Hartford, where the two men had been "hanging out," talking, and drinking with a third man, Jamar Cheatem, the victim's friend. Following the stabbing, Cheatem transported the victim to a hospital, where he was pronounced dead. The defendant was subsequently charged with the victim's murder. Following the defendant's arrest, Coffin was assigned to represent him.

On March 29, 2017, the trial court, *Dewey*, *J.*, conducted a pretrial hearing at which the defendant rejected the state's offer of a plea deal. During the hearing, the defendant informed Judge Dewey that he no longer wished to be represented by defense counsel due to her failure to investigate certain information he had provided her and to give him a copy of the state's discovery materials in a timely manner. The defendant also complained that defense counsel's investigator had encouraged him to plead guilty and that, "[f]rom the beginning," defense counsel had "made mistakes and alluded to the fact that [he] was guilty." Judge Dewey responded: "Well, it's your decision, obviously. . . . You have an experienced attorney and the fact that you don't like the investigation she's doing is not a ground . . . for [dismissing] her . . . . [S]he has been your strongest advocate in all of the pretrials, and I see no basis for her to be withdrawn. File a written motion and give more of [a] reason that complies with the Practice Book and the constitution. But, at the present time, she is your attorney. You do have a right to secure an attorney of your own if you wish. You have a right to represent yourself if you are competent. You also have a right to have [defense counsel] represent you."

On May 24, 2017, as Judge Dewey had suggested, the defendant filed a written motion to dismiss defense counsel in which he asserted four reasons why counsel should be dismissed: (1) she failed to meet professional and ethical standards established by the Connecticut Bar Association and the American Bar Association, (2) she "refused to allow [him] to view any items that would enable [him] to come to an intelligent and informed decision as to where [his] best interest[s] [lie] and . . . to aid in his own defense," (3) she failed to investigate certain information he had provided to her, and (4) "[a] conflict of interest has arisen." On June 13, 2017, Judge Dewey conducted a hearing on the defendant's motion at which the defendant reiterated his prior complaint that defense counsel allowed her private investigator to advise him to accept the state's plea deal, which made him "feel uncomfortable and [distrustful] that [the investigator] would actually put forth his best effort." The defendant also renewed his complaint concerning the amount of time it took for him to receive a copy of the state's discovery materials.[3] When the

[3] The following exchange occurred between Judge Dewey, defense counsel, and the defendant concerning the discovery materials:

"The Defendant: Also . . . when [defense counsel] was given the motion of discovery . . . I told her I would like a copy. She said she wouldn't be able to give me a copy of the motion of discovery at that time. And then, after I made my complaint, I received it two weeks later.

"[Judge Dewey]: You gave him copies of discovery?

"The Defendant: It took me a year to receive it, Your Honor.

"[Judge Dewey]: Counsel?

"[Defense Counsel]: He requested a copy of his file, Your Honor.

"[Judge Dewey]: Oh, his file?

"[Defense Counsel]: Yes.

"The Defendant: The motion of discovery, I asked for a copy.

"[Judge Dewey]: But not the actual discovery in this case, I hope.

"[Defense Counsel]: Yes, his file, the police reports. . . .

"[Judge Dewey]: You weren't entitled to discovery. Police reports aren't given to prisoners, sir. It might have taken a year [for you to receive a copy of discovery]. You shouldn't have gotten it at all.

"The Defendant: Shouldn't have got what?

"[Judge Dewey]: You should not get copies. Police reports are not given to people who are incarcerated. Police reports aren't given, witness statements

defendant finished speaking, Judge Dewey informed him that he had given her no reason to dismiss defense counsel, stating: "You don't like what's happening, but you haven't given me a reason to dismiss her." The defendant responded by stating that "it took some time for . . . information to be investigated as well," that he did not think defense counsel was "being honest" with him and that "it took . . . a year to get [the discovery materials]." Judge Dewey responded that investigations "take time . . . to do . . . properly," that defense counsel "has a reputation for honesty," and that "[t]he fact it took a year [to receive the requested discovery materials] is not a basis for dismissing counsel." She then denied the motion to dismiss defense counsel. During the hearing, the defendant did not discuss the conflict of interest claim, which he cited in his May 24, 2017 written motion, as an additional ground to dismiss defense counsel. At no time did Judge Dewey inquire into the defendant's claim concerning defense counsel's alleged conflict of interest. Nor did Judge Dewey ascertain whether or not the defendant had finished arguing each of the bases in his motion to dismiss defense counsel before Judge Dewey denied the motion and ended the hearing.[4]

aren't given. They are not given to incarcerated individuals. So, the fact that you even got it, you should be thankful your attorney gave it to you. You're not entitled to it, sir.

"The Defendant: Well, she told me it would have to be redacted, Your Honor. . . .

"[Judge Dewey]: Oh, if she did redact it, that was fine."

[4] The June 13, 2017 hearing ended in the following manner:

"[Judge Dewey]: Sir, excuse me?

"The Defendant: If I felt she's not being honest with me, I can't really—

"[Judge Dewey]: Sir, if this attorney is anything, she has a reputation for honesty. There has never been a doubt as to that and her credibility. Perhaps you feel uncomfortable with her, but, based on your motion, what you're indicating—you say that she's not meeting the Connecticut Bar [Association] standards. You've given me no indication of that. You say she refused to allow you to review items. Well, because she's under court orders not to disclose certain items, except redacted items. You say she's failed to investigate information. There's no indication of that.

Two years later, at the defendant's sentencing hearing, when asked by the trial court, *Gold*, *J.*, whether he wished to address the court, the defendant once again raised the issue of defense counsel's alleged conflict of interest. Specifically, he stated that, on two prior occasions, he had attempted to dismiss defense counsel because he did not have faith in her abilities and because she was "representing the son of [the victim]." When the defendant finished speaking, Judge Gold asked defense counsel if there was "anything else" she wished to say, and she indicated that there was not. Judge Gold then addressed the defendant, stating in relevant part: "[T]he first words that you say when you're given an opportunity to speak is to say . . . I tried to dismiss my lawyer. Those are the first words that you . . . wanted to say at your sentencing after hearing these appeals from [the victim's] family. . . . I just don't think that that . . . puts you in the best light. You're free to say whatever you wish to say at your sentencing, and you did. But frankly, I would have thought that you would have chosen something other than a complaint about your lawyer when you had the chance, after three and [one-half] years, to first express your feelings to this family." Judge Gold then sentenced the defendant to fifty years of imprisonment. At no time did Judge Gold inquire into the defendant's claim that defense counsel had a conflict of interest because she also was representing the victim's son.

On appeal, the defendant claims that the trial court violated his constitutional right to the effective assistance of counsel by (1) inadequately inquiring into some of the bases for his pretrial motions to dismiss defense

"The Defendant: Redacted items, it took me a year to get redacted items?

"[Judge Dewey]: The fact [that] it took a year is not a basis for dismissing counsel. Your motion is denied. Thank you. Thank you, counsel.

"[Defense Counsel]: Thank you, Your Honor.

"([The defendant] returns to lockup)."

counsel, and (2) failing to inquire at all into defense counsel's possible conflict of interest.[5] The defendant's claims implicate separate, yet similar, duties of the trial court to inquire into the relationship between the defendant and defense counsel when circumstances warrant such an inquiry. For the reasons set forth hereinafter, we conclude that the trial court conducted an adequate inquiry into the defendant's complaints that defense counsel did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, that she allowed her investigator to advise him to plead guilty, and that she violated unspecified professional and ethical legal standards. We further conclude, however, that both trial judges improperly failed to inquire into the existence of a possible conflict of interest when the matter was brought to their attention.[6]

I

We begin with the defendant's claim that Judge Dewey inadequately inquired into the bases for his oral and written motions to dismiss defense counsel. Specifically, the defendant argues that, in both motions, he asserted a "seemingly substantial complaint," which required Judge Dewey to "inquire into the reasons for [his] dissatisfaction." (Internal quotation marks omitted.) The defendant argues that a sufficient inquiry required Judge Dewey to engage him in more than a cursory exchange regarding his complaints and to ask

[5] The defendant's first claim pertains to Judge Dewey, whereas his second claim pertains to both Judge Dewey and Judge Gold.

[6] In his written motion to dismiss defense counsel, the defendant cited an alleged conflict of interest as the fourth basis for dismissing defense counsel. Because a different legal standard governs the trial court's duty to inquire into possible conflicts of interest than its duty to inquire into other aspects of the relationship between a defendant and defense counsel, we examine the trial court's inquiry into the alleged conflict of interest separately from that court's inquiry into the other complaints raised in the defendant's motion to dismiss defense counsel.

defense counsel about those complaints, which she failed to do.

The state responds that Judge Dewey properly exercised her discretion in declining to conduct an extensive inquiry into the defendant's motions to dismiss defense counsel. The state contends that, distilled to their essence, the defendant's complaints about defense counsel concerned "the amount of time it had taken her to conduct her investigation and to provide him with requested materials, along with vague and unsubstantiated feelings or beliefs that counsel was not doing enough or being honest." The state argues that, because those complaints "were made known to [Judge Dewey], adequately explored, and demonstrably insufficient to [justify defense counsel's dismissal] . . . no further inquiry by [Judge Dewey] was required." We agree with the state.

The following legal principles guide our analysis of this claim. It is well established that "[a] defendant is not entitled to the appointment of a different public defender to represent him without a valid and sufficient reason. . . . Nor can a defendant compel the state to engage counsel of his own choice by arbitrarily refusing the services of a qualified public defender." (Citations omitted.) *State* v. *Gethers*, 193 Conn. 526, 543, 480 A.3d 435 (1984); see also *State* v. *Arroyo*, 284 Conn. 597, 645, 935 A.2d 975 (2007) ("[a]lthough the constitution guarantees a defendant counsel that is effective, it does not guarantee counsel whom a defendant will like"). "When reviewing the adequacy of a trial court's inquiries into a defendant's request for new counsel, an appellate court may reverse the trial court only for an abuse of discretion. . . . [Of course, a] trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel . . . . The extent of that inquiry, however, lies within the discretion of the trial court. . . . When a defen-

dant's assertions fall short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney." (Citations omitted; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 842–43, 189 A.3d 1215 (2018). We have held that any irreconcilable conflict that might handicap the defense is a sufficient reason to warrant the removal of counsel and the appointment of new counsel. See *State* v. *Gethers*, supra, 543. "[I]n some circumstances a complete breakdown in communication between [the defendant] and counsel [also] may require the appointment of new counsel . . . ." (Citation omitted.) *State* v. *Robinson*, 227 Conn. 711, 727, 631 A.2d 288 (1993).

In the present case, it is readily apparent that Judge Dewey properly exercised her discretion in denying the defendant's motions to dismiss defense counsel because the defendant's complaints against defense counsel were not substantial. As previously indicated, apart from defense counsel's alleged conflict of interest, the defendant raised three principal complaints that he claimed justified counsel's dismissal: during a meeting with the defendant, she allowed her investigator, who was also present, to recommend that he plead guilty, she did not diligently provide him with copies of the state's discovery materials or investigate information he had provided to her, and she violated unspecified professional and ethical legal standards.[7] We previously have

[7] We conclude that Judge Dewey properly exercised her discretion in response to the defendant's March 29, 2017 oral motion to dismiss defense counsel by instructing the defendant to file a written motion providing further support for the dismissal and, after the defendant filed that motion, by conducting the June 13, 2017 hearing on it. We note that, except for the alleged conflict of interest, which was stated in the defendant's written motion but not discussed during the June 13, 2017 hearing, all of the complaints raised by the defendant in his oral motion were either incorporated into his written motion or shared with Judge Dewey during that hearing. Accordingly, we consider only the adequacy of Judge Dewey's inquiry into the defendant's written motion during that hearing.

held that a defendant's disagreement with defense counsel regarding the strength of the state's case is not a valid reason to dismiss counsel. See *State* v. *Simpson*, supra, 329 Conn. 843 (concluding that defendant's complaint that he "felt pressured to take the [state's] plea [deal] because [he] was told [by defense counsel that he] had no chance of winning [at] trial" was insubstantial because that advice "amount[ed] to an experienced lawyer's analysis of the evidence available to [the defendant] as against the state's evidence" (internal quotation marks omitted)); see also, e.g., *United States* v. *Juncal*, 245 F.3d 166, 172 (2d Cir. 2001) ("defense counsel's blunt rendering of an honest but negative assessment of [a defendant's] chances at trial, combined with advice to enter the plea, [does not] constitute . . . coercion"); *United States* v. *Moree*, 220 F.3d 65, 72 (2d Cir. 2000) ("[t]hat the attorney advised [the defendant] to take the [plea] offer and warned him that his failure to do so would lead to a thirty year sentence merely asserts that the lawyer gave professional advice as to what the consequences of his choice might be").

Likewise, the defendant's complaint that defense counsel took too long to provide him with a copy of the state's discovery materials and to investigate information he had provided her was also insufficient to justify counsel's dismissal. Indeed, the record reveals that, by the time of the June 13, 2017 hearing on the defendant's written motion to dismiss counsel, which took place nearly two years before trial, the defendant not only had received a copy of the requested discovery materials, but had informed Judge Dewey that the requested investigation also was completed. As for the defendant's complaint that defense counsel violated professional and ethical standards, Judge Dewey had no duty of inquiry with respect to this allegation given that the defendant failed to specify what, or how, any such standards were violated. Vague assertions of this

kind are simply not the type of complaints that trigger a trial court's duty to inquire into the relationship between a defendant and defense counsel, much less do they warrant the dismissal of counsel. Accordingly, we conclude that Judge Dewey adequately inquired into the complaints underlying the defendant's motions to dismiss defense counsel.

II

The defendant next claims that the trial court, on two different occasions, inadequately inquired into defense counsel's possible conflict of interest when the defendant raised the issue. As previously indicated, in his pretrial, written motion to dismiss defense counsel, argued before Judge Dewey, the defendant alleged that "[a] conflict of interest has arisen." Two years later, during his sentencing hearing, the defendant informed Judge Gold that he previously had attempted to dismiss defense counsel because, inter alia, she was "representing the son of [the victim]." On both occasions, neither Judge Dewey nor Judge Gold asked the defendant or defense counsel any questions about the alleged conflicts of interest raised before them. The state does not dispute that Judge Dewey and Judge Gold each had a duty to inquire into defense counsel's possible conflict of interest but, rather, argues that both judges discharged their respective duties of inquiry. We disagree.

It is axiomatic that a criminal defendant's sixth amendment right to the effective assistance of counsel[8] includes the right to counsel that is free from conflicts of interest. *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). It is a "fundamental principle . . .

[8] The sixth amendment right to effective assistance of counsel is made applicable to the states through the due process clause to the United States constitution. See, e.g., *Evitts* v. *Lucey*, 469 U.S. 387, 392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

that an attorney owes an overarching duty of undivided loyalty to his [or her] client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel's duties. . . . Loyalty of a lawyer to his [or her] client's cause is the sine qua non of the [s]ixth [a]mendment's guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel's undivided loyalty." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 136–37, 595 A.2d 1356 (1991).

In cases involving potential conflicts of interest, this court has held that "[t]here are two circumstances under which a trial court has a duty to inquire . . . (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists . . . ." (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 388. "To safeguard a criminal defendant's right to the effective assistance of counsel, a trial court has an affirmative obligation to explore the possibility of conflict when such conflict is brought to the attention of the trial judge in a timely manner." (Internal quotation marks omitted.) Id., 389; see *State* v. *Crespo*, 246 Conn. 665, 698 n.29, 718 A.2d 925 (1998) (defendant's objection to possible conflict of interest "gives rise to an absolute duty to inquire"), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); *State* v. *Martin*, 201 Conn. 74, 80, 513 A.2d 116 (1986) (concluding that duty to inquire arises whenever trial court knows or has reason to know of possible conflict); see also *United States* v. *Levy*, 25 F.3d 146, 153 (2d Cir. 1994) ("[w]hen a [trial] court is sufficiently apprised of even the possibility of a conflict of interest, the court . . . has an 'inquiry' obligation"). In such circumstances, "[t]he court must investigate the facts and

details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *United States* v. *Levy*, supra, 153. We review the defendant's claim that the trial court failed to inquire into a possible conflict of interest as a question of law, and, as such, it is subject to plenary review. See, e.g., *State* v. *Parrott*, 262 Conn. 276, 286, 811 A.2d 705 (2003).

Applying the foregoing principles to the present case, we conclude that it is apparent both Judge Dewey and Judge Gold had a duty to inquire into the defendant's claim, first raised nearly two years before trial, that defense counsel had a conflict of interest. The defendant's allegation in his motion to dismiss defense counsel that "[a] conflict of interest has arisen" constituted not only "a timely conflict objection at trial"; (internal quotation marks omitted) *State* v. *Vega*, supra, 259 Conn. 388; but an unmistakably clear one such that, under our case law, Judge Dewey minimally was required to inquire as to the nature of the alleged conflict. See *State* v. *Martin*, supra, 201 Conn. 83 (trial court improperly denied defense counsel's motion to withdraw without "*any* inquiry in response to an explicit representation of a possible conflict of interest" (emphasis in original)); see also *State* v. *Parrott*, supra, 262 Conn. 288–89 (concluding that, in response to potential conflict of interest caused by defense counsel's choosing to sit apart from defendant at trial for "personal safety" reasons, trial court conducted adequate inquiry in which it determined that defendant and counsel could communicate during voir dire, defendant wanted counsel to continue to represent him, and counsel felt he " 'absolutely' " could provide adequate representation); *State* v. *Vega*, supra, 390–91 (in response to defendant's allegation that his filing grievance against defense counsel created conflict, trial court adequately inquired and determined that complaints "were vague

and generally amounted to disagreements with [counsel's] tactical or strategic decisions, and his concern that [they] had not had the opportunity to meet . . . more frequently"); *State* v. *Kukucka*, 181 Conn. App. 329, 342, 186 A.3d 1171 (because defendant "did not raise a timely conflict of interest objection before the trial court," duty of inquiry analysis was limited to whether trial court knew or reasonably should have known that conflict potentially existed), cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

Likewise, when the defendant complained to Judge Gold that defense counsel was "representing the son of [the victim]," Judge Gold had a duty to inquire regarding the facts surrounding that claim to determine whether counsel was, in fact, representing the victim's son and, if so, whether it adversely had affected her representation of the defendant.[9] See *State* v. *Burns*,

[9] We understand that complaints from defendants about defense counsel are not infrequent and sometimes have no real basis. Nevertheless, this cannot excuse the well established duty to inquire. We want to emphasize that the trial court's duty to inquire is not an onerous one. To the contrary, when there has been a timely conflict objection or the court knows or has reason to know of a potential conflict, the duty of inquiry is limited to determining whether a conflict actually exists, which, in the vast majority of cases, the court can accomplish by asking a few pointed questions. "If the court is satisfied at the inquiry stage that there is no actual conflict or potential for one to develop, its duty ceases." *United States* v. *Cain*, 671 F.3d 271, 293 (2d Cir.), cert. denied sub nom. *Soha* v. *United States*, 566 U.S. 928, 132 S. Ct. 1872, 182 L. Ed. 2d 655 (2012), and cert. denied, 571 U.S. 942, 134 S. Ct. 56, 187 L. Ed. 2d 257 (2013); see also *State* v. *Drakeford*, 261 Conn. 420, 427–28, 802 A.2d 844 (2002) ("[in the absence of] any reason to the contrary, the trial court may rely on [defense counsel's] representation that there is no conflict, and it has no obligation to conduct any further inquiry into the subject" (internal quotation marks omitted)).

We can perceive no reason, moreover, why the court's inquiry need improperly reveal confidential matters between attorney and client. See *Holloway* v. *Arkansas*, 435 U.S. 475, 487, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (noting that trial court can explore "the adequacy of the basis of defense counsel's representations regarding a conflict of [interest] without improperly requiring disclosure of the confidential communications of the client"). Trial courts may take appropriate steps to avoid the potential disclosure of such confidential information, including, if necessary, conduct-

Docket No. A-4696-03T4, 2006 WL 3093137, *6 (N.J. Super. App. Div. November 2, 2006) (deeming defense counsel's prior representation of victim's son "potential conflict" that "should have been brought to the court's attention prior to trial and resolved on the record" in murder trial), cert. denied, 191 N.J. 317, 923 A.2d 231 (2007).

The state argues that Judge Dewey satisfied her duty of inquiry by holding a hearing on the defendant's motion to dismiss defense counsel at which the defendant was allowed to argue in support of the motion. The state contends that, because the defendant did not mention the alleged conflict during that hearing, "Judge Dewey might reasonably have believed that the alleged 'conflict of interest' was comprised solely of the defendant's [other] articulated complaints regarding [defense] counsel's performance." This argument is unavailing because, as we repeatedly have stated, the trial court's duty to explore the possibility of conflict when such conflict is brought to its attention is an *affirmative* duty that can be discharged only by the trial court's

ing an in camera inquiry with the defendant and defense counsel that is later summarized on the record. See *United States* v. *Gregoire*, 628 Fed. Appx. 496, 497 (9th Cir. 2015) (remanding case in which District Court improperly failed to inquire into defendant's alleged irreconcilable conflict with appointed counsel to "conduct an adequate inquiry, including an in camera hearing if necessary, to determine the extent of the [pretrial] conflict between [the defendant] and counsel"); *People* v. *Winbush*, 205 Cal. App. 3d 987, 991, 252 Cal. Rptr. 722 (1988) ("[o]nce the request for new counsel is made, the trial court's first duty is to fully explore with [the] defendant, in open court or during an in camera session without the presence of the prosecutor, [the] defendant's reasons for desiring new counsel"); *State* v. *Yelton*, 87 N.C. App. 554, 557, 361 S.E.2d 753 (1987) (observing that "full and searching inquiry to determine whether an actual conflict of interest exists . . . may include *in camera* proceedings or discussions between the trial judge and [the] defendants" (emphasis in original)); *State* v. *Vicuna*, 119 Wn. App. 26, 32–33, 79 P.3d 1 (2003) (suggesting, in response to state's "argument that requiring more rigorous inquiry regarding an alleged conflict could jeopardize attorney-client privilege," that "court may conduct an in camera review with a sealed record").

questioning the defendant and defense counsel about the claimed conflict. See *State* v. *Vega*, supra, 259 Conn. 389; *State* v. *Martin*, supra, 201 Conn. 82.[10]

For the same reason, we find no merit in the state's contention that Judge Gold fulfilled his duty of inquiry merely by asking defense counsel, prior to imposing sentence on the defendant, "if she had anything further to say." According to the state, because defense counsel had "an independent ethical obligation to avoid or seek agreement regarding conflicting representations, and to advise the court promptly if a conflict of interest had existed or arisen during the trial," and because defense counsel declined the opportunity to address the defendant's allegation, Judge Gold "reasonably could have assumed that no conflict of interest existed or that the defendant had agreed to [waive] it." Contrary to the state's assertions, if an attorney's ethical duty to avoid conflicts and to disclose them whenever they arise was sufficient to protect a defendant's right to be represented by counsel free of any such conflicts, the law would not have seen fit to impose on the trial court an independent duty of inquiry.

We recognize that, in the absence of any reason to the contrary, the trial court may rely on defense counsel's representation that there is no conflict, and it has no obligation to conduct any further inquiry into the subject. See *State* v. *Cator*, 256 Conn. 785, 795, 781 A.2d 285 (2001). In the present case, however, defense counsel did not assert that there was no conflict. See *State* v. *Lopez*, 80 Conn. App. 386, 393–94, 835 A.2d 126 (2003)

[10] Although Judge Dewey invited a written motion from the defendant listing his reasons to dismiss defense counsel, she ended the June 13, 2017 hearing without asking him any questions about defense counsel's conflict of interest, which was plainly alleged in his written motion to dismiss. Accordingly, we disagree with the state that Judge Dewey satisfied her duty of inquiry during the June 13, 2017 hearing to address defense counsel's alleged conflict of interest.

(trial court had affirmative duty to inquire about defense counsel's possible conflict of interest when counsel did not assert that there was no conflict or that her representation of defendant would not be compromised at trial), aff'd, 271 Conn. 724, 859 A.2d 898 (2004); see also *State* v. *Martin*, supra, 201 Conn. 82 (in discharging duty of inquiry, "trial court must be able, and be freely permitted, to rely upon [defense] counsel's representation that the possibility of such a conflict does or does not exist. . . . The reliance in such an instance is upon the solemn representation of a fact made by [counsel] as an officer of the court. . . . The course thereafter followed by the court in its inquiry depends upon the circumstances of the particular case." (Citations omitted; internal quotation marks omitted.)). What the trial court is not permitted to do, however, is simply to infer from defense counsel's silence, after the possibility of a conflict has been raised in open court, that no such conflict exists. Cf. *United States* v. *Crespo de Llano*, 838 F.2d 1006, 1012 (9th Cir. 1987) ("*where neither* [*the*] *defendant nor his lawyers objected to multiple representation*, [the] trial court was entitled to assume that they had determined that no conflict existed or that [the] defendant had knowingly accepted the risk of conflict" (emphasis added)), citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 346–48, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Because Judge Dewey and Judge Gold failed to inquire into defense counsel's alleged conflict of interest, we cannot determine, on the basis of the record before us, whether that allegation has any merit. In such circumstances, we must remand the case to the trial court for a determination of whether defense counsel did, in fact, have an actual conflict of interest that adversely affected her representation of the defendant.[11] Compare *Wood* v. *Georgia*, 450 U.S. 261, 272–73,

[11] Citing *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), the defendant argues that the trial court's failure to inquire into

101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (remanding case to trial court after concluding that it failed to inquire into "sufficiently apparent" conflict of interest, depriving United States Supreme Court of record necessary to determine "whether [defense] counsel was influenced in his basic strategic decisions by the [alleged conflict of interest]"), with *Mickens* v. *Taylor*, 535 U.S. 162, 165, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (upholding denial of habeas relief, following evidentiary hearing on claim that trial court failed to inquire into defense counsel's potential conflict of interest because, even if

defense counsel's alleged conflict of interest entitles him to a new trial. The defendant's reliance on *Holloway* is misplaced because that case involved the trial court's failure to inquire into whether an attorney's representation of three murder defendants at the same trial created a conflict of interest for the attorney. Id., 478–80. In reversing the convictions of the defendants, the United States Supreme Court did not require the defendants to show prejudice but, rather, assumed that the representation was inherently prejudicial. Id., 489–91. The court deemed joint representation inherently prejudicial because of what it "tends to prevent the attorney from doing" on behalf of each of his clients, and because a rule requiring a defendant to show prejudice would "not be susceptible of intelligent, evenhanded application," considering the potential for silence in the record as a result of "what the advocate finds himself compelled to *refrain* from doing . . . ." (Emphasis in original.) Id., 489–90. Subsequently, in *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), a case involving a trial court's failure to inquire into a potential conflict of interest about which it knew or reasonably should have known; id., 164; the Supreme Court expressly limited *Holloway*'s rule of automatic reversal to cases in which "defense counsel [was] forced to represent codefendants over [counsel's] timely objection . . . ." Id., 168. In so doing, the court noted that "[the] [p]etitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the . . . mandated inquiry, makes little policy sense." Id., 172. As Justice Kennedy observed in his concurring opinion in *Mickens*, "[t]he trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice." Id., 176 (Kennedy, J., concurring). Indeed, automatic reversal in such cases is not only unwarranted but would be profoundly unfair to the state. In such cases, "[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures." Id., 179 (Kennedy, J., concurring).

trial court failed to inquire, petitioner was required, and had failed, to prove actual conflict and adverse effect during evidentiary hearing); see also *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 142–43, 866 A.2d 649 (2005) (remanding case to habeas court after it inadequately inquired into apparent conflict of interest because Appellate Court had "no evidence before [it] in the record that reveal[ed] whether the nature of the grievances constituted an actual conflict of interest"); *State* v. *Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244 (2006) (remanding case to trial court after it failed to inquire into possible conflict of interest because, "unlike in *Mickens*, an evidentiary hearing ha[d] not been held," and, thus, court was unable to determine if defendant's right to effective assistance of counsel had been denied); *State* v. *Gillard*, 64 Ohio St. 3d 304, 312, 595 N.E.2d 878 (1992) (remanding case to trial court after it inadequately inquired into possible conflict of interest because court "[could] not be sure that an actual conflict of interest existed").

On remand, the trial court is instructed to conduct a hearing at which the defendant shall have the burden of establishing "(1) that [defense] counsel actively represented conflicting interests[12] and (2) that an actual conflict of interest adversely affected his [counsel's] performance."[13] (Footnote added; internal quotation

[12] The record does not reveal whether the conflict alleged by the defendant before Judge Dewey is the same as the conflict he alleged before Judge Gold, which was that defense counsel was representing the son of the victim. To the extent that it is relevant, the trial court should consider on remand whether the defendant's alleged conflicts of interest before Judge Dewey and Judge Gold are the same and whether that has any impact on the defendant's ability to satisfy his burden on remand.

[13] "Prejudice may be presumed in some sixth amendment contexts, such as the actual or constructive denial of assistance of counsel altogether or various forms of state interference with counsel's assistance. . . . In the context . . . of counsel allegedly burdened by a conflict of interest . . . there is no presumption of prejudice per se. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that . . . conflict of interest adversely affected [counsel's]

marks omitted.) *State* v. *Parrott*, supra, 262 Conn. 287; see also *Cuyler* v. *Sullivan*, supra, 446 U.S. 348. As we previously have explained, an attorney may be subject to conflicting interests when "interests or factors personal to him [or her] . . . are inconsistent, diverse or otherwise discordant with [the interests] of his [or her] client . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Crespo*, supra, 246 Conn. 690. To prove adverse effect, a defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 387.

Following the hearing on remand, the trial court is directed to make its findings of fact and conclusions of law in writing, which shall promptly be filed with the Office of the Appellate Clerk for our review. See, e.g., *State* v. *Pollitt*, 199 Conn. 399, 416–17, 508 A.2d 1 (1986) (remanding case to trial court with order to conduct evidentiary hearing on suppression of evidence claim and instructing court, after making "its findings of fact and conclusions of law," to "promptly file such findings and conclusions with the clerk of this court for our review"); see also Practice Book § 60-2 ("[this]

performance. . . . The Second Circuit Court of Appeals has honed this test further. Once a defendant has established that there is an actual conflict, he must show that a lapse of representation . . . resulted from the conflict. . . . To prove a lapse of representation, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 387; see also *State* v. *Crespo*, supra, 246 Conn. 689 n.21 ("If an actual conflict of interest burdens the defendant's counsel, the defendant need not establish actual prejudice. . . . The defendant need only demonstrate that . . . counsel's performance was adversely affected by the conflict." (Citation omitted; internal quotation marks omitted.)).

court may, on its own motion or upon motion of any party . . . (8) remand any pending matter to the trial court for the resolution of factual issues where necessary"). At that time, depending on the trial court's findings, this court will determine whether it is necessary to reach the defendant's remaining claim on appeal that the trial court improperly admitted into evidence testimony from lay witnesses identifying him in a surveillance video recording.

The case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

KRISTINE CASEY ET AL. *v.* GOVERNOR NED LAMONT
(SC 20494)

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

Syllabus

Pursuant to statute (§ 28-9 (a)), "[i]n the event of serious disaster . . . the Governor may proclaim that a state of civil preparedness emergency exists . . . ."

The plaintiffs, the owners of a pub located in Connecticut, sought relief in connection with the issuance of certain executive orders by the defendant, the governor of the state of Connecticut, amid the COVID-19 pandemic. In response to the pandemic, the governor proclaimed a civil preparedness emergency pursuant to § 28-9 (a) and issued the challenged executive orders in an attempt to contain and mitigate the spread of COVID-19, including orders that limited various activities at bars and restaurants throughout the state. The plaintiffs closed their pub after determining that it would not be profitable to operate the pub while complying with the executive orders. The plaintiffs sought an injunction precluding the enforcement of the executive orders and a judgment declaring the orders unconstitutional. The trial court denied the plaintiffs' requests for relief and rendered judgment for the governor. The plaintiffs appealed to this court upon certification by the Chief Justice pursuant to statute (§ 52-265a) that a matter of substantial public interest was involved. *Held*:

1. The governor did not exceed his statutory authority when he issued the challenged executive orders: on the basis of the text and legislative history of both § 28-9 (a) and another related statute (§ 28-1 (2)) that refers to civil preparedness emergencies under § 28-9 and that defines the term "major disaster," as well as a declaration by the president of the United States that the COVID-19 pandemic was of sufficient severity and magnitude to be deemed a major disaster under federal law that embraces a narrower definition of "major disaster" than that set forth in § 28-1 (2), this court concluded that the COVID-19 pandemic constituted a "serious disaster" for which the governor could proclaim the existence of a civil preparedness emergency under § 28-9 (a); moreover, such a proclamation empowered the governor, pursuant to § 28-9 (b) (1), to modify or suspend any law or requirement that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health, and, pursuant to § 28-9 (b) (7), to take steps that are reasonably necessary in light of the emergency to protect the health, safety and welfare of the people of Connecticut, and all of the challenged executive orders fell within either or both of those provisions.

2. The plaintiffs could not prevail on their claim that § 28-9 (b) (1) and (7) was an unconstitutional delegation by the General Assembly of its legislative powers to the governor, in violation of the separation of powers provision of the Connecticut constitution: in enacting § 28-9, the General Assembly set forth the policy for the governor to follow in the event of a serious disaster and provided standards that both limited the governor's authority to act and were sufficient to guide the exercise of his authority, as the governor could act under § 28-9 (b) (1) only after he proclaimed a civil preparedness emergency or declared a public health emergency, his actions under that provision were limited in duration and to suspending or modifying, rather than repealing, laws, and only to the extent that they were in conflict with the execution of civil preparedness functions or were required to protect public health, and the governor could act under § 28-9 (b) (7) only after he proclaimed a civil preparedness emergency and only to the extent reasonably necessary to protect the health, safety and welfare of the people of Connecticut; moreover, it was reasonable for the legislature to conclude that the executive branch would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and welfare, as the legislature is not in session continuously and would not be well positioned to mount a rapid response to a serious disaster, especially one that develops and evolves quickly and unpredictably, and thus requires an ongoing and agile response; furthermore, a legislative committee with statutory authority to disapprove of the governor's public health emergency declaration provided oversight of his actions, and

the legislature had the ability to impose greater oversight or to amend or repeal § 28-9 to further limit the governor's authority.

Argued December 11, 2020—officially released March 29, 2021*

Procedural History

Action to enjoin the defendant from enforcing certain executive orders, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Waterbury, Complex Litigation Docket, where the case was tried to the court, *Bellis*, *J.*; judgment denying the plaintiffs' request for injunctive and declaratory relief, and the plaintiff, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed to this court. *Affirmed.*

Jonathan J. Klein, for the appellants (plaintiffs).

Philip Miller, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Alma Rose Nunley*, assistant attorney general, for the appellee (defendant).

Opinion

McDONALD, J. For more than one year now, the world has been in the unyielding grip of a highly virulent infectious disease that, to date, has infected approximately 127 million people worldwide and has killed more than 2.7 million individuals. Of those deaths, about 20 percent, or approximately 549,000, have been in the United States of America. In Connecticut alone, more than 305,000 people have been infected and more than

* March 29, 2021, the date that this decision was released as a slip opinion, is the operative date for the beginning of all time periods for the filing of any postopinion motions or petitions.

7800 have died.[1] These numbers, while jarring on their own, tell but one part of the enormous toll inflicted on society since the pandemic's onset. Around the country—indeed the world—large segments of economic activity have been severely disrupted, if not fallen into collapse, millions of people have lost their employment, many hospitals and other health-care operations have been overrun by gravely ill and dying patients, and extraordinary lockdowns ordered by government officials, in an effort to abate the rate of infection, have limited the free flow of personal and commercial activity. As this opinion is issued, it is uncertain when, or how, the pandemic will end.

The disease that has caused so much death and damage is known as COVID-19. It is a respiratory disease caused by a virus that is transmitted easily from person to person and can result in serious illness or death. According to the Centers for Disease Control and Prevention (CDC), the virus is primarily spread through respiratory droplets from infected individuals coughing, sneezing, or talking while in close proximity to other people. Centers for Disease Control & Prevention, How COVID-19 Spreads (last updated October 28, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited March 29, 2021). On January 31, 2020, the United States Department of Health and Human Services declared a national public health emergency, effective January 27, 2020, on the basis of the rising number of confirmed COVID-19 cases in the United States. United States Department of Health & Human Services, Press Release, Secretary Azar Declares Public Health Emer-

[1] See Coronavirus Resource Center, Johns Hopkins University & Medicine, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at John Hopkins University (JHU), available at https://coronavirus.jhu.edu/map.html (last visited March 29, 2021); Connecticut Department of Public Health, Connecticut's COVID-19 Response, available at https://portal.ct.gov/coronavirus (last visited March 29, 2021).

gency for United States for 2019 Novel Coronavirus (January 31, 2020), available at https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html (last visited March 29, 2021). The CDC explained that COVID-19 "represents a tremendous public health threat." Centers for Disease Control & Prevention, Press Release, Update on COVID-19 (February 21, 2020), available at https://www.cdc.gov/media/releases/2020/t0221-cdc-telebriefing-covid-19.html (last visited March 29, 2021).

With this context in mind, we turn to the matter before us, which requires this court to consider the extent of the governor's authority to issue executive orders during the civil preparedness emergency he declared pursuant to General Statutes § 28-9 in response to the COVID-19 pandemic. In particular, we consider whether the defendant, Governor Ned Lamont, lawfully issued certain executive orders that limited various commercial activities at bars and restaurants throughout the state. To that end, we must determine whether the COVID-19 pandemic constitutes a "serious disaster" pursuant to § 28-9 and whether that statute empowers the governor to issue the challenged executive orders. Because we conclude that § 28-9 provides authority for the governor to issue the challenged executive orders, we also consider whether § 28-9 is an unconstitutional delegation of legislative authority to the governor in violation of the separation of powers provision of the Connecticut constitution. See Conn. Const., art. II. We conclude that the statute passes constitutional muster.

The pleadings and the record reveal the following undisputed facts and procedural history. On March 10, 2020, "[i]n response to the global pandemic of [COVID-19]," Governor Lamont "declare[d] a public health emergency and civil preparedness emergency throughout the [s]tate, pursuant to [General Statutes §§] 19a-131a and 28-9 . . . ." Governor Lamont has renewed

the declaration of both emergencies twice, most recently on January 26, 2021. The emergencies currently remain in effect until April 20, 2021. On March 13, 2020, three days after Governor Lamont's declaration, President Donald J. Trump made "an emergency determination under [§] 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. [§§ 5121 –5207 (Stafford Act)]." Letter from President Donald J. Trump to Acting Secretary of the Department of Homeland Security Chad F. Wolf (March 13, 2020) p. 1. On March 28, 2020, President Trump determined that, beginning on January 20, 2020, the impacts of the COVID-19 pandemic on Connecticut "are of sufficient severity and magnitude to warrant a major disaster declaration under the [Stafford Act] . . . ." Federal Emergency Management Agency, Connecticut, Major Disaster and Related Determinations, 85 Fed. Reg. 31,542 (May 26, 2020).

Following Governor Lamont's declaration of the public health and civil preparedness emergencies, he promulgated a series of executive orders in an attempt to contain and mitigate the spread of COVID-19. Relevant to this appeal, on March 16, 2020, he issued Executive Order No. 7D, which provides, among other things, that "any location licensed for [on premise] consumption of alcoholic liquor in the [s]tate of Connecticut . . . shall only serve food or [nonalcoholic] beverages for [off premise] consumption." Executive Order No. 7D (March 16, 2020). In response to the rapidly evolving COVID-19 pandemic, Governor Lamont continued to promulgate a series of executive orders modifying Executive Order No. 7D. Specifically, in April, 2020, Governor Lamont issued Executive Order No. 7X, which extended to May 20, 2020, Executive Order No. 7D's limitations on bars and restaurants. Given that the state had made some progress in stemming the spread of COVID-19, in May, 2020, Governor Lamont issued guid-

ance called "Reopen Connecticut" to begin reopening portions of the state's economy. The goal of Reopen Connecticut was to "[p]roactively protect public health and speed up the pace of economic, educational, and community recovery while restoring Connecticut's quality of life." N. Lamont, Reopen Connecticut: Sector Rules for May 20th Reopen (May 18, 2020) (Reopen Connecticut), available at https://portal.ct.gov/-/media/DECD/Covid_Business_Recovery/CTReopens_Offices_C4_V1.pdf (last visited March 29, 2021). In service of that goal, Governor Lamont issued Executive Order No. 7MM, which permitted restaurants to serve food outside and ordered that "[a]lcoholic liquor may be served only in connection with outdoor dining . . . ." Executive Order No. 7MM (May 12, 2020). Thereafter, he issued Executive Order No. 7ZZ, which allowed the resumption of some indoor dining except that the ban on "the sale of alcohol by certain permittees without the sale of food . . . shall remain in effect and [is] extended through July 20, 2020." Executive Order No. 7ZZ (June 16, 2020). In July, 2020, and in response to certain developments related to COVID-19, Governor Lamont announced that he was suspending phase 3 of the Reopen Connecticut plan, which was previously scheduled to start on July 20, 2020.

In compliance with Executive Order No. 7D, and after determining that it would not be profitable to operate a takeout business, the plaintiffs, Kristine Casey and Black Sheep Enterprise, LLC, closed their establishment, Casey's Irish Pub, on March 16, 2020. Casey is the permittee of a café liquor permit for the pub, which has fifteen stools at the bar, two high-top tables, a pool table, and a maximum capacity of fifty-nine patrons. The pub does not typically serve hot meals, and approximately 90 percent of its revenue comes from the sale of alcohol. The parties agree that, because of the physical location of the pub, "[o]utdoor service is not a viable

option . . . because the tables would completely block the sidewalk, and there would be no protection from cars approaching to park . . . .'' The parties also stipulate that ''[p]reparing takeout meals and sealed alcoholic beverages for [off premise] consumption is not a viable option . . . as Casey knows from her experience in operating the pub and dealing with her customer base that, without the pub atmosphere, there would be insufficient interest from her clientele to justify the expense of providing such service.'' The plaintiffs' pub remains closed, and the parties stipulate that ''it is not economically or physically feasible for [the plaintiffs] to reopen the pub.'' Since the pub's shutdown, the plaintiffs have continued to pay rent in the amount of $3200 per month and operating expenses totaling approximately $14,000 per month without any income stream.

In June, 2020, the plaintiffs commenced this action against Governor Lamont, requesting the court to declare that he acted beyond his statutory and constitutional authority when he issued Executive Order Nos. 7D, 7G, 7N, 7T, 7X, 7MM and 7ZZ.[2] The operative complaint sought a ''temporary and permanent injunction'' against the enforcement of the challenged executive orders. The complaint also requested a judgment declar-

[2] In addition to Executive Order Nos. 7D, 7X, 7MM, and 7ZZ, the provisions of which we have set forth in the text of this opinion, Executive Order No. 7G clarified the limits of Executive Order No. 7D on businesses such as the pub, allowing them ''to sell sealed containers of alcoholic liquor for [pickup] at such restaurant, café or tavern'' under certain conditions, including a requirement that the alcohol purchase ''accompany a [pickup] order of food prepared on the premises . . . .'' Executive Order No. 7G (March 19, 2020). Executive Order No. 7N directed businesses that remained open to serve food and drink for off-premise consumption to ''limit entrance of customers into their locations to the minimum extent necessary to pick up and/or pay for orders, use touchless payment systems, and require remote ordering and payment . . . .'' Executive Order No. 7N (March 26, 2020). Executive Order No. 7T expanded the list of sealed containers of alcohol that liquor permit holders could sell under the conditions set forth in Executive Order No. 7G.

ing the executive orders unconstitutional. The parties filed a stipulation of facts, and, after the filing of briefs, the case was tried to the court by way of oral argument and based on the briefs and the parties' stipulation of facts.[3]

Thereafter, the trial court, *Bellis*, *J.*, issued a memorandum of decision, in which it denied the plaintiffs' request for injunctive and declaratory relief, and the court rendered judgment for Governor Lamont. The court reasoned that the COVID-19 pandemic constitutes a "serious disaster" under § 28-9 (a) and Governor Lamont's executive orders were authorized by § 28-9 (b) (1) and (7). The court also concluded that § 28-9 is not an unconstitutional delegation of legislative authority to the governor because, when the General Assembly passed § 28-9, "it set forth a clear legislative policy" and "gave the governor the ability to implement measures to achieve this goal."

The plaintiffs appealed directly to this court pursuant to General Statutes § 52-265a, and the Chief Justice subsequently certified that this action involves a matter of substantial public interest. On appeal, the plaintiffs do not contend that the restrictions Governor Lamont imposed on the pub were unreasonable or were not related to the public health, safety, and welfare of the people of this state. Rather, they claim that Governor Lamont exceeded his statutory authority by issuing the challenged executive orders. The plaintiffs further contend that, even if Governor Lamont's executive orders are valid under § 28-9, § 28-9 (b) (1) and (7) is an unconstitutional delegation by the General Assembly of its legislative powers in violation of the separation of powers provision of the Connecticut constitution. See Conn. Const., art. II.

[3] Oral argument was conducted using remote technologies because the Superior Court buildings at the time were closed to the public for most purposes as a result of the pandemic.

Governor Lamont disagrees and contends that, because the COVID-19 pandemic is a "serious disaster," § 28-9 provides him with statutory authority to limit the pub's operation. Governor Lamont further contends that § 28-9 does not violate the separation of powers provision of the Connecticut constitution because it does not infringe on legislative authority and it provides sufficient standards for implementation.[4]

Following oral argument, we issued a per curiam ruling on December 31, 2020, in which we affirmed the judgment of the trial court, explaining that Governor Lamont's actions to date had been constitutional. We indicated at that time that a full opinion would follow. This is that opinion.

I

We begin with the plaintiffs' contention that, by issuing the challenged executive orders, Governor Lamont exceeded his statutory authority. Whether the governor has statutory authority to issue the challenged executive orders during a proclaimed civil preparedness emergency turns on whether the COVID-19 pandemic

[4] Following oral argument, we ordered the parties to file supplemental briefs addressing the questions of whether Governor Lamont abandoned reliance on § 19a-131a as a legal basis to support the challenged executive orders and, assuming he did not, whether his authority resulting from a public health emergency declaration, alone, supports the challenged executive orders. In their supplemental brief, the plaintiffs contend, as the trial court concluded, that Governor Lamont abandoned reliance on § 19a-131a. Assuming he did not abandon reliance on § 19a-131a, the plaintiffs claim that the governor's authority resulting from a public health emergency, alone, does not support any of the challenged executive orders. Governor Lamont contends that he has not abandoned reliance on § 19a-131a as a legal basis to support the actions taken pursuant to § 28-9 (b) (1). He also contends, however, that he can rely on § 19a-131a as authority to issue only Executive Order Nos. 7MM and 7ZZ because those are the only orders that fall within the governor's authority to modify statutes during a public health emergency pursuant to § 28-9 (b) (1). Because the parties agree that § 19a-131a, alone, does not provide authority for Governor Lamont to issue all of the challenged executive orders, we must consider whether § 28-9 provides that authority.

constitutes a "serious disaster" under § 28-9 (a). This presents a question of statutory interpretation over which our review is plenary. See, e.g., *Gould* v. *Freedom of Information Commission*, 314 Conn. 802, 810, 104 A.3d 727 (2014). We review § 28-9 in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

We begin with the text of § 28-9 (a), which provides in relevant part: "In the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof, the Governor may proclaim that a state of civil preparedness emergency exists, in which event the Governor may personally take direct operational control of any or all parts of the civil preparedness forces and functions in the state. Any such proclamation shall be effective upon filing with the Secretary of the State. . . ." Governor Lamont does not contend that the COVID-19 pandemic has resulted from an "enemy attack, sabotage or other hostile action . . . ." General Statutes § 28-9 (a). Rather, the governor relies on the term "serious disaster" to justify the civil preparedness emergency proclamation. The plaintiffs contend that the COVID-19 pandemic is not a "serious disaster" because the General Assembly did not intend that term "to include the contagion of disease." Governor Lamont contends that, regardless of whether the statute is plain and unambiguous, the COVID-19 pandemic constitutes a "serious disaster."

The term "serious disaster" is not defined in § 28-9 or in Chapter 517 of the General Statutes. The term "major disaster," however, is defined in the definitional provision of Chapter 517.[5] Specifically, General Statutes § 28-

[5] We subsequently discuss in this opinion whether there is any analytic difference between a "serious disaster" and a "major disaster," and conclude there is not.

1 (2) defines "major disaster" as "*any catastrophe including, but not limited to*, any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought, or, regardless of cause, any fire, flood, explosion, or man-made disaster in any part of this state that, (A) in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the [Stafford Act], as amended from time to time, to supplement the efforts and available resources of this state, local governments within the state, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused by such catastrophe, or (B) in the determination of the Governor, requires the declaration of a civil preparedness emergency pursuant to section 28-9." (Emphasis added.)

Because the term "catastrophe" is not defined in § 28-1, we look to its common dictionary definition. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 488, 131 A.3d 240 (2016); see also General Statutes § 1-1 (a). "Catastrophe" is often defined as "a momentous tragic usu[ally] sudden event marked by effects ranging from extreme misfortune to utter overthrow or ruin . . . ." Webster's Third New International Dictionary (1961) p. 351; accord Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 194. The COVID-19 pandemic has caused vast disruption to everyday life, and it has had a devastating impact on our economy. K. Phaneuf, "CT Economy Will Struggle Until at Least 2030 To Recover from COVID, UConn Report Warns," CT Mirror, October 23, 2020, available at https://ctmirror.org/2020/10/23/ct-economy-will-struggle-until-at-least-2030-to-recover-from-covid-uconn-report-warns/ (last visited March 29, 2021). Most tragically, the United States has now recorded more COVID-19 deaths than the total number of Americans killed during World Wars I and II combined. See Congressional

Research Service, American War and Military Operations Casualties: Lists and Statistics (Updated July 29, 2020) p. 2, available at https://crsreports.congress.gov/product/pdf/RL/RL32492 (last visited March 29, 2021). Thus, by any reasonable measure, the COVID-19 pandemic certainly fits the dictionary definition of catastrophe.

The plaintiffs note, however, that the enumerated list that follows the term "catastrophe" in § 28-1 (2) is limited to "weather conditions, seismic activity, fire, explosion and man-made conditions . . . ." As a result, the plaintiffs argue that there is no language in § 28-1 (2) that indicates any legislative "intent to include the contagion of disease." The plaintiffs argue, albeit implicitly, that we should apply the statutory interpretation rule of ejusdem generis, which provides that, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 314 Conn. 618, 658, 104 A.3d 638 (2014).

Although it is true that the listed examples of catastrophes do not include the contagion of disease, the plaintiffs' argument fails to consider that the list is preceded by the phrase "*including, but not limited to* . . . ." (Emphasis added.) General Statutes § 28-1 (2). By including this phrase, the legislature evinced its intent that a "major disaster" not be limited in scope to the enumerated events, as the plaintiffs contend.[6] See

[6] The Pennsylvania Supreme Court recently reached a similar conclusion under Pennsylvania law. See *Friends of Danny DeVito* v. *Wolf*, Pa. , 227 A.3d 872, 888–89, cert. denied, U.S. , 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020). Under state law, the governor of Pennsylvania is authorized to declare a disaster emergency "upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent." 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (c) (West Supp. 2020). The Pennsylvania Emergency Management Services Code defines "disaster" as "[a] man-made disaster, natural disaster or war-caused disaster." 35 Pa. Stat. and Cons. Stat. Ann. § 7102 (West Supp. 2020). Similar to the definition of "major

United States v. *West*, 671 F.3d 1195, 1200–1201 (10th Cir. 2012) (citing cases holding that doctrine of ejusdem generis is inapplicable when statutory enumeration is preceded by phrase "including, but not limited to"); see also *Tomick* v. *United Parcel Service, Inc.*, 324 Conn. 470, 479, 153 A.3d 615 (2016) ("[r]eading the phrase 'including but not limited to,' as expansive"); *Lusa* v. *Grunberg*, 101 Conn. App. 739, 756, 923 A.2d 795 (2007) ("the phrase [including but not limited to] convey[s] a clear intention that the items listed in the definition do not constitute an exhaustive or exclusive list" (internal quotation marks omitted)). Indeed, as Governor Lamont contends, an expansive reading is warranted in this context given that the General Assembly instructed him to exercise the powers delegated to him under § 28-9 broadly for "the protection of the public health"; General Statutes § 28-9 (b) (1); and "to protect the health, safety and welfare of the people of the state . . . ." General Statutes § 28-9 (b) (7). A narrow interpretation of the circumstances under which the governor would have authority to proclaim a civil preparedness emer-

disaster" in § 28-1 (2), the Pennsylvania Emergency Management Services Code defines "natural disaster" as "[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion *or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life*." (Emphasis in original.) 35 Pa. Stat. and Cons. Stat. Ann. § 7102 (West Supp. 2020). The plaintiffs in *Friends of Danny DeVito* claimed that the COVID-19 pandemic was not a "natural disaster" because it was "not of the same type or kind" as those listed in the statutory definition in § 7102. *Friends of Danny DeVito* v. *Wolf*, supra, 888. The Pennsylvania Supreme Court rejected this argument and concluded that the COVID-19 pandemic qualified as a natural disaster. Id. The court explained that the "specific disasters in the definition of 'natural disaster' themselves lack commonality"; id.; and, by "including the language 'other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life,' it [was] clear that the General Assembly intended to *expand* the list of disaster circumstances that would provide [the Pennsylvania governor] with the necessary powers to respond to exigencies involving vulnerability and loss of life." (Emphasis in original.) Id., 889.

gency, as the plaintiffs contend, would frustrate this legislative intent.

Moreover, it would be absurd for the statutory scheme to be interpreted such that the governor could declare a civil preparedness emergency for an event such as a snowstorm, but not for the worst pandemic that has impacted the state in more than one century. We decline to construe the meaning of "major disaster" in such a manner. See, e.g., *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 803, 955 A.2d 15 (2008) ("[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended" (internal quotation marks omitted)).

To the extent the meaning of "major disaster" is ambiguous given the tension between the enumerated list of catastrophes and the legislature's use of the phrase "including, but not limited to," we look to extratextual sources to gain further insight into whether the legislature intended that a global pandemic could constitute a major disaster. The legislative history of both §§ 28-1 (2) and 28-9 provides further support for the conclusion that the General Assembly did not intend the term "major disaster" to be limited only to catastrophes caused by weather conditions, seismic activity, fire, explosion and man-made conditions, as the plaintiffs contend. Under earlier versions of § 28-9, the governor was authorized to proclaim a civil preparedness emergency "[i]n the event of serious natural disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof . . . ." General Statutes (1958 Rev.) § 28-9; see also General Statutes (1955 Supp.) § 1913d (adding "serious natural disaster" to list of events). At that time, Chapter 517 did not contain a definition of "disaster" or "serious national disaster." In 1975, however, the General Assembly inserted a definition of "disaster" into § 28-1. See Public Acts 1975, No. 75-643, § 1 (P.A.

75-643), codified at General Statutes (Rev. to 1977) § 28-1 (b). It provided in relevant part: " 'Disaster' means occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including but not limited to, fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination . . . *epidemic*, air contamination, blight, drought, infestation, explosion, riot or hostile military or paramilitary action." (Emphasis added.) P.A. 75-643, § 1. Accordingly, at least as early as 1975, the General Assembly clearly anticipated that an epidemic could constitute a "disaster."

Since 1975, the General Assembly has amended the definitions in § 28-1 on several occasions in order to align state law with the federal Stafford Act. See *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 50 n.13. Specifically, in 1979, the General Assembly removed the definition of "disaster" from § 28-1 and added the definition of "major disaster" to better align state and federal law. Public Acts 1979, No. 79-417, § 1 (P.A. 79-417), codified at General Statutes (Rev. to 1981) § 28-1 (b); see 22 H.R. Proc., Pt. 5, 1979 Sess., p. 1648 ("The intent of this [b]ill is to align the [s]tate laws with the [f]ederal laws. . . . Further, [the bill] inserts two new definitions for major disasters and emergency, while repealing the old definition for disaster. Again, this is done to align [f]ederal and [s]tate legislation."). Public Act No. 79-417 defined "major disaster" in relevant part as "any hurricane, storm, flood, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of this state which, in the determination of the president, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Federal Disaster Relief Act of 1974 . . . ." P.A. 79-417, § 1. This definition was nearly identi-

cal to the federal definition of "major disaster" in the federal Disaster Relief Act of 1974. See Disaster Relief Act of 1974, Pub. L. No. 93-288, § 102, 88 Stat. 143, 144, codified at 42 U.S.C. § 5122 (2) (Supp. IV 1974). Although the definition of "major disaster" did not list epidemic or pandemic, there is nothing in the legislative history to indicate that the General Assembly intended that an epidemic or pandemic of sufficient severity could not constitute a "major disaster," when, just four years earlier, it evinced its intent that it could constitute a "disaster." The changes to the definition were merely intended to align state and federal law.[7]

The plaintiffs' contention that the term "major disaster" is limited to weather conditions, seismic activity, fire, explosion and man-made conditions is further belied by the legislature's changes to the definition of "major disaster" in Number 06-15 of the 2006 Public Acts (P.A. 06-15). In 1988, Congress amended the Disaster Relief Act of 1974 and changed the definition of "major disaster" to "any *natural catastrophe* (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) . . . ." (Emphasis added.) The Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, § 103, 102 Stat. 4689, 4690, codified at 42 U.S.C. § 5122 (2) (1988). Rather than adopting the new federal definition, as the General Assembly had previously done, in P.A. 06-15, it enacted a broader definition of "major disaster" by omitting the word "natural" and adding the phrases "including, but not limited to" and "manmade disaster . . . ." P.A. 06-15, § 1, codified

[7] Indeed, we note that General Statutes § 28-9a, which sets forth additional actions the governor may take in the event of an emergency or major disaster, explicitly provides that " '[m]ajor disaster,' 'emergency' and 'temporary housing' as used in this section have the same meanings as the terms are defined, or used, in the [federal] Disaster Relief Act of 1974 . . . ." (Citation omitted.) General Statutes § 28-9a (d).

at General Statutes (Rev. to 2007) § 28-1 (2). Thus, the current statutory definition of "major disaster" under Connecticut law is broader than the federal definition, which is limited to "natural catastrophe[s]"; 42 U.S.C. § 5122 (2) (2018); and encompasses a wider category of catastrophes beyond those listed in the federal definition. See General Statutes § 28-1 (2). Significantly, however, although the federal definition of "major disaster" is narrower than the state definition, President Trump concluded that the impacts of the COVID-19 pandemic on Connecticut were "of sufficient severity and magnitude to warrant a *major disaster declaration* under the [Stafford Act] . . . ." (Emphasis added.) Federal Emergency Management Agency, supra, 85 Fed. Reg. 31,542. It would be illogical to conclude that the effects of the COVID-19 pandemic in this state were of sufficient severity to constitute a "major disaster" under the narrower federal definition of "major disaster" but not sufficient to satisfy the broader state definition of the same term.[8] We decline to construe the statute in such a manner. Accordingly, we conclude that the COVID-

[8] Just as the federal government was faced with major logistical challenges in order to stem the spread of COVID-19, such as distributing supplies from a national stockpile, so, too, was this state. Chapter 517 contains various provisions that demonstrate the need for a civil preparedness emergency to address the logistical challenges posed by a pandemic of the magnitude presented by the COVID-19 pandemic. See General Statutes § 28-1 (4) (defining "civil preparedness" to include "all those activities and measures designed or undertaken (A) to minimize or control the effects upon the civilian population of major disaster or emergency" such as "the procurement and stockpiling of necessary materials and supplies"); General Statutes § 28-11 (a) (during civil preparedness emergency or public health emergency, governor may take possession "(3) of any antitoxins, pharmaceutical products, *vaccines* or other biological products" (emphasis added)); General Statutes § 28-16 ("commissioner [of emergency services and public protection] is empowered, in anticipation of . . . any disaster, to purchase and maintain a stockpile of medical supplies . . . and any other supplies which in his opinion are necessary and desirable to afford relief and assistance to the people of the state in an emergency"). These provisions make clear that civil preparedness emergencies, under § 28-9, and public health emergencies, under § 19a-131a, are related and interconnected.

19 pandemic constitutes a "major disaster," as that term is defined in § 28-1 (2).

Logically, it would seem that the meaning of the term "major disaster" set forth in § 28-1 (2) is substantially similar to the term "serious disaster" in § 28-9 (a). See Webster's Third New International Dictionary, supra, pp. 1363, 2073 (defining "major" as "involving grave risk: serious" and defining "serious" as "grave in disposition, appearance, or manner"). As this court has often explained, however, "we assume that the legislature has a different intent when it uses different terms in the same statutory scheme." *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 662, 931 A.2d 142 (2007) (*Katz*, *J.*, concurring). Thus, we must determine whether a major disaster also constitutes a serious disaster. This question is quickly resolved based on a review of the statutory scheme. Section 28-1 (2) provides that a "major disaster" includes "any catastrophe" that "(B) in the determination of the Governor, requires the declaration of a civil preparedness emergency pursuant to section 28-9." The General Assembly's reference to a civil preparedness emergency under § 28-9 in the definition of "major disaster" set forth in § 28-1 (2) makes clear that it intended that any event that constitutes a "catastrophe" under § 28-1 (2) also constitutes a "serious disaster" if the governor declares a civil preparedness emergency under § 28-9. Put differently, if an event constitutes a "catastrophe" under § 28-1 (2), and the governor determines that the proclamation of a civil preparedness emergency under § 28-9 is required to address it, then the "catastrophe" necessarily is both a "major disaster" and a "serious disaster."[9]

[9] Section 28-1 (2) also provides that a "major disaster" includes "any catastrophe" that "(A) in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the [Stafford Act] . . . to supplement the efforts and available resources of this state . . . in alleviating the damage, loss, hardship, or suffering caused by such catastrophe . . . ." As we have explained, President Trump's determination that the impacts of the COVID-19 pandemic on

Because, as we have explained, the COVID-19 pandemic constitutes a "catastrophe," and Governor Lamont has declared a civil preparedness emergency under § 28-9, we conclude that the COVID-19 pandemic constitutes a "serious disaster" under § 28-9 (a).

Having concluded that the COVID-19 pandemic constitutes a serious disaster and, therefore, that Governor Lamont was statutorily authorized to proclaim a civil preparedness emergency, we must determine whether such proclamation empowered him to issue the challenged executive orders. Relevant to this appeal, subsection (b) of § 28-9 provides in relevant part that, "upon [a civil preparedness emergency] proclamation, the following provisions of this section and the provisions of section 28-11 shall immediately become effective and shall continue in effect until the Governor proclaims the end of the civil preparedness emergency:

"(1) Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency pursuant to section 19a-131a, the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. The Governor shall specify in such order the reason or reasons therefor and any statute, regulation or requirement or part thereof to be modified or suspended and the period, not exceeding six months unless sooner revoked, during which such order shall be enforced. . . .

this state were "of sufficient severity and magnitude to warrant a major disaster declaration under the [Stafford Act]"; Federal Emergency Management Agency, supra, 85 Fed. Reg. 31,542; provides further support for the conclusion that the COVID-19 pandemic constitutes a serious disaster.

* * *

"(7) The Governor may take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action . . . ."

In short, following the proclamation of a civil preparedness emergency pursuant to § 28-9 (a), subsection (b) (1) empowers the governor to modify or suspend any statute, regulation or requirement that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. Subsection (b) (7) additionally empowers the governor to take other steps that are reasonably necessary in light of the emergency to protect the health, safety, and welfare of the people of the state. All of the challenged executive orders fall squarely within either or both of these provisions.

Executive Order Nos. 7D and 7G, which closed bars and restaurants to all on premise service of food and beverages, were promulgated as part of a series of community mitigation strategies that were designed to encourage social distancing and protect public health and safety and to "increase containment of the virus and to slow transmission of the virus . . . ." Executive Order No. 7G (March 19, 2020). As the trial court noted, it is "now common knowledge that COVID-19 is spread by people who are in close physical contact with each other, and it is also well known that people who are drinking alcohol in bars tend to gather in close proximity in order to socialize." Other executive orders similarly provided logistical guidance to bars and restaurants in an effort to limit the number of people within these establishments or otherwise effectuate Executive Order

No. 7D. See Executive Order No. 7N (March 26, 2020) (directing businesses that remained open to serve food and drink for off premise consumption to "limit entrance of customers into their locations to the minimum extent necessary to pick up and/or pay for orders, use touchless payment systems, and require remote ordering and payment"); Executive Order No. 7T (April 2, 2020) (expanding list of sealed containers of alcohol that liquor permit holders could sell under conditions set forth in Executive Order No. 7G); Executive Order No. 7X (April 10, 2020) (extending Executive Order No. 7D's limitations on bars and restaurants through May 20, 2020). Governor Lamont noted the importance of each executive order to "reduc[ing] [the] spread of COVID-19," "increas[ing] containment of the virus," and "slow[ing] transmission of the virus . . . ." Executive Order No. 7G (March 19, 2020); accord Executive Order No. 7T (April 2, 2020). These executive orders fell within Governor Lamont's authority under § 28-9 (b) (7) to "take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state . . . ." Indeed, the plaintiffs do not contend that the restrictions Governor Lamont imposed on the pub were unreasonable or were not related to the public health, safety, and welfare of the people of this state.

Finally, Governor Lamont issued Executive Order Nos. 7MM and 7ZZ as the state began making progress in stemming the spread of COVID-19 in order to "[p]roactively protect public health and speed up the pace of economic, educational, and community recovery while resorting Connecticut's quality of life." Reopen Connecticut, supra. Executive Order No. 7MM permitted restaurants to serve food outside and ordered that "[a]lcoholic liquor . . . be served only in connection with outdoor dining . . . ." Executive Order No. 7MM

(May 12, 2020). Governor Lamont explained in the executive order that, when on premise dining was first permitted, it was limited to outdoor service because "public health experts ha[d] determined that the risk of transmission of COVID-19 [was] reduced in outdoor areas, including where there is more sunlight, greater air movement, and greater space to maintain distance between people . . . ." Id. Thereafter, Governor Lamont issued Executive Order No. 7ZZ, which allowed the resumption of indoor dining except that the ban on "the sale of alcohol by certain permittees without the sale of food . . . [was to] remain in effect and [was] extended through July 20, 2020." Executive Order No. 7ZZ (June 16, 2020). As with his earlier executive orders restricting activities at bars and restaurants, Executive Order Nos. 7MM and 7ZZ also fell within Governor Lamont's authority under § 28-9 (b) (7) to "take such other steps as are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state . . . ." In each of the challenged executive orders, Governor Lamont explained the public health rationale that required the action in order to protect the health, safety, and welfare of the people of this state.

Moreover, Executive Order Nos. 7MM and 7ZZ are also authorized by the governor's authority under § 28-9 (b) (1) to modify or suspend a statute if it conflicts with "the efficient and expeditious execution of civil preparedness functions or the protection of the public health." Executive Order No. 7MM specifically provides that "[t]itle 30 of the . . . General Statutes, including [§§] 30-22 (a) and 30-22a (a) . . . are modified to the extent they conflict with, or create additional requirements [with respect to], the sale of alcoholic liquor . . . ." Executive Order No. 7MM (May 12, 2020). General Statutes § 30-22a sets forth the terms of café liquor

permits for the sale of alcoholic liquor. Executive Order No. 7MM plainly modified § 30-22a (a), directing that, if a café intends to resume sales of alcoholic liquor for on premise consumption, such liquor may be consumed only outdoors and can be sold only in conjunction with the sale of food. Executive Order No. 7ZZ expanded on this modification of § 30-22a (a) by also requiring that the sale of food be accompanied by the sale of alcoholic liquor upon the resumption of indoor dining. Executive Order No. 7ZZ also explicitly provides that "[§] 28-9 (b) . . . authorizes the modification or suspension . . . of any statute . . . that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of public health . . . ." Executive Order No. 7ZZ (June 16, 2020). Both executive orders are thus also supported by the governor's authority under § 28-9 (b) (1), which authorizes the governor to modify or suspend any statute, regulation or requirement, if it conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. Accordingly, we conclude that Governor Lamont did not exceed his statutory authority when he issued the challenged executive orders in an effort to contain the spread of COVID-19.

II

We now consider the plaintiffs' contention that § 28-9 (b) (1) and (7) is an unconstitutional delegation by the General Assembly of its legislative powers to the governor, in violation of the separation of power provision of the Connecticut constitution. See Conn. Const., art. II.

We begin with the relevant legal principles. A challenge to "[t]he constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality,

[and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011).

"The [c]onstitution of this state provides for the separation of the governmental functions into three basic departments, legislative, executive and judicial, and it is inherent in this separation, since the law-making function is vested exclusively in the legislative department, that the [l]egislature cannot delegate the law-making power to any other department or agency." (Internal quotation marks omitted.) *University of Connecticut Chapter*, *AAUP* v. *Governor*, 200 Conn. 386, 394, 512 A.2d 152 (1986). We have explained that "[t]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . . [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power." (Internal quotation marks omitted.) *Persels & Associates*, *LLC* v. *Banking Commissioner*, 318 Conn. 652, 668–69, 122 A.3d 592 (2015).

Unlike the separation of powers doctrine that has developed under the federal constitution, "the historical evolution of Connecticut's governmental system [has] established a 'tradition of harmony' among the separate branches of government . . . ." *State* v. *McCleese*, 333 Conn. 378, 419, 215 A.3d 1154 (2019). "Recognizing that executive, legislative and judicial powers frequently overlap, we have consistently held that the doctrine of the separation of powers cannot be applied rigidly." *Bartholomew* v. *Schweizer*, 217 Conn. 671, 676, 587 A.2d 1014 (1991). As we have recognized, "the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers . . . of necessity overlap each other, and cover many acts which are in their nature common to more than one department." (Internal quotation marks omitted.) *Seymour* v. *Elections Enforcement Commission*, 255 Conn. 78, 107, 762 A.2d 880 (2000), cert. denied, 533 U.S. 951, 121 S. Ct. 2594, 150 L. Ed. 2d 752 (2001). For example, the General Assembly does not have exclusive responsibility for legislating. Rather, the legislature and the governor work together to pass legislation. See, e.g., Conn. Const., art. IV, § 15 ("Each bill which shall have passed both houses of the general assembly shall be presented to the governor. . . . If the governor shall approve a bill, he shall sign and transmit it to the secretary of the state, but if he shall disapprove, he shall transmit it to the secretary with his objections, and the secretary shall thereupon return the bill with the governor's objections to the house in which it originated.").

A statute will be held unconstitutional on the ground that it violates the separation of powers only if it "(1) confers on one branch of government the duties which

belong exclusively to another branch . . . or (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions." (Citation omitted.) *University of Connecticut Chapter*, *AAUP* v. *Governor*, supra, 200 Conn. 394–95. Applying these standards to § 28-9 (b) (1) and (7), we conclude that the plaintiffs cannot meet their heavy burden of establishing that the statute is a violation of the separation of powers provision of article second of the Connecticut constitution on the basis that it impermissibly delegates legislative authority to the governor.

Section 28-9 sets forth the General Assembly's policy that the state must be able to mount a rapid and agile response to a "serious disaster," and the executive branch, namely, the governor, is most capable of carrying out that response. Significantly, although the "lawmaking power is in the legislative branch of our government and cannot constitutionally be delegated . . . the General Assembly may carry out its legislative policies within the police power of the state by delegating to an administrative agency the power to fill in the details." (Citation omitted; internal quotation marks omitted.) *New Milford* v. *SCA Services of Connecticut, Inc.*, 174 Conn. 146, 149, 384 A.2d 337 (1977). Put differently, the General Assembly has "the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet that threat." *Buxton* v. *Ullman*, 147 Conn. 48, 55, 156 A.2d 508 (1959), appeal dismissed sub nom. *Poe* v. *Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). Once the General Assembly has made that determination, it may carry out that policy by delegating to the executive branch the power to "fill in the details" in order to effectuate that policy.[10] "In order to render admissible

[10] There are numerous statutory examples of the General Assembly's delegating to the governor the responsibility of protecting the people of this

such delegation of legislative power, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits . . . ." (Internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 572, 964 A.2d 1213 (2009). As the United States Supreme Court has explained, "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Internal quotation marks omitted.) *Mistretta* v. *United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989); see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring in the judgment and opinion of the court) ("[w]hen the [p]resident acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"). That is, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy* v. *United States*, U.S. , 139 S. Ct. 2116,

state. See, e.g., General Statutes § 3-1 (governor shall "take any proper action concerning . . . the enforcement of the laws of the state and the protection of its citizens"); General Statutes § 3-6a (governor may restrict "movement of persons and vehicles upon the streets and highways of the state" during "extreme weather conditions or other acts of nature"); General Statutes § 16a-11 (governor may declare "energy emergency" and order energy emergency plan); General Statutes § 19a-70 (governor may proclaim emergency due to short supply of "antitoxin or other biologic product" during epidemic and appoint advisory committee to recommend "the priority of the supply, distribution and use of such biologic products in the interest of the health, welfare and safety of the people of the state").

2123, 204 L. Ed. 2d 522 (2019) (plurality opinion). "[T]he answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." Id.

In enacting § 28-9, the General Assembly set forth the policy for the governor to follow in the event of a serious disaster. Specifically, through § 28-9 (b) (1), the General Assembly's policy directs that, upon the proclamation of a civil preparedness emergency, or upon the declaration of a public health emergency under § 19a-131a, the governor may "modify or suspend . . . any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, *is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health*." (Emphasis added.) Section 28-9 (b) (1) further requires the governor to specify the reasons for suspending or modifying the statute, regulation or requirement and "the period, *not exceeding six months* unless sooner revoked, during which such order shall be enforced." (Emphasis added.) The legislature set forth the standards that limit the governor's authority to act under § 28-9 (b) (1) in three primary ways. First, the governor may act pursuant to subsection (b) (1) only after the governor has proclaimed a civil preparedness emergency or declared a public health emergency. Second, the governor's actions are limited to modifying or suspending—not repealing—statutes or other regulations only to the extent that they are in conflict with the execution of civil preparedness functions or are required to protect the public health, and the governor is required to specify the reasons for the modification or suspension. Finally, the governor's actions have temporal limitations, namely, the period of time the modification or suspension may be enforced is limited to six months.[11] There-

[11] We acknowledge that the governor has twice renewed the civil preparedness emergency and, at the same time, declared new civil preparedness

fore, any actions the governor takes under subsection (b) (1) are temporary, that is, he cannot modify or suspend any statutes or regulations permanently.

Section 28-9 (b) (7) similarly makes clear that the governor may take other steps to address the serious disaster, only if they "are reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state, to prevent or minimize loss or destruction of property and to minimize the effects of hostile action." In other words, the governor may act under subsection (b) (7) only after he has proclaimed a civil preparedness emergency, and his actions are limited to those that are *reasonably necessary* to protect the health, safety, and welfare of the people of this state. Moreover, the governor may act only to the extent that the health, safety, and welfare of the people are implicated by this *particular* serious disaster. The governor would not, for example, be able to issue an executive order forbidding restaurants from selling unhealthy foods during the COVID-19 pandemic. Although eating healthy foods is undoubtedly related to the health and welfare of the people of this state, such an action is not reasonably necessary to address the current pandemic. Likewise, should a hurricane of

emergencies, and has renewed the executive orders modifying or suspending statutes and regulations. The statutory six month temporal limitation, however, requires the governor, at a minimum, to continuously evaluate the necessity of the executive orders and to justify their continued existence. As we discuss hereinafter, although this is a broad grant of authority, and there may well be instances in which a challenger to the governor's continued actions can demonstrate that they have lasted an improper duration, that issue is not squarely before us, and nothing in this opinion should be construed as offering an opinion on that separate issue. Indeed, the plaintiffs do not challenge the governor's renewal of the emergencies. Similarly, the plaintiffs acknowledge that they "are not challenging the good intentions of [Governor Lamont] in issuing his executive orders" and "are not asking [this] court to second-guess the policy judgments of [Governor Lamont] or to determine whether his executive orders and the sector rules make sense or are fair."

sufficient severity require the governor to proclaim a civil preparedness emergency, mandating that Connecticut citizens wear masks would not be a proper action under subsection (b) (7) merely because it might have the incidental health benefit of reducing the spread of the common cold. Rather, the governor's actions under subsection (b) (7) must be reasonably necessary to address the specific serious disaster that warranted the civil preparedness emergency proclamation.

Our case law supports the conclusion that § 28-9 (b) (1) and (7) is not an unconstitutional delegation of legislative authority. In *University of Connecticut Chapter*, *AAUP* v. *Governor*, supra, 200 Conn. 386, this court upheld the constitutionality of General Statutes (Rev. to 1985) § 4-85 (b), which authorized the governor to "reduce budgetary allotments by up to 5 percent under certain specified circumstances." Id., 387. The plaintiffs argued that the statute violated the separation of powers provision because it attempted to delegate a strictly legislative function, namely, budgeting. Id., 393. This court rejected that argument. We explained that, rather than interfering with a legislative function, § 4-85 (b) enabled the governor "to supervise the execution of the budget." Id., 396. We explained that this role was particularly suited to the executive branch, which is "most capable of having detailed and contemporaneous knowledge regarding finances. Under the constitutional separation of powers, the governor uses that knowledge in making such spending decisions and to see that the laws are faithfully executed." Id., 397. Here, the General Assembly similarly expressed its policy that the governor is most appropriately suited to use the expertise of the executive branch—particularly in this case, the Department of Public Health—to respond to a potentially, rapidly evolving serious disaster and to take the most appropriate steps to safeguard the people of this state. In *University of Connecticut Chapter*, *AAUP*, we

also rejected the plaintiffs' argument that the standards " 'deems necessary' " and " 'a change of circumstances' " did not provide sufficient standards to the governor. Id., 398. We noted that requiring more specific standards "would hamper the flexibility needed for the governor to monitor and administer expenditures and to supervise the execution of the budget." Id., 399. The standards set forth in subsection (b) (1) and (7) similarly provide sufficient standards to guide the governor's exercise of his authority.

By contrast, in *State* v. *Stoddard*, 126 Conn. 623, 633–34, 13 A.2d 586 (1940), this court reversed a defendant's criminal conviction and struck down a statute that authorized the milk administrator to set the minimum price for milk. The only guidance the General Assembly provided to the administrator in setting the price was to "take into consideration the type of container used and other cost factors [that] should influence the determination of such prices." (Internal quotation marks omitted.) Id., 625. This court concluded that this language did not provide "such prescribed standards or principles, courses of procedure, and rules of decision as is [required] to justify the delegation of powers attempted thereby . . . ." Id., 633. We conclude that, contrary to the plaintiffs' assertions, the standards imposed by subsection (b) (1) and (7) provide greater guidance to the governor than did the statute in *Stoddard*.

We acknowledge that subsection (b) (1) and (7) is a broad grant of authority from the General Assembly to the governor. A broad grant of authority, however, is not the same as limitless or standardless authority. As we have explained, although the General Assembly may not delegate its "law-making" function, it may delegate "some *considerable* segment of its legislative authority." (Emphasis added.) *Salmon Brook Convalescent Home, Inc.* v. *Commission on Hospitals & Health Care*,

177 Conn. 356, 363, 417 A.2d 358 (1979). The United States Supreme Court has similarly explained that, once the legislature has made a policy determination, "[i]t is no objection" that the legislation "call[s] for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425, 64 S. Ct. 660, 88 L. Ed. 834 (1944); see also *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 475, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("[a] certain degree of discretion, and thus of [law-making], inheres in most executive or judicial action" (internal quotation marks omitted)). In a recent concurrence in connection with the United States Supreme Court's denial of injunctive relief pertaining to the California governor's COVID-19 restrictions on the number of people permitted in houses of worship, Chief Justice John Roberts emphasized the need for elected leaders to have broad authority to respond to rapidly evolving emergencies. See *South Bay United Pentecostal Church* v. *Newsom*, U.S. , 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020) (Roberts, C. J., concurring in denial of application for injunctive relief). He explained that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. . . . When [elected] officials undertake . . . to act in areas fraught with medical and scientific uncertainties, *their latitude must be especially broad*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id.

In enacting § 28-9 (b), the General Assembly was as precise as it could be in defining the contours of the governor's authority given that there are myriad serious disasters that could arise and the actions the governor would be required to take could vary significantly from one serious disaster to another. See, e.g., *University*

of Connecticut Chapter, *AAUP* v. *Governor*, supra, 200 Conn. 398 ("these standards are constitutionally sufficient under our law in that they are as definit[e] as is reasonably practicable under the circumstances" (internal quotation marks omitted)); see also *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946) ("[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise [beforehand] the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation"); *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 572 ("[i]n order to render admissible such delegation of legislative power . . . it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out . . . and *with such degree of certainty as the nature of the case permits*" (emphasis added; internal quotation marks omitted)).[12] What could be statutorily or constitutionally appropriate in one serious disaster may not be in another. As Senator Martin M. Looney explained during a special, statutorily created legislative committee's September 4, 2020 meeting to discuss Governor Lamont's public health emergency declaration, § 28-9 is broad because the governor must be able to quickly address the serious disaster. Declaration of a Public Health Emergency Committee Meeting (September 4, 2020), available at https://ct-n.com/ctnplayer.asp?odID=17659 (13:10 through 13:36) (last visited March 29, 2021). Requiring more specific standards "would hamper the flexibility needed" for the governor to respond to the myriad different circumstances that may constitute a

[12] We note that "[o]nly twice in this country's history (and that in a single year) [has the United States Supreme Court] found a delegation excessive—in each case because Congress had failed to articulate *any* policy or standard to confine discretion." (Emphasis in original; internal quotation marks omitted.) *Gundy* v. *United States*, supra, 139 S. Ct. 2129 (plurality opinion).

serious disaster. *University of Connecticut Chapter, AAUP* v. *Governor*, supra, 399.

Moreover, it is reasonable for the legislature to conclude that the executive branch of government would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and welfare. Specifically, the legislature itself is not in session continuously and would not be well positioned to mount a rapid response to a serious disaster, especially one that develops and evolves quickly or unpredictably, and thus requires an ongoing and agile response. Indeed, the former speaker of the House of Representatives, Joe Aresimowicz, noted during the September, 4, 2020 meeting of the Declaration of a Public Health Emergency Committee that, because the Connecticut legislature is part-time, they are "not structured to handle [a serious disaster]." Declaration of a Public Health Emergency Committee Meeting, supra, (17:56). Similarly, Senator Mary Daugherty Abrams, the senate chairperson of the Public Health Committee, explained there are times "we need to take swift, deliberate action as a government to protect the public's health, and the Executive Branch is best equipped to do that. . . . There are 187 members of the legislative body, and the thought that we could all come together swiftly and deliberately to respond to what's come up with the COVID . . . crisis is not realistic." Id., (1:09:19 through 1:09:54).

In rejecting a similar argument that emergency powers of the governor of Kentucky during the COVID-19 pandemic violated the separation of powers provision of that state's constitution, the Supreme Court of Kentucky explained that it was reasonable for the governor to have greater authority in times of emergency "given [the] government's tripartite structure *with a legislature that is not in continuous session*." (Emphasis added.) *Beshear* v. *Acree*, 615 S.W.3d 780, 806 (Ky. 2020).

The court further explained that "[h]aving a citizen legislature that meets part-time as opposed to a full-time legislative body that meets year-round, as some states have, generally leaves [the Kentucky] General Assembly without the ability to legislate quickly in the event of emergency unless the emergency arises during a regular legislative session." (Footnote omitted.) Id., 807. The same rationale applies here.

That having been said, we pause to note that the legislature chose not to include a mechanism for more direct legislative oversight of a declared civil preparedness emergency, as it did for a man-made disaster under § 28-9 (a) or a public health emergency declaration under § 19a-131a. See General Statutes § 28-9 (a) ("[a]ny such proclamation, or order issued pursuant thereto, issued by the Governor because of a disaster resulting from man-made cause may be disapproved by majority vote of a joint legislative committee"); see also General Statutes § 19a-131a (b) (1) ("[a]ny . . . declaration [of a public health emergency] issued by the Governor may be disapproved and nullified by majority vote of a committee consisting of the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses of the General Assembly and the cochairpersons and ranking members of the joint standing committee of the General Assembly having cognizance of matters relating to public health"). Several high courts of our sister states have noted the importance of such legislative oversight under similar statutory schemes. See, e.g., *Beshear* v. *Acree*, supra, 615 S.W.3d 811–12 ("the [Kentucky] General Assembly [is allowed] to make the determination itself if the [g]overnor has not declared an end to the emergency 'before the first day of the next regular session of the General Assembly' "); *Desrosiers* v. *Governor*, 486 Mass. 369, 384, 158 N.E.3d 827 (2020) ("the [Massachusetts] [l]egislature also has at its disposal a way to curb

the [g]overnor's powers under the [Massachusetts Civil Defense Act], should it desire to do so"); *Elkhorn Baptist Church* v. *Brown*, 366 Or. 506, 526, 466 P.3d 30 (2020) ("the [Oregon] [g]overnor's emergency powers are limited in that they can be terminated by the [Oregon] legislature"). This observation does not alter our constitutional analysis in the present case but warrants mention.

Legislative oversight has not been altogether lacking. In the related context of considering Governor Lamont's public health emergency declaration, a legislative committee, namely, the Declaration of a Public Health Emergency Committee, formed pursuant to § 19a-131a (b) (1), has met twice since Governor Lamont first declared the civil preparedness and public health emergencies. The committee, consisting of the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses, and the cochairpersons and ranking members of the Public Health Committee, met for the first time in the history of this state on March 11, 2020, just one day after the governor first declared the public health and civil preparedness emergencies. During that meeting, the committee met "to consider [Governor Lamont's] declaration of a public health emergency." Declaration of a Public Health Emergency Committee, Meeting Minutes (March 11, 2020) p. 1, available at https://www.cga.ct.gov/ph/tfs/20200311_Public%20Health%20Emergency%20Committee/20200311/Minutes_pdf (last visited March 29, 2021). Senator Looney explained to the committee that, "under the statutes, this committee has the right to veto the [g]overnor's plan within [seventy-two] hours of this taking action . . . ." Id., p. 2. When asked by Senator Leonard A. Fasano whether the committee would be required to reconvene if Governor Lamont decided to reinvoke his authority after six months, Senator Looney explained that, if the governor "wanted to extend it beyond that time, it would

require a new order, and [the committee] would have a new opportunity to meet like [it] did this time." Id. Finally, Senator Looney closed the meeting by noting that "it is within the committee's capacity to convene again by Friday [March 13, 2020] at 2:25 p.m., but, barring some other emergency, the committee has met the statutory requirements." Id., p. 4. The committee did not meet again within seventy-two hours of the first proclamation.

Thereafter, the committee met again on September 4, 2020, three days after Governor Lamont's September 1, 2020 declarations. After discussion regarding the scope of Governor Lamont's authority under both a civil preparedness emergency and a public health emergency,[13] the committee took up a motion to disapprove of Governor Lamont's declaration of a public health emergency pursuant to § 19a-131a. Declaration of a Public Health Emergency Committee Meeting, supra, (1:28:10 through 1:28:17). The motion failed, and the committee did not vote to disapprove of Governor Lamont's public health emergency declaration. Id., (1:43:29 through 1:44:11). We take this inaction as an indication of the committee's acquiescence in Governor Lamont's actions pursuant to his public health emergency authority. Although we most often employ this principle when "the legislature [fails] to take corrective action as manifesting the legislature's acquiescence in our construction of a statute"; (internal quotation marks

[13] We note that several members of the committee, including Senator Fasano and Representative Aresimowicz, noted that the committee was not authorized to take any action with respect to Governor Lamont's actions pursuant to the civil preparedness emergency declaration. See, e.g., Declaration of a Public Health Emergency Committee Meeting, supra, (08:27 through 09:06), remarks of Senator Fasano; id., (09:13 through 09:42), remarks of Representative Aresimowicz. As we previously discussed in this opinion, we fail to see why the legislature chose not to include a provision for legislative oversight of a governor's proclaimed civil preparedness emergency, other than for a man-made disaster. Certainly, this could be addressed by the General Assembly in its current, or a future, legislative session, if the legislature deems it appropriate.

omitted) *Spiotti* v. *Wolcott*, 326 Conn. 190, 202, 163 A.3d 46 (2017); the same principle is insightful here. In this case, the legislative committee with the statutory authority to disapprove of Governor Lamont's public health emergency declaration met on two occasions and declined to exercise its disapproval powers either time. Although not the equivalent of full legislative ratification, this procedure should significantly ameliorate concerns regarding legislative oversight. Should the plaintiffs seek to impose greater oversight of the governor's authority under the statutory scheme, whether in the context of a public health emergency or a civil preparedness emergency, the proper avenue is through an amendment to the statute through the legislature, not this court. See, e.g., *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988) ("[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, [whose members] are elected to pass laws." (Internal quotation marks omitted.)).

In sum, § 28-9 sets forth the General Assembly's policy that, in the event of a serious disaster, the health, safety, and welfare of Connecticut's residents is of utmost importance. Section 28-9 (b) affords the governor considerable latitude to employ the "necessary means" for accomplishing that policy objective. *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 594, 37 A. 1080 (1897). But that latitude is neither standardless nor limitless. In addition to the limitations explicated previously, in the event an aggrieved party believes the governor has taken any particular action that exceeds his lawful authority or violates the state constitution, that party may seek redress from the courts. The legislature may also deem it proper to impose greater oversight of the governor's actions during a proclaimed civil preparedness emergency or other-

wise amend or repeal § 28-9 to further limit the governor's authority.

Our conclusion that, although subsection (b) (1) and (7) represents a broad grant of authority to the governor, it is nonetheless constitutional finds support in the analysis of similar issues from the high courts of our sister states. For example, the Pennsylvania Supreme Court recently rejected a separation of powers challenge to that state's Emergency Management Services Code, which permits the governor of Pennsylvania to proclaim a disaster emergency and to take actions similar to those authorized by § 28-9. 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (c) (West Supp. 2020); see *Friends of Danny DeVito* v. *Wolf*, Pa. , 227 A.3d 872, 892–93, cert. denied, U.S. , 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020); see also *Wolf* v. *Scarnati*, Pa. , 233 A.3d 679, 705 (2020) (recognizing that court had determined in *Friends of Danny DeVito* that Pennsylvania governor's exercise of authority delegated under Emergency Management Services Code did not violate separation of powers doctrine under Pennsylvania constitution). The court noted in *Scarnati* that the "[Pennsylvania] General Assembly, in enacting the statute, 'ma[de] the basic policy choices.' . . . The General Assembly decided that the [g]overnor should be able to exercise certain powers when he or she makes a 'finding that a disaster has occurred or that the occurrence of the threat of a disaster is imminent.' " (Citation omitted.) *Wolf* v. *Scarnati*, supra, 704. The court also explained that "the [Pennsylvania] General Assembly . . . provided 'adequate standards which will guide and restrain' the [g]overnor's powers. . . . The General Assembly gave the [g]overnor specific guidance about what he can, and cannot, do in responding to a disaster emergency. . . . *The powers delegated to the* [*g*]*overnor are admittedly* [*far reaching*], *but nonetheless are specific*. For example, the [g]overnor can '[s]uspend

the provisions of any regulatory statute . . . if strict compliance with the provisions . . . would in any way prevent, hinder or delay necessary action in coping with the emergency.' . . . *Broad discretion and standardless discretion are not the same thing. Only those regulations that hinder action in response to the emergency may be suspended.* It may be the case that the more expansive the emergency, the more encompassing the suspension of regulations. But this shows that it is the scope of the emergency, not the [g]overnor's arbitrary discretion, that determines the extent of the [g]overnor's powers under the statute. The General Assembly itself chose the words in [the Emergency Management Services Code]. The General Assembly, under its lawmaking powers, could have provided the [g]overnor with less expansive powers under the Emergency Management Services Code. It did not do so." (Citations omitted; emphasis altered.) Id., 704–705.

The Supreme Court of Oregon has similarly reasoned that, although the emergency powers of the governor of Oregon are broad under that state's statutory scheme, they are not unlimited. *Elkhorn Baptist Church* v. *Brown*, supra, 366 Or. 525. The court reasoned that the governor's actions must be "exercised in a manner consistent with the reason for which they are granted; that is, they must be exercised to address the declared emergency. . . . Second, the [g]overnor's emergency powers . . . may be exercised only during a declared state of emergency, [and Oregon's emergency powers law] requires the [g]overnor to terminate by proclamation when the emergency no longer exists, or when the threat of an emergency has passed." (Internal quotation marks omitted) Id., 525–26. Finally, the court noted that the courts may intervene if the governor's regulations exceed constitutional limits. Id., 526.

Likewise, the Supreme Court of Kentucky held that the extent of the Kentucky governor's authority during

an emergency was not an unconstitutional delegation of legislative authority in violation of the separation of powers provisions of the Kentucky constitution. *Beshear* v. *Acree*, supra, 615 S.W.3d 806, 812. The court acknowledged that the governor's authority is broad, but, "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-oriented, protect life and property . . . and . . . public . . . health . . . allowing the [g]overnor working with the executive branch and emergency management agencies to determine what is necessary for the specific crisis at hand. Floods, tornadoes and ice storms require different responses than threats from nuclear, chemical or biological agents or biological, etiological, or radiological hazards but the emergency powers are always limited by the legislative criteria, i.e., they must be exercised in the context of a declared state of emergency . . . designed to protect life, property, health and safety and to secure the continuity and effectiveness of government . . . and exercised to promote and secure the safety and protection of the civilian population." (Citations omitted; internal quotation marks omitted.) Id., 811.

The Supreme Judicial Court of Massachusetts also recently rejected a separation of powers challenge to the Massachusetts governor's authority to issue emergency orders. *Desrosiers* v. *Governor*, supra, 486 Mass. 382, 384–85. The court reasoned that, "because the [g]overnor's actions were carried out pursuant to the authority granted to the [g]overnor in the [Massachusetts Civil Defense Act], the emergency orders [did] not violate [the separation of powers provision of the Massachusetts constitution]." Id., 382. The court also noted that the act did not interfere with the functions of the legislature. Id., 383.

The plaintiffs, however, point to a recent decision of the Supreme Court of Michigan that they claim supports

their contention that § 28-9 (b) (1) and (7) is an unconstitutional delegation of legislative authority. In a divided opinion, the Michigan high court concluded that the governor of Michigan did not possess the authority to exercise emergency powers under the Michigan Emergency Powers of the Governor Act because that act was an unlawful delegation of legislative power to the executive branch in violation of the Michigan constitution. *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, 506 Mich. 332, 372, 958 N.W.2d 1 (2020). The court reasoned that the powers conferred by the act were "remarkably broad"; id., 363; and there were not sufficient standards in place to constrain the governor's actions. See id., 367–71. The plaintiffs in the present case contend that, as with the Michigan statute, subection (b) (1) and (7) "impermissibly confers truly unlimited power on the governor . . . ." We are not persuaded. As the Chief Justice of the Michigan Supreme Court noted in her concurring and dissenting opinion in that case, the statute does not violate the separation of powers provision because "there are many ways to test the [g]overnor's response to this life-and-death pandemic." *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, supra, 422 (McCormack, C. J., concurring in part and dissenting in part). Namely, "the statute allows a legal challenge to the [g]overnor's declaration that COVID-19, as a threshold matter, constitutes a 'great public crisis' that 'imperil[s]' 'public safety.' . . . For another example, any order issued under the statute could be challenged as not 'necessary' or 'reasonable' to 'protect life and property or to bring the emergency situation within the affected area under control.' . . . In these ways and others, the courts can easily be enlisted to assess the exercise of executive power, measuring the adequacy of its factual and legal bases against the statute's language." (Citations omit-

ted.) Id. The Chief Justice also noted that the legislature itself might revisit its decision to have passed the statute in the first place. Id. Specifically, "[i]f the [l]egislature saw fit, it could repeal the statute. Or, the [l]egislature might amend the law to alter its standards or limit its scope. Changing the statute provides a ready mechanism for legislative balance." Id. The Chief Justice further explained that the governor is also politically accountable to voters, which serves as an additional check. Id. Finally, the Chief Justice noted that the majority had departed from one part of their long-standing test for delegation of legislative power, namely, that "the standard must be as reasonably precise as the subject matter requires or permits." Id., 423 (McCormack, C. J., concurring in part and dissenting in part). We find the reasoning of the Chief Justice's concurrence and dissent to be more persuasive.

As we noted in our per curiam ruling in the present case, we are mindful of the incredibly difficult economic situation that the plaintiffs and thousands of others across the state are in given the COVID-19 pandemic. Individuals and families have been economically upended as a result of the pandemic. We are also mindful of the more than 300,000 Connecticut residents who have been infected with COVID-19 and, most tragically, the nearly 8000 Connecticut citizens who have passed away in the more than yearlong pandemic. As we explained, the governor is charged with protecting the health, safety, and welfare of the citizens of this state, and the COVID-19 pandemic has presented a dynamic and unpredictable "serious disaster." The question of when various restrictions imposed as a result of the pandemic should be lifted is a fact intensive inquiry that involves an understanding of ever evolving scientific guidance, including the effects and impacts of newly discovered strains of the virus and their resistance to recently approved vaccines. It is likely that reasonable

minds may differ as to when each restriction should be lifted, but, as Chief Justice Roberts explained, "[w]hen [elected] officials undertake . . . to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (Internal quotation marks omitted.) *South Bay United Pentecostal Church* v. *Newsom*, supra, 140 S. Ct. 1613 (Roberts, C. J., concurring in denial of application for injunctive relief). As long as Governor Lamont is acting within this admittedly broad statutory and constitutional authority—which we conclude that he is—it is not the job of this court to second-guess those policy decisions.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* REGGIE BATTLE
(SC 20396)

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

Syllabus

The defendant, whose probation had been revoked after a finding of a violation thereof, appealed to the Appellate Court from the trial court's dismissal of his motion to correct the allegedly illegal sentence imposed in connection with the revocation of his probation. The defendant claimed that his sentence was illegal because the violation of probation statute (§ 53a-32 (d)) did not authorize the trial court to impose a sentence of special parole following a probation violation and revocation. The Appellate Court concluded that the sentence imposed was not illegal insofar as it included a period of special parole but concluded that the trial court should have denied the defendant's motion to correct rather than having dismissed it. On the granting of certification, the defendant appealed to this court. *Held* that, following an examination of the record and briefs on appeal and consideration of the arguments presented by the parties, this court concluded that the Appellate Court's thorough and well reasoned opinion fully addressed the issue presented, and,

accordingly, this court adopted that opinion as the proper statement of the issue and the applicable law concerning that issue.

Argued October 19, 2020—officially released April 1, 2021*

Procedural History

Information charging the defendant with the crimes of carrying a pistol without a permit and criminal possession of a pistol, and with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty; judgment of guilty in accordance with plea; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Bright* and *Moll*, *Js.*, which remanded the case to the trial court with direction to render judgment denying the defendant's motion to correct, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Temmy Ann Miller, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, *Sharmese L. Walcott*, state's attorney, and *Elizabeth Tanaka*, former assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The sole issue in this certified appeal is whether General Statutes § 53a-32 (d)[1] affords a trial

* April 1, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-32 (d) provides: "If such violation is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a

court the authority to impose a sentence that includes a period of special parole following a probation violation and revocation. The defendant, Reggie Battle, appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court remanding the case to the trial court with direction to deny his motion to correct an illegal sentence pursuant to Practice Book § 43-22. See *State* v. *Battle*, 192 Conn. App. 128, 147, 217 A.3d 637 (2019). On appeal, the defendant contends that the Appellate Court improperly construed § 53a-32 (d) (4) in concluding that the sentence imposed upon the revocation of his probation was not illegal. We disagree and, accordingly, affirm the judgment of the Appellate Court.

On appeal, the defendant claims that the plain and unambiguous language of § 53a-32 (d) (4) did not authorize the trial court to impose a sentence of special parole upon the revocation of probation because that sanction is not one that is mentioned in the statute. After examining the record and briefs on appeal and considering the arguments of the parties, we conclude that the judgment of the Appellate Court should be affirmed. The Appellate Court's thorough and well reasoned opinion fully addresses the certified question, along with the complete facts and procedural history of this case, and, accordingly, there is no need for us to repeat the discussion contained therein. We therefore adopt the Appel-

portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[2] We granted the defendant's petition for certification to appeal from the Appellate Court, limited to the following issue: "Did the Appellate Court correctly conclude that, under . . . § 53a-32, a trial court, following a probation violation and revocation, may impose a sentence that includes a period of special parole?" *State* v. *Battle*, 333 Conn. 942, 219 A.3d 373 (2019).

late Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 357, 216 A.3d 629 (2019); *State* v. *Henderson*, 330 Conn. 793, 799, 201 A.3d 389 (2019).

The judgment of the Appellate Court is affirmed.

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STATE OF CONNECTICUT *v.* FREDRIK H.

The defendant's petition for certification to appeal from the Appellate Court, 197 Conn. App. 213 (AC 41448), is denied.

Raymond L. Durelli, assigned counsel, in support of the petition.

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

Decided September 23, 2021.

STATE OF CONNECTICUT *v.* JAMAAL COLTHERST

The defendant's petition for certification to appeal from the Appellate Court, 205 Conn. App. 1 (AC 41314), is denied.

ECKER, J., would grant the petition for certification. See *State* v. *McCleese*, 333 Conn. 378, 429, 215 A.3d 1154 (2019) (*Ecker*, *J.*, dissenting).

Michael W. Brown, in support of the petition.

Melissa E. Patterson, senior assistant state's attorney, in opposition.

Decided September 23, 2021

MARISSA LOWTHERT *v.* FREEDOM OF INFORMATION COMMISSION

The plaintiff's petition for certification to appeal from the Appellate Court, 205 Conn. App. 904 (AC 43086), is denied.

Marissa Lowthert, self-represented, in support of the petition.

Mary E. Schwind, in opposition.

Decided September 23, 2021

HAROLD T. BANKS, JR. *v.* COMMISSIONER OF CORRECTION

The petitioner Harold T. Banks, Jr.'s petition for certification to appeal from the Appellate Court, 205 Conn.

App. 337 (AC 43187), is granted, limited to the following issues:

"1. Did the Appellate Court correctly interpret *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006), *Cookish* v. *Commissioner of Correction*, 337 Conn. 348, 253 A.3d 467 (2020), and other decisions of this court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?

"2. Did the Appellate Court correctly interpret *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 967 A.2d 41 (2009), *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 114 A.3d 925 (2015), and other decisions of this court in concluding that review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?"

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

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided September 23, 2021

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION

The petitioner Benjamin Bosque's petition for certification to appeal from the Appellate Court, 205 Conn. App. 480 (AC 43188), is granted, limited to the following issues:

"1. Did the Appellate Court correctly interpret *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 911 A.2d

712 (2006), *Cookish* v. *Commissioner of Correction*, 337 Conn. 348, 253 A.3d 467 (2020), and other decisions of this court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?

"2. Did the Appellate Court correctly interpret *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 967 A.2d 41 (2009), *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 114 A.3d 925 (2015), and other decisions of this court in concluding that review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?"

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

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided September 23, 2021

ADAM M. ZACHS *v.* COMMISSIONER OF CORRECTION

The petitioner Adam M. Zachs' petition for certification to appeal from the Appellate Court, 205 Conn. App. 243 (AC 43380), is denied.

Jennifer B. Smith and *Aaron J. Romano*, in support of the petition.

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

Decided September 23, 2021

TOWING AND RECOVERY PROFESSIONALS OF CONNECTICUT, INC. *v.* DEPARTMENT OF MOTOR VEHICLES ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 205 Conn. App. 368 (AC 43464), is denied.

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

Jesse A. Langer, in support of the petition.

Drew S. Graham, assistant attorney general, in opposition.

Decided September 23, 2021

MARCUS FAIR *v.* COMMISSIONER OF CORRECTION

The petitioner Marcus Fair's petition for certification to appeal from the Appellate Court, 205 Conn. App. 282 (AC 43583), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Melissa E. Patterson, senior assistant state's attorney, in opposition.

Decided September 23, 2021

STATE OF CONNECTICUT *v.* TRAVIS LANIER

The defendant's petition for certification to appeal from the Appellate Court, 205 Conn. App. 586, (AC 43671), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's restriction of defense counsel's cross-examina-

tion of the complainant about matters relevant to the complainant's motive to fabricate his allegations?"

Pamela S. Nagy, supervisory assistant public defender, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided September 23, 2021

MARTIN GRAY *v.* COMMISSIONER OF CORRECTION

The petitioner Martin Gray's petition for certification to appeal from the Appellate Court, 205 Conn. App. 901 (AC 43894), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided September 23, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 208

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MARC HERRON *v.* LINDA DANIELS
(AC 43560)

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

Syllabus

The plaintiff sought to recover the security deposit he had paid to the defendant landlord in connection with a one year lease of a single-family home. A few months after the start of the lease term, the plaintiff purchased his own home and attempted to terminate the lease, offering to vacate the premises and pay the remaining rent due under the agreement. The defendant refused the offer, and the plaintiff agreed to continue to pay rent and to fulfill his other obligations under the lease throughout the remainder of its term, despite vacating the premises. After the leasehold expired, the defendant sent the plaintiff an accounting of the security deposit, indicating that no portion of it would be returned due to unpaid rent and fees due under the lease and expenses incurred to repair alleged damages to the premises, and that the plaintiff owed the defendant additional funds for damages that exceeded the amount of the security deposit. The trial court found in favor of the plaintiff in part on his complaint and on the defendant's counterclaim, and the defendant appealed and the plaintiff cross appealed to this court. *Held*:

1. The trial court did not err when it awarded the plaintiff double damages as a result of the defendant's failure to return a portion of the security deposit: the trial court's determination that certain of the defendant's charges for damages to the premises were pretextual was not erroneous, as the court credited the plaintiff's testimony that he had hired a cleaning service after he vacated the premises and found the defendant's testimony relating to the claimed repair expenses unconvincing; moreover, although the trial court's finding that the charge for the replacement of the furnace filter was pretextual was erroneous, such finding did not undermine its conclusions regarding the disputed charges nor did it impact the judgment rendered; furthermore, the trial court's award of statutory damages equal to double the entire amount of the plaintiff's security deposit was required by the plain language of the applicable statute (§ 47a-21 (d) (2)), even though a portion of the security deposit was properly withheld.
2. The trial court did not err when it concluded that the defendant violated the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.): the trial court's finding that the defendant engaged in unethical behavior that violated the public policy of the applicable statute (§ 47a-21 (d) (2)) by withdrawing portions of the security deposit for her personal use and by assessing certain itemized damages as a pretext to avoid having to return the security deposit following the termination of the

lease was supported by the record; moreover, the defendant's claim that she was not required to place the security deposit into an escrow account because she had fewer than four rental units was unavailing because the applicable statute (§ 47a-21 (k) (2)) provided an affirmative defense only to criminal penalties for the failure to maintain an escrow account, not to similar civil actions; furthermore, the evidence in the record demonstrated that the plaintiff suffered an ascertainable loss as a result of the defendant's withholding of the portion of the security deposit that was legitimately owed to him.

3. The trial court did not abuse its discretion by awarding punitive damages to the plaintiff: the trial court's findings that the defendant did not act in good faith when she assessed pretextual damages to the plaintiff and failed to place the security deposit into an escrow account and that her actions caused substantial injury to the plaintiff were not clearly erroneous and were sufficient to support an award of punitive damages; moreover, the trial court based the award on the defendant's failure to comply with her statutory obligations as a landlord, not on her breach of contract; furthermore, the amount awarded was not excessive in light of the amount in dispute, the defendant's conduct, and the trial court's stated purpose in making the award, which was to provide the defendant with an incentive to comply with security deposit laws and to protect her future tenants.

4. The trial court did not err in holding that the plaintiff was not entitled to a return of the rental payments that he made after vacating the premises: the trial court correctly determined that, pursuant to the applicable statute (§ 47a-11a), the plaintiff did not abandon the premises prior to the end of the lease term, as he explicitly stated that he intended to fulfill his obligations under the lease, he continued to pay rent and landscaping costs for the property throughout the lease term, and he did not return the keys to the premises or request the return of his security deposit until the lease term expired; accordingly, there was no early termination of the lease.

5. The trial court did not err in denying the plaintiff's common-law claim for money had and received: the trial court's determination that the plaintiff was obligated to make monthly rental payments in accordance with the terms of the lease was supported by the record, which demonstrated that the plaintiff signed the lease, indicated that he would continue to abide by its terms, and failed to repudiate the lease during his tenancy; moreover, the record supported the trial court's conclusion that a duty to mitigate damages never arose under § 47a-11a and, accordingly, the plaintiff failed to prove that he had paid his monthly rent by mistake and that he was free from any moral or legal obligation to make the payments.

Argued April 8—officially released October 5, 2021

Procedural History

Action for, inter alia, the return of a security deposit, and for other relief, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Spader*, *J.*; judgment for the plaintiff in part on the complaint and for the plaintiff on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Affirmed*.

Alan R. Spirer, for the appellant-cross appellee (defendant).

Anthony J. Musto, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, C. J. In this landlord-tenant dispute over a security deposit, the defendant landlord, Linda Daniels, appeals from the judgment of the trial court, rendered following a trial to the court, in favor of the plaintiff tenant, Marc Herron. On appeal, the defendant claims that the trial court erred when it (1) awarded the plaintiff double damages pursuant to General Statutes § 47a-21 (d), due to her failure to return to the plaintiff a portion of his security deposit, (2) concluded that the her handling of the plaintiff's security deposit and her failure to return a portion of his security deposit violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (3) awarded punitive damages to the plaintiff under CUTPA.

The plaintiff cross appeals claiming that the court erred in (1) holding that he was not entitled to a return of certain rental payments because, pursuant to General Statutes § 47a-11a, he did not abandon the premises

prior to June 30, 2017, and (2) denying his common-law claim for money had and received. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On May 6, 2016, the parties entered into a written lease agreement for the period of July 1, 2016 to June 30, 2017, for a monthly rental rate of $6365 plus $435 in monthly common charges for the use and occupancy of a single-family home located at 161 Morning Dew Circle in Fairfield (premises). The plaintiff provided a security deposit to the defendant in the amount of $12,730. A few months later, the plaintiff purchased a home for his family and attempted to negotiate an early termination of the lease by offering to vacate the premises and to pay the balance due under the lease.

The defendant, however, demanded that the plaintiff pay an additional $1500 each month for costs associated with the lease, including utilities, lawn care, and property maintenance. In response, the plaintiff sent an e-mail to the defendant's attorney, stating: "I will just continue the lease as is. I will not be present but will adhere to the conditions of the lease. I will provide the absolute minimal yet compliant services to the home. . . . I will pay monthly rent. I will leave water and electric on and pay those bills. I will keep thermostat at minimal level to ensure no freezing occurs. . . . I will keep the right to have minimal furniture in the home to then use when I choose." The plaintiff continued to provide some maintenance and, except for the final month, continued to meet his monthly rental obligations.

The leasehold expired on June 30, 2017, and the plaintiff timely provided the defendant with a forwarding address so that she could return his security deposit, less the unpaid June, 2017 rent. The defendant responded

with an accounting of the security deposit, indicating that no portion of the security deposit would be returned and that the plaintiff owed the defendant $1834.79. The accounting alleged that the June, 2017 rent ($6365), association fees ($435), and associated late fees ($250) were not paid and included a number of charges, totaling $7516.85, for repairs to remedy alleged damages to the premises.

The plaintiff commenced this civil action in May, 2018, seeking the return of his security deposit. The operative complaint included seven counts: breach of contract; violation of § 47a-21 (d); violation of CUTPA; conversion; civil theft; violation of § 47a-11a; and a common-law claim for money had and received. The plaintiff sought, inter alia, double damages under § 47a-21 (d) (2), and attorney's fees and punitive damages under CUTPA. The defendant denied the plaintiff's claims and filed a counterclaim for amounts due to her for damages exceeding the amount of the security deposit.

On October 21, 2019, following a one day trial to the court and the submission of posttrial briefs, the court issued a memorandum of decision in which it found in favor of the plaintiff on his claims for breach of contract, violation of § 47a-21 (d), violation of CUTPA, and conversion. The court rejected the plaintiff's remaining claims. It also concluded that, of the $12,730 security deposit, only $7429.92 properly was withheld by the defendant. The amount properly withheld included the unpaid June rent and association fees, the corresponding late charges and $379.72 for repairs.[1] The court

[1] The court appears to have made a computational error regarding the amount properly withheld by the defendant. Although it found the total amount of the justified deductions from the security deposit was $7429.92, the actual total of the individual charges the court found to be justified deductions was $7429.72. Additionally, the trial court found that the defendant improperly charged the plaintiff $244.66 for HVAC repairs and $838.18 for plumbing repairs even though the evidence showed that the actual amounts claimed were $244.60 and $836.18, respectively. These errors do not affect our analysis of the parties' claims on appeal because the court

found that the defendant's other claimed repair costs "were not supported by the defendant's testimony or attached evidence . . . ." The court further found that certain charges were "fabricated" by the defendant and found that all of the deductions from the security deposit that were disputed by the plaintiff were "pretextual." The court also found that the defendant had mishandled the plaintiff's security deposit by not keeping it segregated in a separate account, using it for her personal expenses during the term of the lease, and not accounting for accrued interest on the security deposit.

In light of its findings, the court concluded that the defendant had breached the lease agreement by withholding more of the security deposit than that to which she was entitled and concluded that the plaintiff was entitled to damages on his breach of contract claim in the amount of $5300.08 and attorney's fees of 15 percent of the amount of the damages.[2] The court nevertheless declined to award the plaintiff any damages on his breach of contract claim because it was awarding the plaintiff greater damages and attorney's fees on his other claims.

Specifically, on the plaintiff's second count, which alleged a violation of § 47a-21 (d), the court awarded, pursuant to the statute, double damages in the amount of twice the plaintiff's security deposit and interest due thereon for the defendant's wilful failure to return the

did not award the plaintiff damages based on the amount of the improper charges and because the defendant does not challenge on appeal the court's calculation of the improper charges.

[2] The court did not identify the contractual basis for its conclusion that the plaintiff was entitled to attorney's fees on his breach of contract claim. The only attorney's fees provision in the lease agreement provides that the defendant was entitled to collect attorney's fees from the plaintiff if it became necessary for her "to employ an attorney to enforce any of the conditions or covenants [of the lease agreement] . . . ." The defendant does not challenge on appeal the court's authority to award attorney's fees with respect to the plaintiff's breach of contract claim.

portion of the deposit to which the plaintiff was entitled. In particular, the court awarded the plaintiff $12,730, the amount of the security deposit, and $12.73 in accrued interest. The court doubled the damages, increasing the award to $25,460 and $25.46, respectively, pursuant to its conclusion that the defendant had violated § 47a-21 (d).

As to the plaintiff's third count alleging a CUTPA violation, the court held that the defendant's mishandling of the security deposit and her improper withholding of a portion of the security deposit were "inexcusable and indefensible and [left] the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter." The court concluded that it would not duplicate the damages award that it had rendered on the plaintiff's second count, but it awarded the plaintiff $19,867.13 in punitive damages, $12,625 in attorney's fees, and $811.92 in costs.

As to the plaintiff's fourth count alleging conversion, the court concluded that a conversion had occurred but that any damages that it might award would be duplicative, so it awarded none. As to the plaintiff's fifth count alleging statutory theft, the court concluded that "the defendant [did not have] the requisite specific intent to raise her conduct to a finding of statutory theft toward the plaintiff. She was negligent and careless with the plaintiff's security deposit, but the court does not find that she committed a statutory theft."

As to the plaintiff's sixth count alleging that he was entitled to a return of a portion of the rent he paid after he moved out of the premises because the defendant had failed to use reasonable efforts to rent the premises pursuant to § 47a-11a, the court found that the defendant's duty under the statute never materialized because the plaintiff never abandoned the premises before the end of the lease term. Similarly, because the

plaintiff never abandoned the premises and continued to use it for storage through the end of the lease term, the court concluded that the plaintiff could not succeed on his seventh count alleging the common-law claim of money had and received.

Finally, because it had concluded that the defendant had failed to prove that she properly had kept the entirety of the security deposit, the court rendered judgment for the plaintiff on the defendant's counterclaim.

The defendant appealed and the plaintiff cross appealed.

I

THE DEFENDANT'S APPEAL

A

The defendant's first claim is that the trial court erred in awarding the plaintiff double damages pursuant to § 47a-21 (d). The defendant presents two arguments relating to this claim. First, the defendant argues that the court erroneously determined that certain of her charges for damages to the premises were pretextual. In making this argument, the defendant does not dispute the court's conclusion that she failed to prove that the plaintiff caused the alleged damages to the premises. Instead, she argues that she complied with § 47a-21 (d) by providing the plaintiff with a list of itemized deductions from his security deposit and that her failure to prove that the deductions were justified does not constitute a violation of the statute unless those charges were pretextual. See *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 310–11, 61 A.3d 1164 (2013). She argues that the court's finding that the deductions were pretextual was clearly erroneous.

Second, the defendant argues that, even if the court's finding of pretext was not clearly erroneous, the court

erred by awarding the plaintiff the entire amount of his security deposit and doubling it pursuant to § 47a-21 (d) when the plaintiff conceded that the defendant properly retained more than one half of the security deposit to cover unpaid rent, association fees, late charges, and certain repairs. The defendant argues that the plaintiff's recovery of statutory damages under § 47a-21 (d) should be limited to double the portion of the security deposit that the court determined was improperly withheld by the defendant.

In response, the plaintiff argues that the trial court's finding that almost all of the defendant's charges for damages to the premises were pretextual is not clearly erroneous. He further contends that the court's award of statutory damages equal to double the entire amount of the plaintiff's security deposit is required by the plain language of § 47a-21 (d) (2). We agree with the plaintiff.

"We accord plenary review to the court's legal basis for its damages award." (Internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 348–49, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017). "The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard. . . . Moreover, to the extent that we must construe the salient provisions of the security deposit statute, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 465, 250 A.3d 696 (2021).

1

We begin by addressing the defendant's argument that the court erroneously determined that she violated § 47a-21 (d) by providing the plaintiff with an itemized list of deductions from his security deposit that included pretextual charges.

"Section 47a-21 (d) (2) requires, in the circumstance where the landlord does not return the entire security deposit, that the landlord return to the tenant both the 'balance of the security deposit paid . . . after deduction for any damages' caused by the tenant and 'a written statement itemizing the nature and amount of such damages. . . .' If a landlord does not comply with these requirements, the sanction is clear: the landlord 'shall be liable for twice the amount . . . of any security deposit paid . . . .' " (Emphasis omitted.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 309–10. A landlord violates the statute when the written statement itemizing deductions from the security deposit includes pretextual or fabricated charges. Id., 310. "The language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not pretextual damages." Id.

Claims of pretext are questions of fact subject to the clearly erroneous standard of review. See *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 481. "In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. . . . Moreover, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 775–76, 216 A.3d 830 (2019).

At trial, the following relevant evidence was presented to the court. In response to the plaintiff's request for the return of his security deposit, the defendant made the following deductions from the security deposit: (1) June, 2017 rent in the amount of $6365, (2)

June, 2017 association fees in the amount of $435, (3) late charges in the amount of $250, (4) fees for cleaning in the amount of $800, (5) irrigation system repair in the amount of $190.45, (6) furnace filter replacement in the amount of $100, (7) landscaping in the amount of $1605.89, (8) lawn maintenance in the amount of $345.64, (9) vacuum hose replacement in the amount of $63.81, (10) replacement of dehumidifier in the amount of $189.27, (11) stair carpeting replacement in the amount of $2800, (12) HVAC pipe replacement in the amount $338.95, (13) HVAC repair in the amount of $244.66, and (14) plumbing repairs in the amount of $838.18. The defendant submitted evidence of invoices she paid relating to the repair, maintenance and cleaning charges.

The parties presented conflicting testimony as to many of the defendant's itemized deductions. The defendant testified that she hired a cleaning service due to the uncleanliness of the premises, that the charge for the furnace filter replacement was a fair and reasonable charge, and that the plaintiff failed to maintain the landscaping of the premises. The defendant also testified that parts of the vacuum hose were missing after the plaintiff vacated the premises and that the carpet needed to be replaced due to an animal urine stain that she initially had noticed in July, 2017, after it was brought to her attention by a painter. The defendant stated that she had not noticed the stain prior to the painter bringing it to her attention despite having paid professional cleaners, who cleaned the premises at some point between April 30 and June 10, 2017. The defendant also testified that she did not take any photographs of the claimed damages.

On the other hand, the plaintiff testified that the condition of the premises was "almost spotless" prior to his departure in October, 2016, because he had hired a cleaner to clean the premises. He also testified that

he hired a landscaping company that regularly maintained the landscaping and the lawn through the spring of 2017. The plaintiff stated that when the defendant contacted him about an issue with the landscaping of the premises, he had the landscaping company ameliorate the issue the following day. He also testified that he did not recall seeing a vacuum hose and that he had a dog but it did not urinate in the premises. The plaintiff stated that he was unaware of any plumbing issues other than the replacement of a gasket and a toilet, which he had replaced on his own accord.

Notably, the plaintiff did not dispute certain charges as justified deductions, including the charges for the June, 2017 rent, the association fees, the late fee, the furnace filter, the irrigation system, and the dehumidifier. In addition, both parties testified that there were HVAC issues predating the plaintiff's tenancy.

The court also had before it undisputed evidence that the defendant did not segregate the plaintiff's security deposit and used it regularly during the term of the lease to pay personal expenses.[3] That evidence showed

[3] General Statutes § 47a-21 (h) provides in relevant part: "(1) Each landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. *Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in subdivision (2) of this subsection.*

"(2) The escrow agent may withdraw funds from an escrow account to: (A) Disburse the amount of any security deposit and accrued interest due to a tenant pursuant to subsection (d) of this section; (B) disburse interest to a tenant pursuant to subsection (i) of this section; (C) make a transfer of the entire amount of certain security deposits pursuant to subdivision (3) of this subsection; (D) retain interest credited to the account in excess of the amount of interest payable to the tenant under subsection (i) of this section; (E) retain all or any part of a security deposit and accrued interest after termination of tenancy equal to the damages suffered by the landlord by reason of the tenant's failure to comply with such tenant's obligations; (F) disburse all or any part of the security deposit to a tenant at any time during tenancy; or (G) transfer such funds to another financial institution or escrow account, provided such funds remain continuously in an escrow account. . . ." (Emphasis added.)

that, during the term of the lease, the account in which the plaintiff's security deposit was supposed to be kept regularly had a balance below $12,730. Furthermore, the defendant testified that the account containing the plaintiff's security deposit also contained security deposits of the tenants of other rental properties she owned, from which the court concluded that "[t]he balance [in the account] should have regularly been much higher."

In its memorandum of decision, the trial court made the following relevant findings of fact. The court found that the June, 2017 rent and association fees, late charges, irrigation system repair, and the replacement of the dehumidifier were legitimate deductions from the security deposit. Thus, the court found that charges amounting to $7429.92 were justified deductions from the plaintiff's security deposit. The court, however, found that the remaining deductions were not proven by a fair preponderance of the evidence as damages incurred during the tenancy and that the deductions were pretextual.

In particular, the court credited the plaintiff's testimony that he had hired a cleaning service when he vacated the premises and found that there was no evidence that the defendant's subsequent cleaning was for conditions beyond ordinary cleaning to re-let the premises. The court did not credit the defendant's evidence with regard to the replacement of the carpet on the stairs, finding that the carpet replacement was "wholly fabricated." Additionally, the court did not credit the defendant's evidence concerning the claimed charges for lawn maintenance, landscaping, HVAC issues, vacuum hose replacement, and plumbing maintenance. Furthermore, the court found that the defendant was "so unconvincing in her testimony that [the

court had] to consider [the remaining charges] pretextual. [The defendant] was only claiming these damages to avoid returning the security deposit." The court determined that the defendant "knowingly included these items in her list because, as her bank statements demonstrate, she was not properly safeguarding her tenants' [security] deposits, and quite frankly, the court believes she had no intention of ever returning the security deposit to the plaintiff."

The defendant argues that the court's finding of pretext was clearly erroneous because she testified that the premises was in "pristine condition" when the plaintiff took possession, the repairs she undertook at the end of the lease term were necessary to restore the premises to that condition, she paid for each repair she charged to the plaintiff and those charges were reasonable and authorized by the lease agreement. Although the defendant acknowledges that the court found her testimony unconvincing, she nonetheless argues that a finding of pretext was unwarranted because the plaintiff bore the burden of proving pretext, and the plaintiff did not meet that burden simply because the court discredited the defendant's testimony. We are not persuaded.

"The sifting and weighing of evidence is peculiarly the function of the trier. [N]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Rollar Construction & Demolition, Inc.* v. *Granite Rock Associates, LLC*, 94 Conn. App. 125, 132, 891 A.2d 133 (2006). We are not in a position to question the court's credibility finding. "[The trier of fact] is free to juxtapose conflicting versions of events and determine which is more

credible." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 25, 153 A.3d 669 (2016).

As the defendant acknowledges, the court did not credit her testimony regarding the legitimacy of the vast majority of the claimed repair expenses. In fact, the court found her testimony so unconvincing that it led the court to infer that the charges were pretextual. Our review of the record reflects additional support for this conclusion, with one small exception, in the testimony of the plaintiff and the defendant's admitted personal use of the plaintiff's security deposit. The one exception is the $100 furnace filter replacement charge claimed by the defendant. The plaintiff testified that he accepted the furnace filter charge as an item of damage and did not dispute the validity of that charge. Thus, because the record does not contain any conflicting evidence as to whether the charge for the replacement of the furnace filter was pretextual, the trial court's finding that this charge was pretextual is clearly erroneous.

"[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020).

After carefully reviewing the record, we conclude that the court's erroneous finding regarding the furnace filter does not undermine our confidence in the court's determination that the disputed charges were pretextual because the record contains sufficient evidence to support the court's finding. Removing the $100 charge from the court's calculation of the portion of the

security deposit improperly withheld by the defendant, there was ample evidence to support the rest of the overcharges totaling more than $5000. Furthermore, because the court's damages award was based on its calculation of statutory damages for a failure to return a security deposit in violation of § 47a-21 (d), and not on the actual amount wrongfully withheld, the court's single erroneous finding had no impact on the judgment it rendered. Therefore, we conclude that the court's erroneous finding concerning the furnace filter replacement was harmless, and the court's finding that the disputed charges were pretextual was not clearly erroneous.

2

We next address the defendant's claim that, even if the court's finding that certain items deducted from the plaintiff's security deposit were pretextual was not clearly erroneous, the court erred in awarding double damages based on the full amount of the security deposit instead of basing the award on the portion of the deposit improperly withheld. The plaintiff argues in response that the doubling of the entire security deposit is the precise remedy called for by the plain language of § 47a-21 (d) (2). We agree with the plaintiff.

Resolution of this claim requires us to construe the language of the statute. Consequently, as previously stated, our review is plenary. See *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 465. Furthermore, when construing the language of a statute, "General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be

considered." (Internal quotation marks omitted.) *Maghfour* v. *Waterbury*, Conn. , , A.3d (2021).

Section 47a-21 (d) (2) provides: "Upon termination of a tenancy, any tenant may notify the landlord in writing of such tenant's forwarding address. Not later than thirty days after termination of a tenancy or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later, each landlord other than a rent receiver shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest, or (B) the balance of such security deposit and accrued interest after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages. *Any landlord who violates any provision of* [*§ 47a-21 (d)*] *shall be liable for twice the amount of any security deposit paid by such tenant, except that, if the only violation is the failure to deliver the accrued interest, such landlord shall be liable for ten dollars or twice the amount of the accrued interest, whichever is greater*." (Emphasis added.)

"By its plain language, § 47a-21 (d) (2) obligates a landlord, within thirty days of the termination of the tenancy [or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later], to deliver to the tenant either (a) the full amount of the security deposit or (b) any remaining balance on that security deposit after deduction for any damages suffered by [the] landlord by reason of [the] tenant's failure to comply with [the] tenant's obligations . . . . When the latter scenario is implicated, § 47a-21 (d) (2) requires the landlord to provide the tenant with a written statement itemizing the nature and amount of such

damages." (Footnote omitted; internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 467.

"[F]or purposes of determining whether to award double damages under [§ 47a-21 (d) (2)] a court need only determine whether a landlord complied with the statutory requirements, and need not determine whether the landlord's reason for withholding the security deposit was justified." (Internal quotation marks omitted.) Id., 470. "We reiterate that the plain language of that statute merely requires a landlord asserting damages stemming from noncompliance with the tenant's obligations to provide the tenant with a written statement itemizing the nature and amount of such damages." (Internal quotation marks omitted.) Id., 471.

Nonetheless, "[t]he language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not *pretextual* damages." (Emphasis added.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 310. A landlord does not satisfy the statutory requirements of § 47a-21 (d) (2) and is subject to double damages when the landlord complies only in form with the requirement prescribed by the statute, while failing to provide the former tenant the balance of the security deposit *legitimately* owed to the former tenant. See id., 310–11 ("While the defendants complied, in form only, with the requirement that a written accounting of damages be sent to the former tenant within the time frame prescribed by § 47a-21 (d) (2) and (4), without also sending the plaintiffs the balance of the security deposit legitimately owed to them, they did not satisfy the statutory requirements. Accordingly, the defendants were subject to the doubling of damages under § 47a-21 (d) (2).").

In the present case, the court found that a portion of the defendant's claimed damages was pretextual.

Thus, the defendant did not comply with the statutory requirements of § 47a-21 (d) (2) because she failed to provide the plaintiff with the balance of his security deposit that was legitimately owed to him. Consequently, because the defendant violated § 47a-21 (d) (2), she was liable for "twice the amount of any security deposit paid by [the plaintiff] . . . ." General Statutes § 47a-21 (d) (2).

The defendant's argument that the statutory damages should be limited to double the portion of the security deposit wrongfully withheld ignores the plain language of the statute. The statute plainly and unambiguously defines the statutory damages as "twice the amount of any *security deposit paid* . . . ." (Emphasis added.) General Statutes § 47a-21 (d) (2). That is precisely what the court awarded the plaintiff on the second count of his complaint. Had the legislature intended the remedy suggested by the defendant, it could have written the statute to accomplish that purpose. It did not. Significantly, however, the legislature did limit the remedy available to a tenant when the landlord's violation of the statute is limited to the failure to deliver to the tenant accrued interest on the security deposit. In such a circumstance, the landlord is liable for only twice the amount of interest or ten dollars, whichever is greater. General Statutes § 47a-21 (d) (2). The fact that the legislature identified a particular circumstance in which the statutory damages would be limited undermines the defendant's argument that it also intended the implicit limitation she suggests.

Furthermore, that the defendant views the application of the statute to the facts of this case to be "manifestly unfair" is irrelevant to our analysis. As this court has previously noted, § 47a-21 (d) (2) "is the punitive damages portion of the security deposit statute." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 466. It is for the legislature—not

this court—to determine what the appropriate statutory penalty is for a landlord who does not fully comply with the statutory obligation to return or account for a tenant's security deposit. It is our duty to apply the plain language of the statute as written, and the language at issue here could not be clearer. Moreover, § 47a-21 (d) (2), like other statutes intended to protect tenants, is a remedial statute and must be "construed liberally in favor of those whom the legislature intended to benefit . . . ." (Citations omitted.) *O'Brien Properties, Inc.* v. *Rodriguez*, 215 Conn. 367, 373, 576 A.2d 469 (1990). Accordingly, we conclude that the court properly awarded the plaintiff twice the amount of the security deposit paid by the plaintiff.

B

Next, the defendant claims that the court erred in concluding that she violated CUTPA by (1) making pretextual deductions from the plaintiff's security deposit and (2) failing to safeguard the plaintiff's security deposit in an escrow account. The defendant argues that her itemization of damages was based on a good faith belief that she had suffered damages as a result of the plaintiff's failure to fulfill his obligation under the lease agreement to maintain the premises. In addition, the defendant argues that she was not required to maintain the security deposit in a separate escrow account, that even if she was, her failure to do so did not constitute a CUTPA violation, and that the plaintiff failed to prove that he suffered an ascertainable loss due to her conduct. We disagree.

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule

by the [F]ederal [T]rade [C]omission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Peterson* v. *McAndrew*, 160 Conn. App. 180, 207–208, 125 A.3d 241 (2015).

In its memorandum of decision, the court found that the defendant had ''engaged in unethical, unscrupulous activity in violation of a stated public policy set forth by the Connecticut legislature and caused a substantial injury to the plaintiff.'' The court concluded that the defendant's failure to safeguard the plaintiff's security deposit, her utilization of the security deposit for her own personal purposes, and her claiming of pretextual damages to avoid complying with § 47a-21 (d) (2) constituted a violation of CUTPA. Moreover, the court stated: ''The defendant is a former Realtor and has been

involved in multiple rental relationships on her properties. When asked about whether she currently maintains security deposits in a separate account she answered in the negative. This case was commenced in 2018, after reviewing pleadings and consulting with an attorney on this case, the defendant is still not following Connecticut's security deposit laws (recall, the trial was August 29, 2019). The [trial] court has concerns for [the defendant's] current tenants that their funds may not be secured. This utter indifference to her obligations as a landlord, when taken in context with what the court finds were pretextual damages being assessed to the plaintiff, is inexcusable and indefensible and leaves the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter. The defendant must be provided with an incentive to comply with security deposit laws and this judgment will hopefully help protect future tenants of the defendant." (Emphasis omitted.)

"It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 472.

In the present case, the evidence in the record supports the court's determination that the defendant engaged in unethical and unscrupulous activity that clearly offended the public policy of the security deposit statute. In particular, the evidence supports the court's findings that the defendant utilized the plaintiff's security deposit for her personal use and assessed certain itemized damages as pretext to avoid complying with § 47a-21 (d) (2). As to the defendant's personal use of the security deposit, the defendant testified that she did not believe that she could use the funds from the account containing the security deposit for her personal

use, but she also testified, and the evidence presented to the court showed, that she used funds from the account to pay her mortgage and that she transferred funds from the account to her personal account.

The defendant argues that the court should not have relied on such evidence to find a CUTPA violation because she was not required to maintain the security deposit in a segregated escrow account and her failure to do so does not constitute a CUTPA violation. We are not persuaded.

"Whether a defendant is subject to CUTPA and its applicability . . . are questions of law. . . . [If] a question of law is presented, review of the trial court's ruling is plenary, and this court must determine whether the trial court's conclusions are legally and logically correct, and whether they find support in the facts appearing in the record." (Citation omitted; internal quotation marks omitted.) Id.

Section 47a-21 (h) (1) requires that "[e]ach landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in subdivision (2) of this subsection." Subdivision (2) does not permit a landlord to withdraw funds from a security deposit escrow fund to pay the landlord's personal expenses.

The defendant argues that § 47a-21 (h) (1) did not apply to her during the lease term because she had fewer than four rental units at the time. In making this argument, the defendant relies on § 47a-21 (k) (2), which provides in relevant part: "Any person who knowingly and wilfully violates the provisions of subsection (h) of this section . . . shall be subject to a fine of not

more than five hundred dollars or imprisonment of not more than thirty days or both for each offense. It shall be an affirmative defense under the provisions of this subdivision that at the time of the offense, such person leased residential real property to fewer than four tenants who paid a security deposit." That statute though provides an affirmative defense only to the *criminal penalties* set forth in subsection (k) (2) if, at the time of the offense, the defendant leased residential real property to fewer than four tenants who paid a security deposit. General Statutes § 47a-21 (k) (2). In the present *civil* case, however, the defendant was not subject to a fine or imprisonment. Moreover, § 47a-21 (*l*) provides in relevant part that "[n]othing in this section shall be construed as a limitation upon . . . the right of any tenant to bring a civil action permitted by the general statutes or at common law." Accordingly, assuming that the defendant had fewer than four tenants during the lease term, § 47a-21 (k) (2) does not relieve her of her obligations under § 47a-21 (h).[4]

We also are unpersuaded by the defendant's argument that a violation of § 47a-21 (h) is not a CUTPA violation. In support of this argument the defendant relies on this court's decision in *Tarka* v. *Filipovic*, 45 Conn. App. 46, 694 A.2d 824, cert. denied, 242 Conn. 903, 697 A.2d 363 (1997). Such reliance is misplaced. In *Tarka*, this court affirmed the trial court's acceptance of the finding of the attorney referee that the defendants' failure to place the plaintiff's security deposit in an interest bearing account did not rise to the level of a CUTPA violation. Id., 55–56. In doing so, this court noted that whether a practice violates CUTPA is a question of fact. Id., 55. The court also noted that "[t]he

[4] Because the defendant's reliance on § 47a-21 (k) (2) is misplaced, we need not address the defendant's claim that the court's finding that the defendant owned four rental properties was clearly erroneous.

attorney referee determined that [the defendants'] conduct arose out of the defendants' ignorance of their obligations." Id.

In the present case, the court specifically found that the defendant's conduct rose to the level of a CUTPA violation. Furthermore, the court in this case did not conclude that the defendant's violation of her obligations with respect to the plaintiff's security deposit was the result of ignorance. To the contrary, the court concluded that the defendant, who "is a former Realtor and has been involved in multiple rental relationships on her properties," showed "utter indifference to her obligations as a landlord . . . ." The court further noted that the defendant's violations of § 47a-21 with respect to other tenants continued up to and through the trial. Consequently, the factual findings in this case are markedly different than those presented in *Tarka*. Just as this court did not disturb the trial court's factual finding in *Tarka* regarding whether the defendants' conduct rose to the level of a CUTPA violation; *Tarka* v. *Filipovic*, supra, 45 Conn. App. 56; we will not disturb the trial court's finding in the present case. We cannot say that the court erred in concluding that the manner in which the defendant handled the defendant's security deposit constituted a CUTPA violation.

Moreover, as discussed in part I A 1 of this opinion, the evidence in the record supports the trial court's determination that certain itemized damages assessed by the defendant were pretextual. The defendant does not argue that pretextual charges cannot form the basis of a CUTPA violation. Instead, she repeats her argument that the disputed charges were not pretextual and that this case is nothing more than a contract dispute between the parties over the reasonableness of the repairs the defendant made and for which she charged the plaintiff. Given our conclusion in part I A 1 of this opinion, the defendant's argument is without merit.

We also disagree with the defendant's contention that the plaintiff failed to prove that he suffered an ascertainable loss. The issue of whether the plaintiff suffered an ascertainable loss as a result of the defendant's CUTPA violation is a question of fact, which we review under the clearly erroneous standard. See *Cohen* v. *Meyers*, 175 Conn. App. 519, 554, 167 A.3d 1157, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

"The ascertainable loss requirement [of General Statutes § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss . . . as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. . . . Rather . . . [d]amage . . . is only a species of loss . . . hence [t]he term loss necessarily encompasses a broader meaning than the term damage. . . . Accordingly . . . for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the amount of the actual loss. . . .

"Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim . . . .

"A plaintiff also must prove that the ascertainable loss was caused by, or a result of, the prohibited act.

General Statutes § 42-110g (a) . . . . When plaintiffs seek money damages, the [as a result of] language . . . in § 42-110g (a) requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff. . . . [P]roximate cause is [a]n actual cause that is a substantial factor in the resulting harm . . . . The question to be asked in ascertaining whether proximate cause exists is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's act." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 535–36, 219 A.3d 948 (2019).

In the present case, the evidence in the record supports the court's finding that the defendant assessed pretextual damages to the plaintiff. This evidence also demonstrates that the plaintiff suffered an ascertainable loss as a result of the withholding of the portion of the security deposit that was legitimately owed to him. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 667, 166 A.3d 857 ("Whenever a consumer has received something other than what [the consumer] bargained for, [the consumer] has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Internal quotation marks omitted.)), cert. denied, 327 Conn. 927, 171 A.3d 60 (2017); see also *Larobina* v. *Home Depot, USA, Inc.*, 76 Conn. App. 586, 597, 821 A.2d 283 (2003) (concluding that trial court improperly concluded that plaintiff failed to prove ascertainable loss because "plaintiff did receive something other than that for which he had bargained; he bargained to have carpeting installed at a price of $7.37 per square yard, but he got nothing").

Consequently, we conclude that the trial court properly found that the defendant violated CUTPA.

C

The defendant's final claim is that the trial court abused its discretion in awarding punitive damages in the amount of $19,867.13. The defendant argues that her conduct did not warrant an award of punitive damages. We disagree.

We begin our analysis with the standard of review. "Awarding punitive damages and attorney's fees under CUTPA is discretionary; General Statutes § 42-110g (a) and (d)[5] . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Footnote added; footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 446, 78 A.3d 76 (2013).

"We note also that the CUTPA statutes do not provide a method for determining punitive damages . . . ." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 313. Additionally, "[u]nlike punitive damages under Connecticut common law, punitive damages under CUTPA are focused on deterrence, rather than mere compensation." *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 140, 30 A.3d 703, cert. granted, 303 Conn. 904, 31 A.3d 1179 (2011) (appeal withdrawn January 27, 2012), and

[5] General Statutes § 42-110g provides in relevant part: "(a) . . . The court may, in its discretion, award punitive damages . . . .

"(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ."

cert. granted, 303 Conn. 905, 31 A.3d 1180 (2011) (appeal withdrawn January 26, 2012).[6]

In the present case, the trial court awarded punitive damages on the basis of the "defendant's indifference to the law when engaged in this transaction" and "her continued inexcusable failure to segregate her current security deposits from her personal accounts after the commencement of this action, when at the latest she should have learned what the law is." (Emphasis omitted.) The court then awarded punitive damages in the amount of $19,867.13, as determined by the amount of the security deposit of $12,730 and pretextual charges of $7137.13. As stated previously in this opinion, the court also provided the following basis for its award of punitive damages under CUTPA: "The [trial] court has concerns for her current tenants that their funds may not be secured. This utter indifference to her obligations as a landlord, when taken in context with what the court [found] were pretextual damages being assessed to the plaintiff, is inexcusable and indefensible and leaves the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter." Additionally, the court stated that the defendant "must be provided with an incentive to comply with security deposit laws and this judgment will hopefully help protect future tenants of the defendant."

In her principal brief, the defendant advances several arguments in support of her claim that the trial court erred in awarding punitive damages. The defendant argues that her actions constituted a good faith claim as defined under § 47a-21 (j) (2), and argues further that the plaintiff did not suffer an ascertainable loss as a result of her actions. Additionally, the defendant

[6] Under Connecticut common law, punitive damages are limited to litigation costs. See *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 447–48, 152 A.3d 1183 (2016).

contends that her actions did not involve a reckless indifference to the plaintiff's rights or an intentional and wanton violation of the plaintiff's rights. Also, the defendant argues that punitive damages are ordinarily not recoverable for breach of contract. Last, the defendant argues that the calculation of the punitive damages was excessive. We address each argument in turn.

First, the defendant argues that her actions constituted a good faith claim as defined under § 47a-21 (j) (2). Section 47a-21 (j) is titled "Investigation of complaints by commissioner. Order. Jurisdiction. Regulations," and provides the procedural parameters in which the banking commissioner may receive, investigate, and remedy complaints regarding any alleged violations of subsections (b), (d), (h), or (i) of § 47a-21.[7] Section 47a-21 (j) (2) provides: "The commissioner shall not have jurisdiction over (A) the failure of a landlord to pay interest to a tenant annually under subsection (i) of this section, or (B) the refusal or other failure of the landlord to return all or part of the security deposit if such failure results from the landlord's good faith claim that such landlord has suffered damages as a result of a tenant's failure to comply with such tenant's obligations, regardless of whether the existence or amount of the alleged damages is disputed by the tenant. For purposes of this section, 'good faith claim' means a claim for actual damages suffered by the landlord for which written notification of such damages has been provided to the tenant in accordance with the

[7] General Statutes § 47a-21 (j) (1) provides: "Except as provided in subdivision (2) of this subsection, the commissioner may receive and investigate complaints regarding any alleged violation of subsections (b), (d), (h) or (i) of this section. For the purposes of such investigation, any person who is or was a landlord shall be subject to the provisions of section 36a-17. If the commissioner determines that any landlord has violated any provision of this section over which the commissioner has jurisdiction, the commissioner may, in accordance with section 36a-52, order such person to cease and desist from such practices and to comply with the provisions of this section."

provisions of subdivision (2) of subsection (d) of this section."

The defendant, here, fails to explain how this statutory provision is applicable to her claim that the trial court erred in awarding punitive damages. The jurisdictional parameters of the banking commissioner are not at issue in the present case. Furthermore, the court concluded that the defendant's claims were not made in good faith when it found that certain itemized damages assessed by the defendant were fabricated and pretextual and that her handling of the security deposits of the plaintiff and other tenants showed an utter indifference to her obligations as a landlord. See *Cianci* v. *Originalwerks*, *LLC*, 126 Conn. App. 18, 22, 16 A.3d 705 ("[w]e will not disturb the court's finding unless it is clearly erroneous"), cert. denied, 301 Conn. 901, 17 A.3d 1043 (2011).

Second, the defendant argues that the plaintiff did not suffer an ascertainable loss as a result of the defendant's actions. As stated in part I B of this opinion, the plaintiff suffered an ascertainable loss due to the defendant's withholding of the plaintiff's security deposit that she legitimately owed to him.

Third, the defendant argues that none of her actions involved a reckless indifference to the plaintiff's rights or an intentional and wanton violation of the plaintiff's rights warranting an award of punitive damages. We disagree.

Here, the court found, and the record supports, that the defendant failed to comply with § 47a-21 (d) and assessed pretextual damages to the plaintiff. Moreover, the evidence showed that she violated § 47a-21 (h). In particular, the defendant testified that she did not believe that she was allowed to use the security deposit for personal purposes, yet the evidence demonstrated that she did so. Consequently, the court found that the

defendant's actions were "inexcusable and indefensible" and constituted "unethical, unscrupulous activity in violation of a stated public policy set forth by the Connecticut legislature and caused a substantial injury to the plaintiff." These findings are not clearly erroneous and are sufficient to support an award of punitive damages. See *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 486, 871 A.2d 981 (2005) ("[t]he trial court's findings that the defendant's conduct was 'reprehensible,' that its conduct of 'bilking' its customers was not isolated and that this initial conduct of making unauthorized charges was 'exacerbated' by the defendant's use of the phony business card constitute evidence of reckless indifference to and intentional and wanton violation of the plaintiff's rights").

The defendant's fourth argument is that punitive damages are ordinarily not recoverable for breach of contract. The punitive damages award in this case, however, was not based on a simple breach of contract finding but, rather, was based on a CUTPA violation for unscrupulous conduct. The court clearly based its award of punitive damages on the defendant's actions in failing to comply with her statutory obligations as a landlord.

Finally, the defendant argues that the trial court's award of punitive damages was excessive. The defendant contends that the award of punitive damages is excessive "by any objective determination." We note that, "[w]hile the CUTPA statutes do not provide a method for determining punitive damages, courts generally award punitive damages in amounts equal to actual damages or multiples of the actual damages." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 131 Conn. App. 139–40.

In the present case, the trial court determined the award of punitive damages by adding together the

amount of the security deposit and the pretextual charges, resulting in CUTPA punitive damages of $19,867.13. This amount was approximately one and one-half times the security deposit paid by the plaintiff and less than the statutory damages the court awarded pursuant to § 47a-21 (d) (2). The stated purpose of the court's punitive damages award was to deter the defendant from continuing to flout her obligations under the security deposit statute by providing the defendant "with an incentive to comply with security deposit laws . . . ." Furthermore, the court stated that "this judgment will hopefully help protect future tenants of the defendant." Accordingly, given the actual amounts in dispute, the defendant's conduct, both as to the plaintiff and her other tenants, and the stated purpose of the court's punitive damages award, we conclude that the trial court's award of punitive damages was not excessive. See *Ulbrich* v. *Groth*, supra, 310 Conn. 456 ("[a]lthough the trial court's punitive damages award in the present case undoubtedly was a large one, especially in light of the large size of the compensatory damages award, we cannot conclude that the award constituted a manifest abuse of discretion or that an injustice was done"); see also *Votto* v. *American Car Rental, Inc.*, supra, 273 Conn. 486 (trial court's awarding of punitive damages equal to three times amount of unauthorized charges to plaintiff's credit card was not abuse of discretion).

In sum, on review of the record, we conclude that the trial court did not abuse its discretion in awarding punitive damages to the plaintiff. The court based its determination on evidence that showed that the defendant failed to properly safeguard the plaintiff's security deposit and then attempted to avoid returning the security deposit to the plaintiff by fabricating pretextual charges. Furthermore, the court clearly articulated that the purpose of the punitive damages award was to deter

the defendant from continuing her improper use of her tenants' security deposits and to protect future tenants from the defendant improperly managing their security deposits. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 131 Conn. App. 140 ("[u]nlike punitive damages under Connecticut common law, punitive damages under CUTPA are focused on deterrence, rather than mere compensation").

II

THE PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that the trial court erred in holding that he was not entitled, pursuant to § 47a-11a, to a return of rent payments he made after vacating the premises. Additionally, the plaintiff claims that the court erred in denying his common-law claim for money had and received. We disagree with both claims.

A

The plaintiff first claims that the court erred by not awarding him damages for rent he paid after he moved out of the premises and the defendant had the opportunity to re-let the premises. Specifically, the plaintiff argued before the trial court that the defendant should be required to return to the plaintiff all rents she received after February, 2017, because the lease was terminated by operation of law due to the defendant's violation of § 47a-11a.

Section 47a-11a provides: "(a) If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental in mitigation of damages.

"(b) If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental, the rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment."

The plaintiff argued that the defendant admitted at trial that the plaintiff abandoned the premises during the winter of 2016 through 2017 and testified further that she was present in April, 2017, when a moving truck removed the remainder of the plaintiff's personal property from the premises. Consequently, he argued that, by operation of law, the lease agreement was terminated by March, 2017, and the defendant had no right to any rent from that point forward.

The court rejected the plaintiff's claim on the basis of its factual findings that "[t]he parties attempted to negotiate an early exit for the plaintiff but when the negotiations failed [the plaintiff] indicated he would fulfill his obligations under the lease and he left items (albeit very few items) in storage at the premises until at least the end of April, 2017." The court further found that the plaintiff "did not hand over the keys to the premises and he continued to pay rent . . . ."

On appeal, the plaintiff does not challenge the court's factual findings. Instead, he argues that, "[a]ccepting all of the facts found by the trial court, the plaintiff contends that the payments were made without the plaintiff's obligation to pay or the defendant's right to receive them." He describes the issue as a matter of law subject to plenary review. Thus, we understand the plaintiff's claim to be that the court improperly construed § 47a-11a by concluding that his conduct did not constitute "abandonment" under the statute.

"The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law and our review, therefore, is plenary." (Internal quotation marks omitted.) *Russell* v. *Russell*, 91 Conn. App. 619, 629, 882 A.2d 98, cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005). We begin with the text

of the statute and its relationship to other statutes. See General Statutes § 1-2z.

Section 47a-11a does not provide a statutory definition of the terms "abandons" or "abandonment"; however, a statutory definition is provided for "abandonment" in General Statutes § 47a-11b. Thus, we look to § 47a-11b for guidance in our interpretation of the terms "abandons" and "abandonment" in § 47a-11a. See *Cagiva North America, Inc.* v. *Schenk*, 239 Conn. 1, 12, 680 A.2d 964 (1996) ("[w]hen construing a statute, we may look for guidance to other statutes relating to the same general subject matter, as the legislature is presumed to have created a consistent body of law"); *BayBank Connecticut, N.A.* v. *Thumlert*, 222 Conn. 784, 790, 610 A.2d 658 (1992) ("[s]tatutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law" (internal quotation marks omitted)).

Section 47a-11b provides in relevant part: "(a) For the purposes of this section, 'abandonment' means the occupants have vacated the premises without notice to the landlord and do not intend to return, which intention may be evidenced by the removal by the occupants or their agent of substantially all of their possessions and personal effects from the premises and either (1) nonpayment of rent for more than two months or (2) an express statement by the occupants that they do not intend to occupy the premises after a specified date. . . ." Thus, in accordance with the statutory definition of abandonment in § 47a-11b, we construe the terms abandons and abandonment in § 47a-11a as meaning that the tenant has vacated the premises without notice to the landlord and does not intend to return. As ascertained from the text of § 47a-11b, this intention may be evidenced by the removal of substantially all of the tenant's possessions and personal effects from the premises and either (1) nonpayment of rent for more

than two months or (2) an express statement by the tenant that he does not intend to occupy the premises after a specified date.

Applying this definition, we conclude that the court correctly determined that the plaintiff did not abandon the premises before the end of the lease term. The plaintiff did not vacate the premises without notice to the defendant. To the contrary, he tried to negotiate an early termination of the lease agreement. When those negotiations failed, he expressly stated his intention to fulfill his obligations under the lease, which is the opposite of abandoning the premises. In an e-mail to the defendant's attorney, the plaintiff stated: "I will just continue the lease as is. I will not be present but will adhere to the conditions of the lease. I will provide the absolute minimal yet compliant services to the home. . . . I will pay monthly rent. I will leave water and electric on and pay those bills. I will keep thermostat at minimal level to ensure no freezing occurs. . . . I will keep the right to have minimal furniture in the home to then use when I choose." Consistent with his e-mail, there was never a period of more than two months when the plaintiff did not pay rent. In fact, as previously discussed in this opinion, the plaintiff testified that, in addition to rent, he continued to pay for landscaping on the property through the end of the lease term. Finally, the plaintiff did not turn over the keys to the premises and request the return of his security deposit until the end of the lease term. Given these facts, none of which the plaintiff challenges on appeal, we agree with the court that the plaintiff never abandoned the premises and did not trigger an early termination of the lease agreement under § 47a-11a.

B

Last, the plaintiff claims that the court improperly held that he failed to prove his common-law claim for

money had and received. The plaintiff contends that he is entitled to recover rent in the amount of $6365 and common charges in the amount of $435 that were paid for each month from March through June, 2017.

"To prevail on a claim for money had and received, a plaintiff must prove both the lack of authority to authorize the payment and that it is inequitable for the recipient to retain it. . . . Because a cause of action for money had and received requires proof of two prongs, this court may affirm the judgment of the trial court on proof that the payment was authorized or that its retention by the defendant is equitable under all of the circumstances." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 77–78, 95 A.3d 538, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

"Our Supreme Court has stated that when money is paid by one on the basis of a mistake as to his rights and duties and the recipient has no right in good conscience to retain the money, an action of indebitatus assumpsit may be maintained to recover the money, regardless of whether the mistake was one of fact or of law. . . . The action of indebitatus assumpsit for the recovery of money had and received and for money paid . . . is an action of the common law, but, to a great extent, an equitable action, adopted for the enforcement of many equitable, as well as legal rights. . . . Stated another way, [t]he action for money had and received is an equitable action to recover back money paid by mistake where the payor is free from any moral or legal obligation to make the payment and the payee in good conscience has no right to retain it. Is the plaintiff in this action, as between it and the defendant, in equity and good conscience entitled to the money? If it is, then it is entitled to recover. The real ground of recovery is the equitable right of the plaintiff to the money. . . .

"[E]quitable remedies are not bound by formula but are molded to the needs of justice. . . . The court's determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings . . . that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . .

"We will reverse a trial court's exercise of its equitable powers only if it appears that the trial court's decision is unreasonable or creates an injustice. . . . [E]quitable power must be exercised equitably . . . [but] [t]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Stratford* v. *Wilson*, 151 Conn. App. 39, 46–48, 94 A.3d 644, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

In its memorandum of decision, the trial court found that the plaintiff failed to prove that he provided payments to the defendant under the mistaken belief that he had an obligation to do so. The court found that the plaintiff signed the lease agreement, continued to use the premises for storage until April, 2017, and failed to repudiate the lease agreement at any point during the tenancy. Thus, the court concluded that the plaintiff failed to prove his common-law claim of money had and received.

On appeal, the plaintiff argues that the court's conclusion was improper because the plaintiff presented evidence showing that he stated in writing to the defendant's attorney that he would no longer be present at the premises after October, 2016. Also, the plaintiff argues that the defendant testified to the following: the plaintiff had abandoned the premises in the winter of 2016–2017, the defendant was physically present at the premises when the remainder of the plaintiff's property was removed from the premises, and she did not attempt to re-let the premises prior to July, 2017. We are not persuaded.

The court's determination that the plaintiff was obligated to make the monthly rental payments in accordance with the terms of the lease agreement is supported by the record demonstrating that the plaintiff signed the lease agreement, communicated to the defendant's attorney that he would abide by the terms of the lease, and failed to repudiate the lease agreement at any point during the tenancy. Furthermore, as we also concluded in part II A of this opinion, there was ample evidence to support the court's conclusion that a duty to mitigate damages pursuant to § 47a-11a never materialized and, thus, the plaintiff failed to prove that he had paid his monthly rent by mistake and that he was free from any moral or legal obligation to make the rental payments. Therefore, having reviewed the record, we conclude that the trial court reasonably concluded that the plaintiff failed to prove his claim of money had and received.

The judgment is affirmed.

In this opinion the other judges concurred.

WATSON REAL ESTATE, LLC *v.* WOODLAND RIDGE, LLC, ET AL.
(AC 43006)

Cradle, Alexander and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract. The parties entered into an escrow agreement in conjunction with the purchase of a lot in a residential subdivision owned by the defendant W Co. The escrow agreement provided that, in the event of a dispute, all costs of litigation, including attorney's fees, shall be paid to the prevailing party. During trial, the parties agreed that the issue of attorney's fees should be reserved until after a decision on the merits of the complaint had been rendered. The trial court rendered judgment in favor of W Co., from which the plaintiff appealed to this court, which affirmed the trial court's judgment. While that appeal was pending, the trial court denied W Co.'s motion for attorney's fees. Following this court's release of its decision on the plaintiff's appeal, W Co. moved for judgment on its pending counterclaim seeking attorney's fees. The court denied W Co.'s motion for judgment and its motion for reargument and reconsideration, and W Co. appealed to this court. *Held* that the trial court failed to exercise its discretion with respect to W Co.'s claim for attorney's fees: the trial court summarily denied W Co.'s motion for attorney's fees and its motion for judgment on its counterclaim without explanation; in the court's subsequent articulation, it explained that it denied the motion for judgment because it had denied the motion for attorney's fees nearly two years earlier and W Co. had not filed an appeal, and the court's circular explanation for its denials of W Co.'s motions demonstrated that it failed to exercise its discretion; moreover, the parties' contract provided for attorney's fees for the prevailing party, and the court had a duty to exercise its discretion to determine whether W Co. had proven its claim for attorney's fees and whether those fees were reasonable, and, at no point, did the court indicate that it had considered the merits of the defendant's W Co.'s request; furthermore, W Co. properly moved for judgment on its pending counterclaim and timely appealed from the court's denial of that motion, and the lack of an appeal from the court's denial of W Co.'s motion for attorney's fees could not serve as the sole basis for not awarding attorney's fees.

Argued January 6—officially released October 5, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior

Court in the judicial district of Hartford, where the named defendant filed a counterclaim; thereafter, the matter was tried to the court, *Dubay, J.*; judgment in part for the named defendant, from which the plaintiff appealed to this court, *Alvord*, *Moll* and *Bear*, *Js.*, which affirmed the trial court's judgment; subsequently, the court, *Dubay, J.*, denied the named defendant's motion for attorney's fees; thereafter, the court denied the named defendant's motion for judgment on its counterclaim and its motion to reargue and for reconsideration, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

Mario R. Borelli, for the appellant (named defendant).

Jeffrey J. Mirman, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The present appeal originated from an escrow agreement entered into by the parties in conjunction with the purchase of a lot in a residential subdivision. In *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, 187 Conn. App. 282, 284–85, 202 A.3d 1033 (2019), this court affirmed the judgment of the trial court rendered in favor of the defendant Woodland Ridge, LLC.[1] Specifically, we rejected the claims of the plaintiff, Watson Real Estate, LLC, that the trial court (1) improperly failed to find that a meeting of minds existed between the parties as to the specifications of the common driveway that the defendant was required to install under the escrow agreement, (2) improperly failed to find that the defendant had breached the escrow agreement by not reimbursing the plaintiff for

[1] The plaintiff also named Daniel Zak, Peter J. Alter, and Leonard Bourbeau as defendants, but these individuals did not participate in the trial court proceedings or the previous appeal. *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 284 n.1. We, therefore, refer to Woodland Ridge, LLC, as the defendant.

costs incurred for work that the defendant was required to complete and (3) abused its discretion in denying the plaintiff's request to amend its complaint to add a claim for unjust enrichment. Id.

Both prior to and following the plaintiff's appeal, the defendant sought attorney's fees pursuant to a prevailing party clause contained in the parties' agreement. The trial court denied the defendant's attempts to recover attorney's fees, and this appeal followed.

In this appeal, the defendant claims that (1) the trial court improperly denied its claim for attorney's fees, pursuant to a prevailing party clause in the parties' escrow agreement, and (2) it was entitled to appellate attorney's fees. We conclude that the court failed to exercise its discretion with respect to the defendant's request for attorney's fees. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings.

This court previously set forth the relevant facts and procedural history underlying the defendant's claim for attorney's fees. "The defendant was the owner and developer of a four lot residential subdivision located on the westerly side of Woodland Street in Glastonbury. The subdivision consists of two front lots abutting Woodland Street (lots 1 and 2) and two rear lots abutting the western boundaries of the front lots (lots 3 and 4). A common driveway providing ingress and egress to the subdivision runs west from Woodland Street past the entrances to lots 1 and 2 and terminates at the entrances to the rear lots.

"In May, 2006, H. Kirk Watson, a member of the plaintiff, entered into an agreement with the defendant for the purchase of lot 1. At the time of the execution of the purchase agreement, the common driveway had been paved only from Woodland Street to a point 118 feet before the entrance to lot 1; the remainder of the

driveway, including the portion passing along the entrance to lot 1, remained unpaved. Consequently, Watson, in his capacity as a member of the plaintiff, entered into an agreement with the defendant and Attorney Peter J. Alter to create an escrow fund from a portion of the defendant's proceeds from the sale of lot 1 to assure the defendant's completion of the common driveway and certain other improvements and construction that remained to be completed (escrow agreement). Under the escrow agreement, the defendant was to deposit with the escrow agent, Alter, the sum of $51,000, which represented a fair estimate of the cost of completion of the [w]ork.

"The particular items that remained to be completed were set forth in a punch list that was attached to the escrow agreement as exhibit A. Pursuant to exhibit A, the defendant was required to complete the common driveway to the point at which it becomes an individual driveway for each approved lot, but the defendant was not to put the final course of bituminous pavement on the common driveway until construction of all four houses [was] complete (as indicated by the issuance of a certificate of occupancy), or five (5) years from the date of [the escrow agreement], whichever shall first occur. The stated rationale for this delay was to avoid damage to the final pavement as may be caused by heavy construction vehicles using the driveway during home construction. As Watson later testified at trial, at the time he executed the escrow agreement, he believed that this language required the defendant to initially extend the existing layer of pavement along the remainder of the driveway and, then, at the appropriate time, install a second layer of pavement over the entire length of the driveway. Per exhibit A, the defendant was also required to install a common electric power service from which each lot could secure individual service.

"Because the parties recognized that the work needed to be completed before the plaintiff could secure a building permit and a certificate of occupancy, the escrow agreement provided for a procedure by which the plaintiff could contract with a third party to complete the work and seek reimbursement from Alter out of the escrow funds if the defendant failed to complete the work in a timely manner. Pursuant to this procedure, the plaintiff was to give written notice to the defendant that the plaintiff's construction project required that the work be completed within a reasonable time. If the defendant subsequently failed to complete the work within thirty days, the plaintiff was then authorized to contract for the completion of the work, and, upon [submission] of an invoice or contract for performance from a [third-party] contractor, [Alter] shall advance the funds from the escrow agreement to satisfy the invoice or contract provisions.

"Upon the closing of the transaction, Watson took title to the property in the name of the plaintiff and began developing the property. Between the time of closing and the completion of the plaintiff's house, no additional paving of the common driveway was done. Watson was told by the town, however, that in order to obtain a certificate of occupancy, the paved portion of the common driveway needed to be extended to the entrance of the plaintiff's property. Consequently, in 2008, Watson contracted with a third party to pave this portion of the common driveway at a cost of $4914, which Watson paid. The remainder of the driveway, however, remained a dirt road. Watson also paid $530.70 to Megson & Heagle Civil Engineers & Land Surveyors, LLC (Megson & Heagle), to satisfy an unpaid bill incurred by Daniel Zak, an agent for the defendant, in connection with the preparation of a Connecticut Light and Power Company easement map (easement map) for the common driveway.

"Between 2008 and 2011, no additional paving was done on any portion of the common driveway. In September, 2011, Zak notified Alter that the defendant intended to complete all of the remaining work required under the escrow agreement. The defendant, thereafter, engaged R & J Paving, LLC (R & J Paving), to pave the final portion of the common driveway, from the entrance of the plaintiff's property to the entrances to lots 3 and 4. *The defendant did not, however, have a second, final layer of pavement installed, which Watson believed was required under the escrow agreement.* Upon receipt from Zak of the paving invoice, Alter released $9000 to R & J Paving and divided the remainder of the escrow funds between Zak and Leonard Bourbeau, a member of the defendant. The plaintiff was never reimbursed for the costs it expended in extending the common driveway to the entrance to its property and settling the invoice for the easement map. The plaintiff, however, had not submitted invoices for these expenditures to Alter as required under the escrow agreement.

"The plaintiff commenced the present action in March, 2013. In count two of the operative, revised complaint—the only count at issue in this appeal—the plaintiff alleged, inter alia, that the defendant breached the escrow agreement by improperly seeking the release of escrow funds. The plaintiff further alleged that, as a result, it sustained damages, including the costs to complete the work that the defendant had failed to perform. The matter was tried to the court on September 20 and 22, 2016.

"At trial, the plaintiff appeared to abandon its claim that the defendant improperly sought the release of the escrow funds. *The plaintiff, instead, proceeded under a theory that the defendant breached the escrow agreement by failing to install a second, final layer of pavement over the common driveway. The principal issue*

at trial was whether the defendant's obligation under the agreement to install a final course of bituminous pavement was intended to require the defendant to apply two layers of pavement. On this issue the parties presented contradictory evidence.

* * *

"In its memorandum of decision issued on January 10, 2017, *the court . . . determined that it could not find that there was a meeting of the minds as to the specifics of the common driveway and concluded that the plaintiff had failed to sustain its burden of proving its breach of contract claim*. The court, therefore, rendered judgment in favor of the defendant on count two of the plaintiff's revised complaint." (Footnotes omitted; emphasis altered; internal quotation marks omitted.) Id., 285–92.

In the prior appeal filed by the plaintiff, we first considered whether the trial court improperly found that a meeting of the minds between the parties had not occurred with respect to the number of layers of pavement to be applied to the common driveway. Id., 294. We rejected this claim. Id., 296–97. Next, we declined to review the plaintiff's claim that the defendant had breached the escrow agreement by not reimbursing the plaintiff for costs it had incurred on the basis that this claim had not been alleged in the operative complaint or asserted at trial. Id., 297–98. Finally, we concluded that the court had not abused its discretion in denying the plaintiff's request for leave to amend its revised complaint to add a claim of unjust enrichment. Id., 299–300.

With this summary in mind, we now turn to the facts relating to the defendant's claim for attorney's fees. In its revised complaint, the operative pleading, the plaintiff set forth nine counts against the various defendants. In its amended answer, dated November 23, 2015,

the defendant set forth the following counterclaim: "The escrow agreement, exhibit A to the plaintiff's revised complaint, provides, in pertinent part, that in the event of a dispute between this defendant and the plaintiff, 'all costs of litigation, including reasonable [attorney's] fees, shall be paid to the prevailing party by the [nonprevailing] party.' Wherefore, the defendant . . . in the event that it is the prevailing [party] in this action, seeks its costs of litigation and reasonable attorney's fees." During trial, the parties represented to the court their agreement that the issue of attorney's fees should be reserved until after a decision on the merits of the complaint had been rendered.

On January 10, 2017, the court issued its memorandum of decision. At the outset, the court observed that only count two of the revised complaint, alleging breach of contract, remained pending against the defendant. With respect to this count, the plaintiff had alleged that the defendant breached the escrow agreement and its obligation to fully and completely pave the driveway pursuant to specifications set forth in the purchase agreement. The court found that the plaintiff failed to meet its burden with respect to its claim of a breach of the escrow agreement and the specifics of the driveway set forth in the purchase agreement. The court further explained that there was no "meeting of the minds as to the specifics of the common driveway." The court then rendered judgment in favor of the defendant as to count two of the revised complaint.

On May 9, 2017, the defendant filed a motion for attorney's fees and an affidavit of attorney's fees and costs totaling $38,807.88. One week later, the plaintiff appealed from the judgment rendered in favor of the defendant on count two of the revised complaint. On May 19, 2017, the plaintiff filed an opposition to the motion for attorney's fees. The plaintiff argued that the court had not rendered a judgment on the defendant's

counterclaim seeking attorney's fees and, in the alternative, it should deny any such fees in the exercise of its discretion. On June 28, 2017, the court issued an order denying the motion for attorney's fees.

This court released its decision on the plaintiff's appeal on January 22, 2019. *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 282. On February 25, 2019, the defendant moved for judgment on its counterclaim seeking attorney's fees. The defendant also filed an updated affidavit for attorney's fees and costs that included work done for the appeal for a total claim of $45,857.88. On April 18, 2019, the plaintiff filed an opposition to the motion for judgment. It iterated some of its prior arguments as to why attorney's fees should not be awarded and added a claim that the prior denial constituted "the law of the case." The court denied both the defendant's motion for judgment on its counterclaim and its subsequent motion for reargument and reconsideration.

The defendant filed the present appeal on June 3, 2019. Nine days later, the defendant moved for an articulation of the trial court's 2019 denials of its motions for judgment on its counterclaim and for reargument and reconsideration. On July 11, 2019, the court granted the defendant's motion and stated: "[The motions for judgment and for reargument/reconsideration] were denied out of hand as the court had ruled on the defendant's request for attorney's fees nearly two years earlier. . . . [The] [m]atter went to judgment on January 17, 2018. The appeal period expired twenty-one days thereafter."

On July 19, 2019, the defendant moved for further articulation, requesting that the trial court explain why it was not entitled to attorney's fees incurred as a result of the plaintiff's appeal. On September 24, 2019, the court granted the defendant's motion and noted that,

although the 2019 affidavit of attorney's fees included appellate work, "[n]either [the 2019 motion for judgment nor the motion to reargue/for reconsideration] contain anything in the body of either filing that would give the trial court even a hint of a request for attorney's fees in connection with a successful defense of the appeal. The first time the court [was] made explicitly aware of the request [was] in this request for further articulation." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court improperly denied its request for trial and appellate attorney's fees. Specifically, it contends that such an award was authorized by the prevailing party clause contained in the parties' escrow agreement, it was the prevailing party, and, therefore, the court improperly denied its request for attorney's fees. We conclude that the court improperly failed to exercise its discretion with respect to the defendant's claim for attorney's fees.

We begin with the relevant legal principles and our standard of review. This court has noted that, as a general matter, Connecticut follows the American rule[2] with regard to attorney's fees. See *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 570, 910 A.2d 235 (2006). "[U]nder the American rule, [a party] ordinarily cannot recover attorney's fees for breach of contract in the absence of an express provision allowing recovery . . . ." (Footnote omitted; internal quotation marks omitted.) *Winakor* v. *Savalle*, 198 Conn. App. 792, 810–11, 234 A.3d 1122, cert. granted, 335 Conn. 958, 239 A.3d 319 (2020); see also *Total Recycling Services of*

[2] "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Hirsch*, 170 Conn. App. 439, 453 n.9, 154 A.3d 1009 (2017).

Connecticut, Inc. v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 326–27, 63 A.3d 896 (2013); *Neiditz* v. *Housing Authority*, 42 Conn. App. 409, 413, 679 A.2d 987 (1996).

"[W]here a contract provides for the payment of attorney's fees . . . those fees are recoverable solely as a contract right. . . . Therefore, the language of the [contract] governs the award of fees . . . . Such attorney's fees incurred language has been interpreted by our Supreme Court . . . as permitting recovery so long as that bill is not unreasonable upon its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the [court's] own expert judgment." (Internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 283, 880 A.2d 985 (2005); see also *Atlantic Mortgage & Investment Corp.* v. *Stephenson*, 86 Conn. App. 126, 134, 860 A.2d 751 (2004).

In reviewing a claim that attorney's fees are contractually authorized, "we apply the well established principle that [a] contract must be construed to effectuate the intent of the parties, which is determined from [its] language . . . interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 308 Conn. 327. The intent of the parties is a question of law subject to plenary review when the contract is unambiguous within its four corners. *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 811, 17 A.3d 40 (2011).

In the present case, the parties' escrow agreement provided that, in the event of a dispute, "all costs of litigation, *including reasonable* [*attorney's*] *fees*, *shall be paid to the prevailing party by the* [*nonprevailing*] *party*." (Emphasis added.) The parties do not dispute

that the escrow agreement authorized payment of attorney's fees to the prevailing party. The question that remains, therefore, is whether the court properly denied the defendant's request for attorney's fees.

"An award of attorney's fees is not a matter of right. Whether any award is to be made and the amount thereof lie within the discretion of the trial court, which is in the best position to evaluate the particular circumstances of a case. . . . A court has few duties of a more delicate nature than that of fixing counsel fees. The issue grows even more delicate on appeal; we may not alter an award of attorney's fees unless the trial court has clearly abused its discretion, for the trial court is in the best position to evaluate the circumstances of each case. . . . Because the trial court is in the best position to evaluate the circumstances of each case, we will not substitute our opinion concerning counsel fees or alter an award of attorney's fees unless the trial court has clearly abused its discretion." (Internal quotation marks omitted.) *Francini* v. *Riggione*, 193 Conn. App. 321, 329–30, 219 A.3d 452 (2019); *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 101–102, 100 A.3d 450 (2014).

"If a contractual provision allows for reasonable attorney's fees, [t]here are several general factors which may properly be considered in determining the amount to be allowed as reasonable compensation to an attorney. These factors are summarized in [rule 1.5 (a) of the Rules of Professional Conduct]. . . . [T]he commentary to rule 1.5 provides that the factors specified in the rule . . . are not exclusive and not all may be relevant given a particular instance." (Citation omitted; internal quotation marks omitted.) *Francini* v. *Riggione*, supra, 193 Conn. App. 330–31. "These factors include: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the fee customarily

charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client; the experience, reputation and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent." *WiFiLand, LLP* v. *Hudson*, supra, 153 Conn. App. 103. Additionally, a court may rely on its own general knowledge of what occurred during the proceedings to provide evidence in support of an award of attorney's fees. *Francini* v. *Riggione*, supra, 331.

Under the facts and circumstances of the present case, we conclude that the court did not exercise its discretion in ruling on the defendant's request for attorney's fees. "While it is normally true that [appellate courts] will refrain from interfering with a trial court's exercise of discretion . . . this presupposes that the trial court did in fact *exercise* its discretion. [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be *exercised* in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Emphasis in original; internal quotation marks omitted.) *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 609, 181 A.3d 550 (2018) (when trial court properly is called on to exercise its discretion, its failure to do so is error); *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) (same).

Following the judgment rendered in favor of the defendant with respect to the plaintiff's breach of contract claim, the defendant moved for an award of attorney's fees in the amount of $38,807.88 on May 9, 2017. At that time, no judgment had been rendered on the defendant's counterclaim seeking attorney's fees. The court denied the defendant's motion without explanation on June 28, 2017. Thus, the defendant's counterclaim seeking attorney's fees remained pending until February, 2019.

After the resolution of the plaintiff's appeal, the defendant moved for judgment on its counterclaim seeking attorney's fees on February 25, 2019. The defendant updated its request to $45,857.88, to include work done for the appeal. The court, again, simply denied the defendant's motion for judgment on the counterclaim without explanation on April 23, 2019. It similarly denied the defendant's motion for reargument and reconsideration. In response to the defendant's motion for articulation, the court subsequently explained that it had denied the motion for judgment on the counterclaim and the motion for reargument and reconsideration "out of hand" due to the fact that it had denied the 2017 motion for attorney's fees nearly two years earlier and the defendant had not filed an appeal.

The court's circular explanation for its repeated denials of the defendant's efforts to obtain an award of attorney's fees demonstrates that it failed to exercise its discretion in conformity with the spirit of the law. The parties' contract specifically provided for attorney's fees for the prevailing party. See generally *A & A Mason, LLC* v. *Montagno Construction, Inc.*, 49 Conn. Supp. 405, 407, 889 A.2d 278 (2005) (it is elementary that, when authorized, fees and costs are ordinarily awarded to prevailing party). Furthermore, the defendant was a prevailing party following the judgment rendered in its favor with respect to the plaintiff's breach of contract action. "Our Supreme Court has stated: [P]revailing party has been defined as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." (Internal quotation marks omitted.) *Giedrimiene* v. *Emmanuel*, 135 Conn. App. 27, 34–35, 40 A.3d 815, cert. denied, 305 Conn. 912, 45 A.3d 97 (2012); see also *Peterson* v. *McAndrew*, 160 Conn. App. 180, 210–11, 125 A.3d 241 (2015).

The trial court had a duty to exercise its discretion to determine whether the defendant had proven its claim

seeking attorney's fees and whether those fees were reasonable. Here, the court simply denied the defendant's 2017 motion for attorney's fees and the 2019 motion of judgment on its counterclaim without any explanation, and later issued an articulation concluding that the defendant's motions for judgment and for reargument and reconsideration were untimely. At no point, however, did the court provide any indication that it had considered the merits of the requests for attorney's fees, despite the contractual language and the defendant's status as a prevailing party.[3]

We also disagree with the trial court's assessment that the defendant was required, under these facts and circumstances, to file an appeal in 2017, following the denial of its motion for attorney's fees. Our Supreme Court has held that a judgment rendered on the merits is final for the purposes of filing an appeal, even though the recoverability or amount of attorney's fees has not yet been determined. See *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1998); see also *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014). Our Supreme Court further recognized that this rule may lead to "piecemeal appeals for judgments on the merits and awards of attorney's fees." (Internal quotation marks omitted.) *Paranteau* v. *DeVita*, supra, 524. Thus, a separate question exists as to the timeliness of an appeal from an award of attorney's fees, a collateral and independent claim, as compared with a judgment rendered on the merits of the underlying action. See *Benvenuto* v. *Mahajan*, 245 Conn. 495, 500, 715 A.2d 743

[3] We conclude, therefore, that the plaintiff's contentions in its appellate brief that the court declined to award the defendant attorney's fees on the basis that it was unjustly enriched, or that the defendant failed to present sufficient evidence of the amount of reasonable attorney's fees, constitute nothing more than speculation, which, as we repeatedly have noted, has no place in appellate review. See, e.g., *Village Mortgage Co.* v. *Veneziano*, 203 Conn. App. 154, 171, 247 A.3d 588 (2021); *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 640, 195 A.3d 707 (2018).

(1998); see also *Neiditz* v. *Housing Authority*, supra, 42 Conn. App. 411–12 (request for attorney's fees is not motion to open, set aside, alter, or modify judgment but, rather, raises legal issues collateral to main cause of action). This court recently explained that, once the trial court determines the amount of attorney's fees, that determination "will be a separately appealable final judgment as to the reasonableness of the fees awarded." *Iino* v. *Spalter*, 192 Conn. App. 421, 457, 218 A.3d 152 (2019); see also *Paraneau* v. *DeVita*, supra, 524 n.11.

In the present case, the defendant filed a counterclaim seeking attorney's fees.[4] In its January 10, 2017 memorandum of decision, the court did not address or render judgment with respect to this counterclaim. Following the resolution of the plaintiff's appeal on the merits of its action against the defendant, on February 25, 2019, the defendant moved for judgment on its counterclaim. On April 23, 2019, the court denied the defendant's motion for judgment on the counterclaim. The defendant filed the present appeal from the April 23, 2019 denial of its motion for judgment on the counterclaim and from the May 28, 2019 denial of its motion for reargument and reconsideration.

Under the unique facts of the present case, in which the trial court did not address the defendant's counterclaim seeking attorney's fees pursuant to a prevailing party clause in the parties' contract, and in which the

[4] We note that the plaintiff never challenged the propriety of asserting a counterclaim to obtain attorney's fees through either a motion to strike, a motion to dismiss or a motion for summary judgment. See Practice Book §§ 10-30,10-39, and 17-49. We therefore expressly decline to consider whether the use of such a pleading is proper for the purpose of recovering attorney's fees. Furthermore, the plaintiff failed to file a motion to dismiss the defendant's appeal as untimely. See, e.g., *Meribear Productions, Inc.* v. *Frank*, 193 Conn. App. 598, 604–605, 219 A.3d 973 (2019) (although Appellate Court ordinarily dismisses late appeals that are subject of timely motion to dismiss, twenty day time limit for filing appeal is not subject matter jurisdictional).

plaintiff failed to challenge the propriety of such a pleading or properly challenge the timeliness of the present appeal, we conclude that the defendant was not foreclosed from challenging the denial of its claim for attorney's fees. The defendant properly moved for judgment on its pending counterclaim for attorney's fees in 2019 and timely appealed from the trial court's denial of that motion. Simply stated, we are not persuaded that the defendant was required to file an appeal following the 2017 denial of the motion for attorney's fees, given its unresolved counterclaim. The defendant timely appealed from the 2019 denial of its motion for judgment on the counterclaim, and the lack of an appeal in 2017 cannot serve as the sole basis for not awarding attorney's fees.

Finally, we briefly address the plaintiff's contention that the trial court had determined that no enforceable contract existed between the parties, and, therefore, there was no agreement regarding an award of attorney's fees to the prevailing party. We disagree with the premise of this argument. As we stated in our prior decision, "the [trial] court determined that it could not find that there was a meeting of the minds *as to the specifics of the common driveway* . . . ." (Emphasis added; internal quotation marks omitted.) *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 292. This finding regarding the lack of a meeting of the minds applied only to the specifics of the work to be completed regarding the common driveway and not to the escrow agreement itself, which contained the prevailing party clause.

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

In this opinion the other judges concurred.

OCWEN LOAN SERVICING, LLC *v.* SANDRA A. SHELDON ET AL.
(AC 43704)

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

Syllabus

The plaintiff, O Co., sought to foreclose a mortgage on certain real property owned by the defendants, S and J. S and J originally signed a promissory note to G Co., secured by a mortgage on the property, and further agreed to participate in a "bisaver program," through which they made a payment to G Co. every two weeks via a direct withdrawal by G Co. from S's checking account. G Co. ceased withdrawing payments in 2008, and reported S and J, who had neither requested nor authorized the cessation, as delinquent to several credit reporting agencies, which severely damaged S and J's credit. S and J thereafter reached an oral agreement with G Co., pursuant to which G Co. agreed to "restore" their credit. G Co. did not restore their credit, S and J ceased to make additional payments, and G Co. resumed reporting S and J as delinquent to the credit agencies. Subsequently, G Co. assigned the note to O Co. S and J asserted several special defenses to the foreclosure action, including unclean hands. Thereafter, P Co. was substituted as the plaintiff. The trial court concluded that S and J had satisfied their burden of proof on their special defense of unclean hands and rendered judgment in their favor, finding that they had equitable title to the property. On P Co.'s appeal to this court, *held*:

1. The trial court's finding that G Co. did not restore S and J's credit was not clearly erroneous: the court credited J's testimony that G Co. never sent letters to the credit reporting agencies in order to correct its error and restore S and J's credit, which supported the finding that G Co. did not restore their credit, and the court was not required to credit evidence submitted by P Co., including three letters that P Co. claimed demonstrated that G Co. had restored S and J's credit; moreover, this court declined to review P Co.'s unpreserved claim that the court relied on J's testimony in contravention of the best evidence rule, as P Co. did not object to J's testimony that G Co. and O Co. failed to restore S and J's credit, and J's testimony that G Co. did not send letters to the credit reporting agencies was based on his firsthand observations.
2. The trial court properly balanced the equities in concluding that P Co.'s legal title to the property was unenforceable after finding for S and J on their special defense of unclean hands.
   a. The trial court properly applied the doctrine of unclean hands: the court concluded that G Co.'s failure to take payments from S and J and to restore S and J's credit after erroneously reporting them to be in default caused their credit to be destroyed; moreover, the court's findings

that G Co.'s conduct was wilful and that S and J came to the court with clean hands were not clearly erroneous, as G Co. voluntarily reported S and J's nonpayment, caused by G Co.'s failure to withdraw payments, to the credit reporting agencies, and the court credited J's testimony that G Co. failed to send letters to restore S and J's credit; furthermore, the court's finding that S and J's economic downfall was caused by G Co. was not clearly erroneous, as evidence presented linked S and J's economic difficulties to G Co.'s actions in failing to restore their credit, including J's testimony that G Co. had not attempted to restore S and J's credit but, instead, had continued to report nonpayment to the credit reporting agencies for more than ten years, and P Co.'s argument that the ruination of S and J's credit was unconnected to G Co.'s error in failing to withdraw the payments was based on the incorrect premise that G Co. had acted to restore S and J's credit.

b. The trial court did not abuse its discretion in determining that a reasonable balancing of the equities weighed in favor of S and J's equitable title to the property: the court considered all relevant factors and found that S and J's economic downfall was a greater inequity than their failure to make a payment on the note in more than ten years; moreover, the remedy ordered by the court did not eliminate S and J's obligations under the note or hold that P Co. may not pursue its legal remedy to enforce the note, but merely held that P Co. was not entitled to the equitable remedy of foreclosure.

Argued February 10—officially released October 5, 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 Windham, where PHH Mortgage Corporation was substituted as the plaintiff; thereafter, the case was tried to the court, *Hon. Leeland J. Cole-Chu*, judge trial referee; judgment for the defendants, from which the substitute plaintiff appealed to this court. *Affirmed.*

Jordan W. Schur, for the appellant (substitute plaintiff).

Opinion

ALEXANDER, J. In this foreclosure action, the substitute plaintiff, PHH Mortgage Corporation, appeals from the judgment of the trial court rendered in favor of the

defendants, Sandra A. Sheldon and James J. Sheldon. On appeal, the substitute plaintiff claims that, in concluding that the defendants prevailed on their special defense of unclean hands, the court (1) made a clearly erroneous factual finding that a predecessor of the substitute plaintiff failed to "restore" the defendants' credit following its own error, and (2) improperly determined that the balancing of the equities prevented foreclosure. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant. On September 24, 2007, the defendants signed a promissory note in which they promised to pay $182,000, plus interest, to GMAC Mortgage, LLC (GMAC). The note was secured by a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS),[1] as nominee for GMAC. Part of the property that is the subject of the mortgage and this foreclosure action is located in Killingly (Killingly property). The other portion of the property is located in Foster, Rhode Island. Only a foreclosure on the Killingly property was sought in the present case.

Shortly after the note was executed, the defendants accepted GMAC's offer of a " 'bisaver program' " wherein payments would be made on the loan every two weeks by direct withdrawal from Sandra Sheldon's checking account. In or about August, 2008, for reasons that remain unexplained, GMAC ceased withdrawing

[1] "MERS does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members. The MERS system is designed to allow its members, which include originators, lenders, servicers, and investors, to assign home mortgage loans without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 572 n.2, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).

the biweekly payments as the defendants had authorized it to do. The substitute plaintiff and GMAC admitted that the nonpayment of the loan was GMAC's fault. The court determined that there was no evidence that, had GMAC continued to withdraw the authorized biweekly payments, there would have been any interruption in the defendants' payments. Although the missed payments were a result of GMAC's failure to withdraw those payments, GMAC, nevertheless, reported the absence of the payments to several credit reporting agencies. The court found that, as a result, the defendants' credit was "damaged quickly" and eventually was "destroyed." Soon after GMAC stopped withdrawing the payments and began reporting the resultant missed payments as a default on the part of the defendants, James Sheldon's credit cards were cancelled. Because James Sheldon needed at least one open credit card account for travel related expenses in order to fulfill the duties of his employment in multistate construction management, he could not continue such work, and his income dropped dramatically.

The defendants filed complaints with the Rhode Island Department of Business Regulation, Division of Banking (department) in 2008 and 2009. An officer with the department told GMAC that it " 'screwed up and you gotta fix it.' " Bryan Duggan, a GMAC representative, acknowledged GMAC's error in failing to withdraw the loan payments, but GMAC continued to send regular reports to credit reporting agencies that the defendants were in default. On July 14, 2009, an oral agreement was reached between the defendants and GMAC, wherein the defendants agreed to bring the loan current and make three additional regular monthly payments, and GMAC agreed to restore the defendants' credit. The defendants satisfied the October, 2008 through July, 2009 loan payments in July, 2009, and made three additional mortgage payments, with the last one being in

December, 2009. James Sheldon testified that, because the defendants did not believe that GMAC had performed its obligation to restore their credit, they made no additional mortgage payments thereafter. As a result of the defendants' refusal to make additional mortgage payments, GMAC resumed reporting to credit agencies by early 2010, that the defendants were delinquent in their mortgage payments.

On August 20, 2010, GMAC assigned the mortgage to Ocwen Loan Services, LLC (Ocwen). Although James Sheldon explained the situation to Ocwen, it refused to do anything to restore the defendants' credit or to take into account the effect that GMAC's errors had on the defendants' credit and income. Ocwen continued to send reports of the defendants' nonpayment of the mortgage to credit reporting agencies. At least one credit reporting agency reported the defendants as having no credit rating at all, which fact prevented them from obtaining a Veterans Administration refinancing loan.

In 2017, Ocwen commenced this foreclosure action against the defendants.[2] In its amended complaint, Ocwen alleged that the defendants had defaulted on their mortgage payment due on November 1, 2009, and every month thereafter. Ocwen alleged that, as a result, it had elected to accelerate the balance due on the note and to foreclose on the mortgage on the Killingly property. The defendants, who were self-represented throughout the proceedings in the trial court, filed an

[2] The record reflects that at or around the time that the mortgage was assigned to Ocwen, it also was "referred to foreclosure." Nevertheless, the foreclosure action that is the subject of this appeal was not instituted until September, 2017. James Sheldon testified that this delay caused the defendants additional harm and that he made several requests that if Ocwen was going to foreclose on the property it do so quickly so that the matter could be resolved and the defendants' credit standing could be restored in a timely fashion. The court, in its memorandum of decision, stated that it found James Sheldon's testimony "credible and, in essence, accepts it."

answer and asserted special defenses, including unclean hands.[3] Ocwen assigned the note and mortgage to the substitute plaintiff and filed a motion to substitute PHH Mortgage Corporation as the plaintiff, which was granted by the court.[4]

Following trial, the court issued a memorandum of decision on October 18, 2019, in which it concluded that the defendants had satisfied their burden of proof of their special defense of unclean hands. The court credited James Sheldon's testimony. It determined that the defendants' original default was GMAC's fault due to its failure to take biweekly mortgage payments and that GMAC reported, without justification, these nonpayments to credit reporting agencies as the defendants' fault. The court further found that GMAC failed to restore the defendants' credit, thereby causing the defendants' credit to be destroyed, and rendering James Sheldon unable to continue his career in multistate construction management.

In balancing the equities, the court found for the defendants on the issue of liability and concluded that the substitute plaintiff's legal title to the property was unenforceable. It found that the defendants had equitable

[3] Although the substitute plaintiff makes a passing reference in its appellate brief to the defendants' unclean hands defense being "unstated," it does not challenge the court's construction of the defendants' narrative special defenses as including a claim that the plaintiff acted with unclean hands. Furthermore, to the extent that the substitute plaintiff's passing reference to the defense being unstated could be construed as an argument that the court should not have considered such a defense because it was not specifically pleaded by the defendants, we note that "in light of the court's inherent equitable powers in a foreclosure action . . . [a trial court may properly] consider the equitable doctrine of unclean hands without it being specifically pleaded." *McKeever* v. *Fiore*, 78 Conn. App. 783, 789, 829 A.2d 846 (2003).

[4] The substitute plaintiff took the note subject to all defenses that could be asserted by the defendants, including equitable defenses. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 371, 143 A.3d 638 (2016).

title subject to legal title being quieted in them by agreement or by a separate action. This appeal followed.[5] Following the filing of the present appeal, the substitute plaintiff filed a motion for articulation, which the trial court granted. Additional facts will be set forth as necessary.

Because the substitute plaintiff's claims on appeal center on the unclean hands doctrine, we note at the outset the following relevant legal principles. "Our jurisprudence has recognized that those seeking equitable redress in our courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 407, 867 A.2d 841 (2005).

I

The substitute plaintiff first claims that the court's finding that GMAC did not restore the defendants' credit

[5] The defendants failed to file an appellee's brief as ordered by this court. This court, therefore, ordered the appeal to be considered on the basis of the substitute plaintiff's brief and the record, as defined by Practice Book § 60-4.

is clearly erroneous. It argues that the defendants "presented no credible evidence that [the] credit reporting was *not* corrected as agreed." (Emphasis in original.) We are not persuaded.

"[W]hen reviewing findings of fact, we defer to the trial court's determination unless it is 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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 183 Conn. App. 200, 210, 192 A.3d 439, cert. granted, 330 Conn. 920, 193 A.3d 1214 (2018).

The substitute plaintiff challenges the court's decision to credit James Sheldon's testimony that GMAC did not restore his credit. Specifically, it argues that James Sheldon did not testify as to what GMAC failed to do to restore his credit, but testified only that GMAC failed to fix his credit "to my satisfaction and my wife's satisfaction." James Sheldon did not, as the substitute plaintiff contends, testify that GMAC failed to restore his credit only because it did not fix his credit to his undefined "satisfaction." His testimony was that GMAC did not restore his credit at all because it did not send letters to credit reporting agencies in order to correct its mistake and restore the defendants' credit. He testified that he brought the loan current and made the additional loan payments as requested by GMAC, but that GMAC "never followed through."[6] James Sheldon

[6] The court noted that, despite the arguable lack of consideration for the verbal agreement, it was GMAC's responsibility to restore the defendants' credit whether or not the defendants resumed payments.

testified that GMAC did not send letters to the credit reporting agencies, questioning, "[W]hy would they not do this? It corrects everything. And really maybe eight, fifty cent stamps is all it's gonna cost 'em, that's all. GMAC didn't do it . . . ." He further stated that, "when Ocwen had the chance, they didn't feel like generating eight letters either . . . ." James Sheldon argued that, as of July 31, 2009, he never again heard from the executive officers at GMAC despite that "[i]t's probably eight letters, three credit bureaus and five creditors, and they just walked away."[7] The court, as was within its province to do, credited the testimony of James Sheldon that GMAC did not restore his credit. See *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 772–73, 43 A.3d 567 (2012) (it is within province of trier of fact to weigh evidence presented and determine credibility).

The substitute plaintiff contends that James Sheldon's two credit denial letters from 2019, which were admitted as full exhibits at trial, had no bearing on the status of the defendants' credit in 2009, but rather related to the defendants' failure to make any payments in the following eight years. Regardless of whether these credit denial letters relate to GMAC's failure to restore the defendants' credit, James Sheldon's testimony supports the court's finding that GMAC did not restore the defendants' credit. See, e.g., *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 210 (finding of fact is clearly erroneous when there is *no* evidence in record to support it).

The substitute plaintiff argues that the court's factual finding, in reliance on James Sheldon's testimony, was clearly erroneous because the uncontroverted documentary evidence proved that GMAC met its obligation

[7] Because James Sheldon made these statements when he was not under oath during the testimony of the plaintiff's sole witness, the court interpreted his statements as clarifying his position to the court.

to restore the defendants' credit rating. In particular, the substitute plaintiff relies on three letters that it claims show that GMAC had restored the defendants' credit in accordance with the verbal agreement. The first letter, which was dated July 27, 2009, and which was addressed to the defendants from Duggan, stated that GMAC "sent an *amendment* to the four credit reporting agencies for the [September, 2008] through [the June, 2009] payments. These payments will reflect as paid within the month due. The credit report will reflect no late payments since the loan origination in [September, 2007]." (Emphasis added.) The letter further stated that the defendants "may use this letter for verification, should you need to provide a potential credit grantor with proof that this correction is in [progress]." A second letter, dated July 31, 2009, sent from Duggan to the defendants, stated that the $13,544.06 that was received on July 23, 2009, was applied to the October, 2008 through July, 2009 payments and that "the credit has been *amended* to reflect no late payments on the account. A letter will be sent under separate cover to be used for potential creditors." (Emphasis added.) In a third letter, dated March 13, 2012, to the department, Duggan stated that GMAC had "received complaints filed with your office by the [defendants] in 2008 and 2009," and that "[i]n [July, 2009], [the defendants] remitted funds to satisfy the [October, 2008] through [July, 2009] payments. . . . A recent review of the information reported by the credit bureaus reflects no late payments on the account prior to August 1, 2009, which was the agreement reached . . . ."

The substitute plaintiff contends that the July 27, 2009 letter informs the defendants that credit reporting amendments were sent to the credit reporting agencies and that the credit reporting would be corrected to show the loan as paid from September, 2008 through July, 2009. The substitute plaintiff contends that the

July 31, 2009 letter confirms the removal of the negative credit reporting for the defendants and that the March 12, 2012 letter further demonstrates that the defendants' credit was restored upon receipt of the defendants' three payments. It further argues that the department must have agreed that GMAC met its obligation to the defendants because it took no further action on the defendants' complaint.

The court was not convinced that the letters to which the substitute plaintiff directs our attention demonstrated that GMAC had restored the defendants' credit. It determined that, in the letters, GMAC only "claimed to send correcting credit reports to credit reporting agencies, but all that the evidence shows it actually did is to place the burden of fixing their credit on the defendants: it gave the defendants a letter acknowledging its error and saying the defendants could use it to try to restore their credit." The court stated that, "[a]part from submitting GMAC correspondence using the word 'amendment' instead of 'correction,' the [substitute] plaintiff offered no direct evidence of any such 'amendment .' . . ." In its articulation, the court stated, "[T]he evidence showed that GMAC claimed that it sent 'corrective credit reporting' . . . not that it actually did so." [8] It was within the province of the court not to credit the letters and the testimony of the substitute plaintiff's witness as having established that GMAC had restored the defendants' credit and instead to credit the testimony of James Sheldon that GMAC and its successors in interest never restored the defendants' credit rating.

[8] The substitute plaintiff argues its sole witness, Peter Killinger, an analyst in its foreclosure department, testified, in reference to the July 31, 2009 letter, that GMAC restored James Sheldon's credit because "[w]ell, it says here that they did." Although the court did not specifically mention this portion of Killinger's testimony, it implicitly rejected Killinger's interpretation that the letter established this correction and instead credited James Sheldon's testimony that GMAC did not restore the defendants' credit.

The substitute plaintiff argues that, in accordance with the best evidence rule, the defendants should have produced credit reports to refute the letters it presented, which demonstrated that the defendants' credit had been restored. It contends that in light of the defendants' failure to do so, the court should have concluded that GMAC had restored the defendants' credit. The substitute plaintiff misunderstands the best evidence rule. The rule does not prevent the court from relying on evidence that has been admitted before it. Instead, it is a ground on which a party may rely to object to the admission of evidence because other evidence is preferable. See *State* v. *Carter*, 151 Conn. App. 527, 537–38, 95 A.3d 1201 (2014), appeal dismissed, 320 Conn. 564, 132 A.3d 729 (2016). Significantly, the substitute plaintiff did not object to James Sheldon's testimony that GMAC and Ocwen failed to restore the defendants' credit rating. Thus, its claim that the court should not have relied on this evidence because it was not the best evidence of whether GMAC performed its obligation to restore the defendants' credit rating was not properly preserved and, therefore, is unreviewable. See, e.g., *State* v. *Warren*, 83 Conn. App. 446, 451, 850 A.2d 1086 (unpreserved evidentiary claims are not reviewable on appeal), cert. denied, 271 Conn. 907, 859 A.2d 567 (2004). In any event, we note that the rule, nevertheless, is inapplicable. "[T]he best evidence rule requires a party to produce an original writing, if it is available, when the terms of that writing are material and must be proved." (Emphasis omitted; internal quotation marks omitted.) *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 452, 802 A.2d 887, cert. denied, 262 Conn. 918, 812 A.2d 861 (2002); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 10.1.2, p. 697 ("The Best Evidence Rule is a rule of preference, not one of exclusion. Thus, it prefers proof by the original document but will accept oral evidence if necessary.").

The disputed issue regarding whether GMAC restored the defendants' credit was not something that was reduced to a writing. Rather, James Sheldon's statements that GMAC did not send letters to his credit agencies is based on his firsthand observations. "Where one testifies to what he has seen or heard, such testimony is primary evidence regardless of whether such facts are reduced to writing." (Internal quotation marks omitted.) *Coelm* v. *Imperato*, 23 Conn. App. 146, 150, 579 A.2d 573, cert. denied, 216 Conn. 823, 581 A.2d 1054 (1990).

We also reject the argument of the substitute plaintiff that the department concluded that GMAC had met its obligation to fix the defendants' credit rating. The absence of evidence before the court regarding the outcome of the defendants' complaint that was filed with the department does not indicate whether or how it resolved the complaint. Although the court could have drawn the inference the plaintiff advocates for on appeal, it was not required to do so. James Sheldon, whose testimony the court credited, explained that he followed the advice of the department and entered into an agreement with GMAC but that GMAC never followed through in sending the letters to restore his credit.

We will not second-guess the court's decision to credit James Sheldon's testimony or its decision not to credit GMAC's representation in the letters of what steps it purportedly took to restore the defendants' credit. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 772–73 (appellate court must defer to fact finder's assessment of credibility). For the foregoing reasons, we conclude that the court's finding that GMAC did not restore the defendants' credit is not clearly erroneous.

II

The substitute plaintiff next claims that the court improperly balanced the equities in concluding that its

legal title was unenforceable after finding for the defendants on their special defense of unclean hands. We are not persuaded.

A

This claim contains various subarguments in which the substitute plaintiff challenges the court's underlying factual findings and legal application of the unclean hands doctrine. Our standard of review is as follows. "[A]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . Whether the trial court properly interpreted the doctrine of unclean hands, however, is a legal question distinct from the trial court's discretionary decision whether to apply it. . . . [T]he question of whether the clean hands doctrine may be applied to the facts found by the court is a question of law. . . . We must therefore engage in a plenary review to determine whether the court's conclusions were legally and logically correct and whether they are supported by the facts appearing in the record." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, supra, 87 Conn. App. 406.

1

The substitute plaintiff contends that the court improperly determined that it engaged in misconduct despite the defendants "hav[ing] not shown fraud or other inequitable or illegal conduct on the part of [the] plaintiff . . . ." It contends, citing *LaSalle National Bank* v. *Freshfield Meadows, LLC*, 69 Conn. App. 824,

798 A.2d 445 (2002) (*LaSalle*), that "[s]ituations where the plaintiff refused to accept payments postcommencement of foreclosure [were] not deemed unclean hands by this [c]ourt."

In *LaSalle*, this court concluded that the unclean hands doctrine was not applicable where the plaintiff bank did not accept payments, which had been made by the defendant after indebtedness was accelerated due to the defendant's default, because it was not required to do so pursuant to the note or mortgage. *LaSalle National Bank* v. *Freshfield Meadows, LLC*, supra, 69 Conn. App. 835–36. Those facts are markedly different from the facts in the present case, wherein it was GMAC's failure to withdraw the authorized payments from Sandra Sheldon's bank account and where GMAC, prior to default, ruined the defendants' credit as a result. There is no rigid formula for what constitutes misconduct, rather, to constitute misconduct it must be "of such a character as to be condemned and pronounced wrongful by honest and fair-minded people . . . ." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001). In our exercise of plenary review, we determine that the court properly applied the doctrine of unclean hands to the facts of the present case when it determined that GMAC failed to take loan payments from the defendants and failed to restore the defendants' credit after it erroneously reported the defendants' to be in default, thereby causing the defendants' credit to be destroyed.

2

The substitute plaintiff next argues that the court's finding that its conduct was wilful was clearly erroneous. We disagree.

"Whether a party's conduct is wilful is a question of fact. . . . The term has many and varied definitions, with the applicable definition often turn[ing] on the

specific facts of the case and the context in which it is used. . . . As we previously have observed . . . wilful has been defined [as] voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary . . . or with indifference to the natural consequences. . . . Wilful misconduct has also been defined as intentional conduct that is deemed highly unreasonable or indicative of bad faith." (Citations omitted; internal quotation marks omitted.) *Cathedral Green, Inc.* v. *Hughes*, 174 Conn. App. 608, 622–23, 166 A.3d 873 (2017).

We conclude that the court's finding was not clearly erroneous. Wilfulness reasonably can be inferred from GMAC's voluntary act of reporting to credit reporting agencies the nonpayment of the mortgage that was caused by GMAC's own failure to withdraw the mortgage payments from Sandra Sheldon's checking account and its subsequent failure to restore the defendants' credit. See *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 623, 987 A.2d 1009 (2010) (intent may be inferred from conduct and circumstances).

3

The substitute plaintiff next argues that the court's finding that the defendants came to the court with clean hands is clearly erroneous. Specifically, it contends that the defendants' actions indicate that they came to the court with unclean hands because they "unilaterally demand[ed]" GMAC to satisfy the verbal agreement to their own undefined " 'satisfaction' " standard and failed to make any loan payments for more than a decade. It contends that it is clear that the defendants came to the court with unclean hands because they "made a complaint to the [department], and nothing happened. It is clear that the [department] found that

the complaint had no merit . . . .'' We are not persuaded.

As we have detailed in part I of this opinion, James Sheldon testified that GMAC did not restore his credit because GMAC declined to send correction letters to credit reporting agencies and that the absence of evidence regarding the outcome of the defendants' complaint against GMAC with the department does not indicate that their claim against GMAC was without merit. We conclude that the substitute plaintiff has not demonstrated that the court's finding that the defendants came to the court with clean hands was clearly erroneous.

4

The substitute plaintiff next argues that the court erred in finding that the defendants' economic downfall was caused by GMAC's actions. It contends that the defendants' loan was current as of November, 2009, that the defendants' credit was restored as of July, 2009, and, therefore, that the defendants' failure to obtain new credit cards after July, 2009, and the defendants' economic difficulties from 2009 through 2020, was outside the control of the substitute plaintiff. We are not persuaded.

The court found that, ''[q]uickly after those negative credit reports began, and because of them—that is, because GMAC stopped taking the defendants' payments and started reporting as their default what was GMAC's fault—all [of] [James] Sheldon's credit cards were cancelled.'' The court determined that there was no evidence contradicting James Sheldon's testimony that, after GMAC stopped taking the automatic biweekly payments, it reported, without justification, the resulting nonpayments to credit reporting agencies as defaults, and that those reports ''eviscerated the defendants' credit and caused [James] Sheldon to be

unable to continue his career in multistate construction management."

There was evidence linking the defendants' economic difficulties to the actions of GMAC in failing to restore the defendants' credit. James Sheldon testified that GMAC failed to restore his credit by not sending letters of correction to the credit reporting agencies. He further testified that he followed the advice of an agent with the department, who had advised him, "[D]o not make another payment until such time as you've straightened this out." He explained that he tried to contact GMAC and, later, Ocwen to resolve the situation, but that it was "impossible" because "they never made any effort to reach a resolution" and that they "didn't wanna talk," but said they would "pass it up the chain," and no one would discuss the matter because information concerning this issue was not in the file. He testified that "the most important thing that we do was to get our credit restored. GMAC was responsible for the destruction of that." He stated that, even during the time frame wherein GMAC was "investigating the mortgage, GMAC kept sending that little note to the credit bureau saying [he was] not paying his mortgage. I needed that off the books. They agreed to do it . . . if I brought the account up to date, gave them three extra payments to cover the period of time that it would take . . . for the credit bureaus to actually get the paperwork entered into the system. I agreed to that." He further testified that his credit rating was destroyed and that "[n]owhere did anybody think that . . . for ten years, they would continue to report . . . no, he didn't make his mortgage payment this month."

The substitute plaintiff's argument that the ruination of the defendants' credit is unconnected to GMAC's actions in failing to take the biweekly payments under the bisaver program is based on the incorrect premise that GMAC had *restored* the defendants' credit as of

July, 2009. As the court found, GMAC did not restore the defendants' credit. It reasonably can be inferred from James Sheldon's testimony that GMAC's failure to restore the defendants' credit led to and caused the defendants' financial ruin. The court determined that "the degree of the defendants' financial ruin caused by GMAC long before this action began has increased over the life of this action by the length of time the defendants have suffered the effects of GMAC's unjustified and unremedied ruin of their credit [and] their financial reputation . . . ." The court further reasoned that it regarded Duggan's July 27, 2009 letter, in which he stated that GMAC sent an "amendment" to credit reporting agencies for the September, 2008 through June, 2009 payments, as an admission "of the foreseeable damage to the defendants' credit: any credit reporting company, or actual or prospective creditor relying on such company's report on the defendants, would dismiss the defendants' credit on seeing a report of ten months [of] failure to pay their mortgage." The court drew reasonable inferences from the evidence in this regard. In light of the foregoing, we conclude that the court's finding that GMAC's act in reporting its own failure to take the authorized biweekly payments GMAC as defaults caused the defendants' financial ruin was not clearly erroneous.

B

The substitute plaintiff's final claim is that the court did not properly balance the equities when it "wiped out [the substitute plaintiff's] lien based on oral testimony that lacked documentary proof to show that the credit was not corrected or documentary evidence that [the substitute plaintiff] somehow caused [the defendants'] 2019 credit denials. The flimsy evidence offered by [the] [d]efendants does not equal or justify wiping out a consensual lien and giving the [d]efendants a free

house. None of the above factors appear[s] to have been considered by the [c]ourt." We disagree.

"This court will reverse a trial court's exercise of its equitable powers only if it appears that the trial court's decision is unreasonable or creates an injustice. . . . [E]quitable power must be exercised equitably . . . [but] [t]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 70 Conn. App. 427, 435, 800 A.2d 530, cert. denied, 261 Conn. 917, 806 A.2d 1058 (2002). "How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Internal quotation marks omitted.) *New Breed Logistics, Inc.* v. *CT INDY NH TT, LLC*, 129 Conn. App. 563, 571, 19 A.3d 1275 (2011).

As we have previously explained in this opinion, the court's findings that GMAC did not restore the defendants' credit and that GMAC's misconduct led to the defendant's economic difficulties were not clearly erroneous. See parts I and II A of this opinion. The substitute plaintiff cannot prevail on its argument that the court improperly balanced the equities because it credited James Sheldon's testimony, which the substitute plaintiff argues is "flimsy." It was in the court's province to do so. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 772–73.

The substitute plaintiff, nevertheless, contends that, even if the court properly credited James Sheldon's testimony, it "was not entitled to wipe clear a $308,380.43 loan obligation . . . ."[9] The court, however, is permitted, in the exercise of its discretion, to

[9] The court noted that the amount of the debt was in dispute and that it was not necessary to find the amount of the debt because that issue was not actually litigated at trial. We note that the original promissory note was for $182,000.

withhold the remedy of foreclosure based on equitable considerations and principles. See *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 671, 212 A.3d 226 (2019). "[E]quitable remedies are not bound by formula but are molded to the needs of justice." (Internal quotation marks omitted.) *McKeever* v. *Fiore*, 78 Conn. App. 783, 788, 829 A.2d 846 (2003). "[T]he trial court enjoys broad discretion in considering whether to grant a mortgagee the remedy of foreclosure for the default of a mortgage loan." *ARS Investors II 2012-1 HVB, LLC* v. *Crystal, LLC*, 324 Conn. 680, 685, 154 A.3d 518 (2017).

We find no merit in the substitute plaintiff's claim that the court failed to consider multiple factors in its favor, such as the defendants not having paid the mortgage in more than a decade. The court's articulation makes clear that it considered all relevant factors and rejected the substitute plaintiff's argument that the balancing of the equities weighed in its favor. The court stated in its articulation that, "[i]mplicitly, the [substitute] plaintiff claims that the court, its findings of fact notwithstanding, should have concluded that the defendants not making a mortgage payment in more than ten years is the greater inequity than the [substitute] plaintiff's predecessor destroying the defendants' credit, in turn destroying [James] Sheldon's career and earning capacity and the defendants' ability to pay the mortgage. Implicitly, the [substitute] plaintiff argues that, given the facts found by the court, the defendants should lose more than they, due to GMAC's and [the] successor mortgagor Ocwen's conduct in credit reporting, have already lost: they should lose their home, too. The court rejected that analysis of the equities of the present case."

In its memorandum of decision, the court reasoned that "the defendants have suffered the effects of GMAC's unjustified and unremedied ruin of their credit, their financial reputation; and by the length of time they

have endured the burden and stress of this foreclosure action, which the court finds, to the extent retrospective prognostications may be considered in equity, would have been unnecessary had GMAC, in whose shoes the plaintiff and its principal stand, promptly repaired the damages it unjustifiably caused to the defendants' credit." (Footnote omitted.)

Finally, we note that the remedy ordered by the court does not "wipe clear" the defendants' obligation under the note. The court did not hold that the substitute plaintiff may not pursue its legal remedy to enforce the note. Instead, it held that the plaintiff is not entitled to the equitable remedy of foreclosure. See *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 674, 94 A.3d 622 (2014) ("[u]nlike the equitable nature and aims of foreclosure, a claim on the note at law is grounded in contract, and is enforceable as between the parties to that contract—the debtor and the creditor, as well as persons who succeed to those obligations or rights by transfer or assignment").

On the basis of the court's factual findings of inequitable misconduct by GMAC and its successor, Ocwen, we conclude that the court properly acted within its discretion when it determined that a reasonable balancing of the equities weighed in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SHAWN G.*
(AC 42617)

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

Syllabus

Convicted, after a jury trial, of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, criminal possession of a revolver and risk of injury to a child, and, after a plea of guilty, of being a persistent serious felony offender, the defendant appealed to this court, claiming that the evidence was insufficient to sustain his conviction and that the trial court improperly declined to issue a capias he requested. The police had executed a search warrant on the defendant's apartment, where he lived with his wife and minor stepchildren. During their search of the apartment, the police found, inter alia, a loaded revolver and cash in a storage container, crack cocaine in a dresser drawer, used drug baggies that tested positive for cocaine residue and a digital scale. Two cell phones also were found during a search of the defendant's person. The defendant told the police that the revolver was his and that he had bought it to protect his family. *Held*:

1. The evidence was sufficient to support the defendant's conviction of the weapon and drug charges, but his conviction of risk of injury to a child could not stand:

   a. The evidence was sufficient to establish that the defendant had dominion and control over and constructively possessed the revolver, as his ownership of the revolver was the ultimate manifestation of dominion and control; the defendant's admission to the police that he purchased the revolver to protect his family supported the conclusion that he intended to exercise dominion and control over it by using it for that purpose, and, notwithstanding his contention that he was not in exclusive possession of the apartment and that the state never proved that he resided there at the time of the search, there was abundant evidence from which the jury could conclude that the defendant lived there, including the concession by his counsel that he spent time there with his wife and family, and, that the revolver was found in the bedroom he shared with his wife, reinforced the evidence of his ownership of and intention to maintain dominion and control over the revolver.

   b. The defendant's claim that the state failed to prove that he constructively possessed the narcotics found in his bedroom was unavailing, the confluence of incriminating statements and circumstances having

* 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.

supported the inference that he was in a position of control over the narcotics and, thus, constructively possessed them: the jury had evidence before it that guns frequently are used by drug dealers to protect themselves and their cash and narcotics, the presence of the loaded revolver in the bedroom was relevant in determining whether the defendant intended to exercise dominion and control over the narcotics, the cash found in the same storage container as the revolver was in denominations that were significant to the purchase of narcotics, and digital scales are commonly used to ensure that narcotics are accurately measured for packaging and distribution; moreover, as the bedroom is an intimate area of the home, the jury reasonably could have concluded that access to it would ordinarily be limited to the defendant and his wife, and the cumulative effect of the most incriminating statements and circumstances relating to the conduct of someone involved in the sale of narcotics implicated the defendant, rather than his wife.

c. The mere presence of a firearm hidden in a storage container in the defendant's bedroom did not constitute a situation under the risk of injury statute (§ 53-21 (a) (1)) in which a child was likely to be injured, and the state conceded that it failed to present sufficient evidence with respect to that charge; accordingly the judgment was reversed with respect to that conviction.

2. The defendant failed to demonstrate that the trial court violated his sixth amendment right to compulsory process when it declined to issue a capias for a police officer who failed to appear at trial in response to a subpoena and denied the defendant's request for a continuance:

a. Although the trial court mistakenly believed it could not issue the capias in the absence of in-hand service of the subpoena on the officer, who was in Florida at the time of trial, it properly considered the interwoven nature of the defendant's requests for the capias and a continuance before it denied the request for a continuance, which the defendant did not challenge on appeal, as the court had before it uncontroverted evidence that the officer had been out of state at all relevant times and would remain so for another two weeks, the defendant already had been granted continuances to procure witnesses, his request was untimely, the length of the requested continuance was too long, the proffered testimony would be cumulative of evidence already before the jury, and the denial of the continuance would not impair his ability to defend himself.

b. Any violation of the defendant's sixth amendment right to compulsory process stemming from the trial court's refusal to issue a capias to procure the police officer's presence was harmless beyond a reasonable doubt, as defense counsel conceded that the officer's testimony might have been cumulative of evidence that was already before the jury, the impact of the testimony would have been inconsequential, as the defendant never proffered that it would undermine the evidence against him, and, given that the officer had discovered the narcotics in the bedroom and heard the defendant confess that the gun was his, the

testimony likely would have been adverse to the defense, for which the defendant never articulated to the court a reason to believe otherwise.

Argued December 2, 2020—officially released October 5, 2021

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, criminal possession of a revolver and risk of injury to a child, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Middlesex, where the first part of the information was tried to the jury before *Suarez, J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

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

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

Opinion

ELGO, J. The defendant, Shawn G., appeals from the judgment of conviction, rendered after a jury trial, of one count of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2017) § 21a-278 (b),[1] one count of criminal possession of a revolver in violation of General Statutes § 53a-217c (a) (1), and one count of risk

[1] We note that the legislature amended § 21a-278 since the events at issue. See Public Acts 2017, No. 17-17, § 2. For convenience, all references to § 21a-278 in this opinion are to the 2017 revision of the statute.

of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that (1) the evidence adduced at trial was insufficient to sustain his conviction of each of the three counts, and (2) the trial court violated his sixth amendment right to compulsory process by declining to issue a capias that he requested. We affirm in part and reverse in part the judgment of the trial court.

At trial, the jury was presented with evidence of the following facts. The defendant lived in the first floor apartment of a two-story, multifamily house at 215 Pearl Street in Middletown (apartment). He shared the apartment with his wife and his two stepchildren—a sixteen year old boy and a twelve year old girl. On May 31, 2017, officers from the Middletown Police Department executed a search warrant on the defendant's apartment. When they arrived at the apartment, they observed the defendant and another male standing in the street. The police then went to the apartment, where the defendant's wife answered the door. The defendant's stepchildren were in the apartment at that time. During the search of the apartment, the officers found, among other things, crack cocaine and a revolver.

The defendant subsequently was arrested and charged with the aforementioned offenses. A trial followed, at the conclusion of which the jury found the defendant guilty of all counts. The defendant thereafter pleaded guilty to being a persistent serious felony offender in violation of General Statutes § 53a-40 (c). On October 3, 2018, the court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after twelve years, plus five years of probation.[2] This appeal followed.

[2] For the possession with intent to sell conviction, the court sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, plus five years of probation. The court also sentenced the defendant to concurrent ten year terms of incarceration on the criminal possession of a revolver and risk of injury to a child counts.

I

The defendant claims that the evidence adduced at trial was insufficient to establish his guilt for each of the three offenses of which he was convicted. The state concedes that the evidence is insufficient to support his conviction of risk of injury to a child but contends that the evidence was sufficient to support his conviction of criminal possession of a revolver and possession of narcotics with intent to sell by a person who is not drug-dependent. We agree with the state.

As this court has observed, "[a] defendant who asserts an insufficiency of evidence claim bears an arduous burden." *State* v. *Hopkins*, 62 Conn. App. 665, 669–70, 772 A.2d 657 (2001). "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . On appeal, we do not

ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Capasso*, 203 Conn. App. 333, 338–39, 248 A.3d 58, cert. denied, 336 Conn. 939, 249 A.3d 352 (2021).

A

The defendant first claims that there was insufficient evidence to convict him of criminal possession of a revolver in violation of § 53a-217c (a) (1). Although he concedes that he had knowledge of the revolver, the defendant argues that there was insufficient evidence to prove that he exercised dominion or control over it. The state counters that, because the defendant admitted that he owned the revolver and the evidence supported a finding that he lived at the apartment and shared the bedroom where the revolver was found, the jury reasonably could have concluded that the defendant had dominion and control over it. We agree with the state.

The following additional facts are relevant to this claim. While searching the bedroom of the apartment, Detective Daniel Schreiner found a loaded Taurus .38 special revolver and $2661 in cash inside a stackable drawer. The uniform arrest report, which the defendant signed while being processed, listed the apartment as his address. Subsequently, the police questioned the defendant at the Middletown police station. At that time, the defendant waived his *Miranda*[3] rights in writing. During questioning by detectives, the defendant stated that the revolver was his and that he had purchased it for $800 because he needed it to protect his family.

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

Section 53a-217c (a) provides in relevant part: "A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and (1) has been convicted of a felony . . . ."[4] General Statutes § 53a-3 (2) defines "possess" as "to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." Because the gun was not found on the defendant's person, the state prosecuted the defendant under the theory of constructive possession.

As our Supreme Court recently explained, "there are two kinds of possession, actual and constructive. . . . [C]onstructive possession is possession without direct physical contact. . . . To establish constructive possession, the control must be exercised intentionally and with knowledge of the character of the controlled object. . . . Moreover, [when] the defendant is not in exclusive possession of the premises where the [contraband is] found, it may not be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [A]lthough mere presence is not enough to support an inference of dominion or control, [when] there are other pieces of evidence tying the defendant to dominion [or] control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime. . . .

"[A] case for constructive possession of a firearm often is necessarily built on inferences, and a jury may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable

[4] At trial, the parties stipulated that the defendant had a prior felony conviction.

and logical. . . . Although [p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis . . . it must suffice to produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . [I]f the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. . . . Therefore, [b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic . . . that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [A]lthough we do not sit as the seventh juror when we review the sufficiency of the evidence . . . we also must be faithful to the constitutional requirement that no person be convicted unless the [g]overnment has proven guilt beyond a reasonable doubt [and] take seriously our obligation to assess the record to determine . . . whether a jury could *reasonably* find guilt beyond a reasonable doubt." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Dawson*, Conn. , , A.3d (2021).

In support of his argument that the evidence was insufficient, the defendant argues that the evidence demonstrates only that he had knowledge of the revolver and, further, that the state never proved that he actually resided at the apartment at the time of the search. Relying on *State* v. *Gainey*, 116 Conn. App. 710, 977 A.2d 257 (2009), and *State* v. *Billie*, 123 Conn. App. 690, 2 A.3d 1034 (2010), the defendant contends that the evidence is insufficient to establish dominion and control over the revolver. We disagree.

In *Gainey*, police officers executed a search warrant on the defendant's residence, where they detained the defendant and a female individual inside. *State* v. *Gainey*, supra, 116 Conn. App. 712. While searching the apartment, the police found a set of keys and an eviction notice addressed to the defendant and Jane Doe in one of the bedrooms, as well as a scale. Id. Their search continued in the yard to a vehicle, which they unlocked with keys found in the bedroom. Id. Inside the vehicle was a cell phone instructional manual. Id. Officers then found fifteen bags of heroin hidden in the ashtray area of the vehicle's rear passenger compartment. Id., 712–13.

After the defendant was convicted of possession of narcotics on the theory that he constructively possessed the drugs, this court determined that the evidence was insufficient to establish constructive possession because there was "no more than a temporal and spatial nexus between the defendant and the contraband . . . ." Id., 722. As the court noted, "[t]he eviction notice, without more, was insufficient to show that the room in which it was found was the defendant's bedroom, and, further, it could not be used to show that the room was exclusively for the use of the defendant. Presumably, an eviction notice that was addressed to both the defendant and a Jane Doe would concern any inhabitant of the house. There was also testimony about a woman being inside the house when the warrant was served. The items found inside the vehicle do not buttress the inference of exclusive control, either. Again, paperwork regarding the house, even in the defendant's name, does not evince control, especially if the jury had to consider that the house was inhabited by at least two persons. Additionally, the testimony regarding the [cell phone] instruction book was that the defendant's name was decorated 'with hearts and designs' and does not overwhelm us that there is more than a temporal or spatial nexus between the defendant and the drugs

that were found in the backseat ashtray." Id., 722–23. As the court emphasized, "the search did not yield any insurance or registration cards, and the last registered owner of the vehicle was not the defendant." Id., 712. Because none of the evidence in the home was sufficient to demonstrate that the defendant owned the vehicle and, more specifically, connected him to the narcotics found therein, this court concluded that the state could not establish that the defendant exercised dominion and control over the narcotics. Id., 722–23.

In *Billie*, an informant told the police that he had witnessed a " 'black male' " place narcotics underneath the rear porch of a particular residence. *State* v. *Billie*, supra, 123 Conn. App. 692. In response, officers were dispatched to the residence, where they discovered a clear, plastic sandwich bag underneath the rear porch area containing twenty-two smaller, individually wrapped packages of crack cocaine. Id. The police then removed all but one of the smaller packages, replaced the sandwich bag in the hidden location, and set up surveillance of the property. Id. Several hours later, the police observed the defendant enter the driveway at the front of the property and walk to the location of the narcotics. Id., 693. After officers emerged and identified themselves, the defendant dropped the sandwich bag containing only the single package of crack cocaine along with another bag containing marijuana. Id. The defendant thereafter was convicted of possession of narcotics with intent to sell under General Statutes § 21a-277 (a). Id., 693–94.

On appeal, the defendant conceded that he had possession of the single package of cocaine recovered after his arrest but argued that the state failed to present sufficient evidence that he constructively possessed the remaining twenty-one packages. Id., 697–98. The state noted that the defendant "purposely entered the property, proceeded directly to the location of the narcotics

and immediately removed the sandwich bag from the hidden location without having to look or feel around," and that the defendant was a prior resident at the location. Id., 699. On appeal, this court reversed the judgment of conviction, reasoning that "the state's argument conflates the two separate requirements of constructive possession: knowledge and dominion and control." Id. The court stated: "[W]e believe that this evidence is relevant to whether the defendant had knowledge of the narcotics but does not support a reasonable inference of dominion and control. As this court has recognized, contraband found in a public area could have been secreted there by virtually anyone." (Internal quotation marks omitted.) Id.

In the present case, the defendant argues that, like the defendant in *Gainey*, he was not in exclusive possession of the apartment and the firearm was not found on his person, and, as in *Billie*, his statements to the police indicate that, at most, he had knowledge of the revolver. Therefore, he contends that the evidence was insufficient to prove that he exercised dominion or control over the revolver. The evidence, however, does not support his contention that he had only "mere knowledge" of the revolver, as the defendant admitted to the officers that he purchased the revolver for personal use. In the absence of evidence that the defendant was deprived of physical possession, his ownership of the revolver is the ultimate manifestation of dominion and control. See Black's Law Dictionary (6th Ed. 1990) p. 1106 (Ownership is defined as "[t]he complete dominion, title, or proprietary right in a thing or claim. . . . The right of one or more persons to possess and use a thing to the exclusion of others."). Furthermore, the defendant's statement that he purchased the revolver to protect his family supports the conclusion that he intended to exercise dominion and control over it by using it for that purpose.

Moreover, the argument that the state never proved that the defendant lived at the apartment in question is both unfounded and beside the point. First, there is abundant evidence from which the jury could have concluded that the defendant lived at the apartment where the revolver was found, and, indeed, counsel for the defendant conceded that the defendant spent time at the apartment with his wife and family. Second, unlike in *Gainey*, in which the contraband was found in the rear passenger compartment of a vehicle but the evidence was insufficient to connect it to the defendant, and unlike in *Billie*, in which the contraband was found outside of the defendant's residence in a space accessible to the public, the revolver here was found in the defendant's bedroom, an intimate and private area of his residence. See *State* v. *Rhodes*, 335 Conn. 226, 232, 249 A.3d 683 (2020) ("the record contains sufficient circumstantial evidence, beyond mere proximity, that the defendant knew the firearm was in the car, was in a position to control it, and intended to control it"). The fact that the defendant shared the bedroom with his wife does not preclude a finding of constructive possession. As we observed in *State* v. *Bowens*, 118 Conn. App. 112, 124–25 n.4, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010), in which the defendant did not own the vehicle in which the contraband was found, "[c]onstructive possession can be joint, does not require actual ownership of the firearm, and can be established through circumstantial evidence . . . ." (Internal quotation marks omitted.) Indeed, the fact that the revolver was found in the bedroom of the defendant's apartment merely reinforces the evidence of his ownership and intention to maintain dominion and control over it. Accordingly, we conclude that the evidence was sufficient to support a finding that the defendant constructively possessed the revolver found in the apartment.

B

The defendant next claims that the state presented insufficient evidence to support his conviction of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b). We disagree.

The following additional facts are relevant to the defendant's claim. When the police arrived at the apartment to execute their search warrant, the defendant's wife answered the door, joined by a large dog, a pit bull.[5] At the request of the police, the defendant's wife put the dog in a crate. While searching the apartment, Detective Jorge Yepes found 3.1 grams of crack cocaine inside the upper left drawer of a dresser in the bedroom.[6] The dresser also had both men's and women's clothes in it. In the pocket of one of the men's pants and on the bedroom floor, Yepes found two " 'used drug baggies,' " which later tested positive for cocaine residue. At trial, Sergeant Frederick Dirga testified that the pants appeared to be for a "heavyset, large male." At the time, the defendant was five feet, nine inches, in height and weighed 240 pounds. The police also found two Michael Kors watches in the bedroom on the top of the stackable storage containers. Baughnita Leary, the defendant's girlfriend, testified that the watches were gifts that she had given to the defendant. In the basement of the apartment, the police found a digital scale, typically used by drug dealers to measure cocaine for packaging for sale, inside a bag of men's clothing identified as belonging to the defendant. At the time of the search, the defendant was physically present in

[5] Sergeant Joseph Flynn testified at trial that pit bulls are favored by drug dealers in order to guard their product when it is unattended.

[6] Sergeant Frederick Dirga testified that, in Middletown, crack cocaine sells for $10 for 0.10 grams and that the crack cocaine found in the apartment had a street value of approximately $360.

front of the apartment. When the police searched the defendant's person, they found two cell phones.[7]

In addition to the watches and revolver establishing the defendant's residence at the apartment bedroom, Dirga testified at trial that he had seen the defendant "come and go" to and from the apartment "too many times to count" during the period of February to May, 2017, and that the defendant lived on the first floor. Detective Nathan Peck, to whom the defendant admitted that he owned the revolver, testified that he also witnessed the defendant "come and go" to and from the residence on numerous occasions.

The state also presented evidence that the defendant had various expensive expenditures that were inconsistent with his reported employment and wage history. For example, the state presented the arrest report, which was filled out by the police during their questioning of the defendant, in which the defendant listed his current occupation as "unemployed."[8] The state also

[7] Dirga testified on direct examination that drug dealers usually have two cell phones—a personal phone and one used for conducting business.

[8] The defendant's theory at trial was that he was not living in the apartment at the time of the search and that the expensive items in question were gifts bought for him by Leary. Leary testified that, in May, 2017, the defendant was living with her. She also testified that, after a tractor-trailer accident, which resulted in the death of her fiancé and two children in 2014, she received a substantial amount of money, became "very wealthy," and would "spoil" the defendant with expensive gifts. For example, she claimed that she gave the defendant $5000 in cash on May 1, 2017. Leary also testified that she bought the defendant a Victory Magnum motorcycle, as well as the Michael Kors watches found during the search of the defendant's apartment.

The prosecution countered this testimony by calling Peck as a rebuttal witness, who testified that the police executed a search warrant on Leary's residence the same day that they searched the defendant's apartment and did not find any men's clothing in her residence. During closing arguments, the prosecution also argued that Leary was biased and that her testimony about the gifts was not credible because she was the defendant's girlfriend, they were in a sexual relationship, and she admitted on cross-examination that she wanted to have children with the defendant.

To the extent that the defendant relies on Leary's testimony in his sufficiency of the evidence claims, we note that the jury was under no obligation

offered the testimony of Emilio Theodoratos, a wage employment agent from the Department of Labor. Theodoratos testified that he had reviewed the defendant's reported employment history. According to a Department of Labor automated benefits system report of the defendant's reported employment and wage history, there was no record of any employment during the first six months of 2017 and no record of employment at all in 2016. However, while searching the glove compartment of the defendant's automobile, the police located a bill of sale for a 2017 Victory motorcycle. That bill of sale indicated that the defendant paid for a $21,516.87 Victory Magnum motorcycle in full and in cash on February 8, 2017.

General Statutes (Rev. to 2017) § 21a-278 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years nor more than twenty-five years . . . ."

to credit Leary's testimony. "Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *Whitnum-Baker*, 169 Conn. App. 523, 527, 150 A.3d 1174 (2016), cert. denied, 324 Conn. 923, 155 A.3d 753 (2017). On appeal, for a sufficiency of evidence claim, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Capasso*, supra, 203 Conn. App. 339.

The defendant argues that there was insufficient evidence to sustain his conviction because the state failed to prove beyond a reasonable doubt that he constructively possessed the cocaine. The state counters that the evidence and reasonable inferences drawn therefrom establish incriminating circumstances from which the jury could infer that the defendant knew of the presence and character of the cocaine and exercised dominion and control over it. We agree with the state.

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where, as here, the cocaine was not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses and to assure that proof exists beyond a reasonable doubt, it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." (Citation omitted; internal quotation marks omitted.) *State* v. *Leon-Zazueta*, 80 Conn. App. 678, 683, 836 A.2d 1273 (2003), cert. denied, 268 Conn. 901, 845 A.2d 405 (2004).

In support of his claim of evidential insufficiency, the defendant relies on *State* v. *Nova*, 161 Conn. App.

708, 129 A.3d 146 (2015). In *Nova*, the police obtained a warrant to search both the defendant and an apartment building that the police believed was the defendant's residence. Id., 710. While surveilling the building in preparation for execution of the warrant, the police saw the defendant drive into the building's parking lot, exit the vehicle, and enter the apartment through the main entry door, which opened into the kitchen. Id., 710–11. The defendant then reemerged, ascending the external staircase of the balcony on the third floor, remained on the balcony for approximately one minute, and then descended from the balcony and returned to his vehicle. Id. When the police subsequently executed the search warrant on the apartment, they found drugs and drug paraphernalia in the kitchen and on the balcony. Id., 712. The search of the defendant revealed two cell phones but no cash or drugs. Id., 713.

In reversing the defendant's conviction, this court stated that "[i]t is undisputed that the defendant did not exclusively possess the apartment or make any incriminating statements. Thus, the question is whether the other circumstances were sufficiently incriminating to support an inference that the defendant constructively possessed the narcotics police discovered in the apartment." Id., 719. In its review of the record, the court determined that "there was no evidence that the defendant was observed carrying anything into the kitchen or onto the balcony, no evidence that he touched anything while in the kitchen or on the balcony, and no evidence that he left the kitchen or balcony with anything." Id., 722. Moreover, the court noted that it was speculative to conclude, "on the basis of the defendant's mere proximity to the packaging materials and his passage through the kitchen, that he controlled the cocaine found in the kitchen cabinets and garbage. The kitchen was a common area used by the apartment's occupants and was adjacent to the main entry door, requiring the

defendant, like anyone entering the apartment, to pass through it." Id., 723. Moreover, "there was no compelling correlation between the defendant simply being in the apartment where drugs and paraphernalia later were discovered and the conclusion that he constructively possessed those narcotics and paraphernalia." Id., 722–23. This court thus concluded that "the defendant's presence in the kitchen and on the balcony established nothing more than a temporal and spatial nexus between him and the cocaine and packaging materials found in those areas." Id., 721. The court further emphasized that, although the defendant had access to the apartment over a nine month span, "the defendant's relationship to the contraband, not his relationship to the apartment, is the proper focus of the constructive possession inquiry." Id., 725.

We are not persuaded that the facts in *Nova* compel a similar result here. First, as we have previously explained, the defendant's nonexclusive possession of the apartment, and the bedroom in particular, does not preclude a finding of constructive possession where "there are other incriminating statements or circumstances tending to buttress . . . an inference [of constructive possession]." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 211, 24 A.3d 1218 (2011); cf. *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986) ("[t]he essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent"). In *State* v. *Winfrey*, supra, 211–13, for example, our Supreme Court concluded that the defendant was in constructive possession of contraband found in the console of his wife's vehicle, notwithstanding the presence of another passenger, on the basis of factors that made it more likely that the defendant, rather than the passenger or his wife, owned the contraband. See also *State* v. *Hill*, supra, 516 ("The phrase

'to exercise dominion or control' as commonly used contemplates a continuing relationship between the controlling entity and the object being controlled. Webster's Third New International Dictionary defines the noun 'control' as the 'power or authority to guide or manage.' ").

In considering what factors may reasonably manifest the exercise of dominion or control when a defendant is in nonexclusive possession of the premises where contraband is found, we find instructive our Supreme Court's decision in *State* v. *Butler*, 296 Conn. 62, 993 A.2d 970 (2010). In that case, the court recognized that, when a defendant is not in exclusive possession of a vehicle, evidence from which a jury reasonably can infer that a defendant is a narcotics trafficker, coupled with sufficient evidence connecting a defendant to the narcotics, may establish that a defendant exercised dominion and control over the narcotics. Id., 78–79. Specifically, the court observed that "there was significant evidence from which it was reasonable for the jury to infer that the defendant was a narcotics dealer. *Such an inference would also help support the further inference that the defendant had possessed the narcotics.* See *State* v. *Marshall*, 114 Conn. App. 178, 188, 969 A.2d 202 (evidence that defendant had sold narcotics from same vehicle to undercover agent relevant to dispel doubts about possession), cert. denied, 292 Conn. 911, 973 A.2d 661 (2009); *State* v. *Diaz*, 109 Conn. App. 519, 527, 952 A.2d 124 (claim of insufficient evidence to support possession of narcotics unavailing when '[t]he jury had before it ample evidence from which it could infer that the defendant was a drug seller and that his apartment was integral to that criminal enterprise'), cert. denied, 289 Conn. 930, 958 A.2d 161 (2008); *State* v. *Riser*, 70 Conn. App. 543, 553–54, 800 A.2d 564 (2002) (discovery of $1532 and other evidence demonstrating that defendant was trafficking crack cocaine supported

inference of possession of contraband).'' (Emphasis added.) *State* v. *Butler*, supra, 79–80. The defendant in *Butler* was accompanied by two passengers in a rental vehicle that was stopped by the police for a motor vehicle violation. Id., 66–67. From their patrol car, the officers observed the defendant closing the center console of the vehicle, which subsequently was found to contain 21.5 grams of cocaine. Id. The Supreme Court held that evidence of that movement, in addition to evidence of $1369 in cash, several cell phones found on his person, and the fact that the defendant was operating a rental vehicle, was sufficient to demonstrate constructive possession. Id., 67, 79–80.

In the present case, the jury had before it a confluence of incriminating statements and circumstances that support the inference that the defendant was in a position of control over the narcotics and possessed the requisite mental intent. As we noted in part I A of this opinion, the evidence presented at trial was sufficient to establish the defendant's intention to maintain his dominion and control over the revolver found in the bedroom he shared with his wife. By the same token, the fact that the fully loaded revolver was in the defendant's bedroom was a relevant factor for the jury to consider in determining whether the defendant also intended to exercise dominion and control over the narcotics found there, as the jury had evidence before it that guns frequently are used by drug dealers to protect themselves, their cash, and their narcotics.[9] See, e.g., *State* v. *Butler*, supra, 296 Conn. 74 (''[w]e have often stated . . . that it is reasonable for police officers to suspect guns to be associated with illegal drug selling operations'' (internal quotation marks omitted)); *State* v. *Mann*, 271 Conn. 300, 325, 857 A.2d 329 (2004) (''Connecticut courts

[9] Sergeant Joseph Flynn testified that the purpose of a firearm in the sale of narcotics was ''to protect [the dealer] . . . [his] product, [and his] money . . . .''

repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms," and "[f]ederal courts also have recognized this fact of life" (internal quotation marks omitted)), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). The evidence also established that the $2661 in cash discovered in the apartment bedroom not only was found in the same storage container as the revolver, but also was in denominations of five $100 bills; four $50 bills; ninety-six $20 bills; and several bills in smaller denominations. According to the testimony of Sergeant Joseph Flynn, those denominations were significant because crack cocaine typically is purchased in transactions of $20 at a time. With respect to the digital scale found in the basement in a bag with the defendant's clothes, Dirga testified that scales commonly are used to ensure that cocaine is accurately measured for packaging and distribution. Here, the cocaine found in the bedroom drawer weighed 3.1 grams, which, when broken down into amounts typical for sale, amounted to $360 worth of crack cocaine. In addition to that cocaine, officers found two baggies with cocaine residue, one of which was located in a pair of pants matching the defendant's size and build.

In analyzing a claim of constructive possession when a defendant has nonexclusive possession of the premises, we reiterate that the bedroom, unlike the kitchen in *Nova*, is not a common space but an intimate area of a home. As such, a jury reasonably could conclude that, for purposes of assessing the intention to exercise dominion and control, access to the bedroom would ordinarily be limited to the defendant and his wife. Further, the most incriminating statements and circumstances relating to the conduct of someone involved in the sale of narcotics—such as the revolver that the defendant admittedly owned, the large amount of cash found in the same storage container as the revolver,

the drug baggie found in a pair of men's pants matching the defendant's physical description, the digital scale found in the bag of the defendant's clothing, the two cell phones found on the defendant, and the evidence of the defendant's cash purchase of the Victory motorcycle—all implicate the defendant, rather than his wife. As in *Butler*, the cumulative effect of this evidence supports an inference that the defendant intended to exercise dominion and control over the narcotics and, therefore, constructively possessed the cocaine. See *State* v. *Slaughter*, 151 Conn. App. 340, 349–50, 95 A.3d 1160 (testimony about modus operandi of drug dealers coupled with defendant's conduct sufficient to establish constructive possession even though defendant's girlfriend was lessee of apartment where narcotics were found because there was no evidence to support belief that girlfriend knew of presence of drugs or was involved in sale of illicit drugs), cert. denied, 314 Conn. 916, 100 A.3d 405 (2014). We, therefore, conclude that the evidence before the jury was sufficient to support a finding that the defendant constructively possessed the cocaine found in the apartment.

C

The defendant also claims that the state presented insufficient evidence to support his conviction of risk of injury to a child in violation of § 53-21 (a) (1).[10] The state's theory at trial was that the defendant had exposed his twelve year old stepdaughter to a risk of injury because his revolver was loaded and accessible in the stackable drawer in the bedroom. On appeal, the defendant argues, inter alia, that the mere presence of a firearm hidden in a storage container does not

[10] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the . . . health of such child is likely to be injured . . . shall be guilty of . . . a class C felony . . . ."

constitute a situation in which a child is likely to be injured for purposes of § 53-21 (a) (1).

On our review of the record, we agree with the defendant. Moreover, the state concedes that it failed to present sufficient evidence with respect to the risk of injury to a child conviction. For that reason, the defendant's conviction of risk of injury to a child cannot stand.

II

As a final matter, the defendant claims that the court violated his right to compulsory process under the sixth amendment[11] by refusing to issue a capias for Yepes, who failed to appear at trial in response to a subpoena. The state concedes that the court mistakenly concluded that it could not issue a capias in the absence of in-hand service of the subpoena on Yepes. It nevertheless contends that the court's denial of defense counsel's request for a continuance to secure Yepes' testimony, which was predicated on the same compulsory process concern that animated his capias request, renders the capias issue academic, as the defendant cannot demonstrate that the court violated his right to compulsory process under the particular facts of this case. The state also argues, as an alternative ground of affirmance, that any violation of the defendant's right to compulsory process was harmless beyond a reasonable doubt. We agree with both of the state's arguments.

A capias is a vehicle to compel attendance at a judicial proceeding. See *Pembaur* v. *Cincinnati*, 475 U.S. 469, 472 n.1, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ("[a]

[11] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "[T]he sixth amendment [right] to compulsory process [is] made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

capias is a writ of attachment commanding [an] official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt"); *DiPalma* v. *Wiesen*, 163 Conn. 293, 298, 303 A.2d 709 (1972) ("[i]f one is not warranted in refusing to honor a subpoena and it is clear to the court that his absence will cause a miscarriage of justice, the court [is permitted to] issue a capias to compel attendance"). As one court has noted, it is "an extraordinary measure"; *Wright* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-15-4006830-S (January 18, 2019) (67 Conn. L. Rptr. 659, 660); that involves the arrest of the witness in question. See General Statutes § 52-143 (e). In light of the gravity of such action, Connecticut law is clear that the issuance of a capias is not mandatory but, rather, rests in the sole discretion of the trial court. The trial court "has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 33, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019). Our review of a court's ruling on a continuance request likewise is governed by the abuse of discretion standard. See *State* v. *Campbell*, 328 Conn. 444, 473, 180 A.3d 882 (2018) ("[t]here is no question but that the matter of a continuance is traditionally within the discretion of the trial judge which will not be disturbed absent a clear abuse" (internal quotation marks omitted)).

A

To properly consider the defendant's claim regarding the alleged violation of his right to compulsory process,

a detailed examination of the extensive procedural history of this case is necessary. During a pretrial hearing held on July 12, 2018, the court asked counsel whether they believed that trial could be completed within one week.[12] At that time, the prosecutor expressed confidence in his ability to conclude the state's case-in-chief in two days. Following defense counsel's representation of the defendant's witness list, the prosecutor indicated to the court that he had notified defense counsel on an earlier date that Yepes would not be available for trial. The prosecutor explained that, because Yepes was on vacation in Florida, he intended to call officers who witnessed what Yepes saw to testify at trial. When defense counsel indicated that he thought he could still subpoena Yepes in Florida, the prosecutor responded that Yepes was out of state for the month of July and reiterated that he had so apprised defense counsel on an earlier date.

On that same day, as well as during the court's advisement to venirepersons, the court stated that it anticipated evidence starting on July 16, 2018, and continuing for approximately one week, "plus or minus a day or two." The court further informed potential jurors that, although "nobody can really give you an end date . . . we anticipate about a week for all the evidence and the conclusion of the case."

During its case-in-chief, the state established that Officers Schreiner, Mark Lemieux, Dirga, and Yepes executed the search warrant on the apartment. Both Schreiner and Dirga testified that Yepes was on vacation in Florida for the month of July. Dirga also testified that he was present during the search of the apartment bedroom and had observed Yepes when he found the

[12] The record indicates that counsel were reminded by e-mail that the court would be adhering to the original trial schedule, with voir dire commencing on July 11, 2018, and evidence beginning on July 16, 2018 through July 20, 2018, or until a verdict was reached.

crack cocaine inside the bedroom dresser and the baggies containing cocaine residue in the pocket of the men's pants and on the bedroom floor.

At the end of the day on July 16, 2018, the court reviewed the remaining schedule with the jury and, on the basis of the prosecutor's representations, indicated that the state intended to conclude its case-in-chief on Thursday, July 19. On July 18, the state presented the testimony of six witnesses and then indicated that it likely would conclude its case-in-chief the next morning. On July 19, the state rested its case. At that time, the defendant moved for a judgment of acquittal, which the court denied.

Defense counsel then asked the court for a recess to contact his witnesses. Upon his return, defense counsel informed the court that he was not prepared to begin the defendant's case until the next morning. Counsel, therefore, requested a continuance. Although the court acknowledged that the jury was aware that the case could "spill out" to the following week, after asking counsel whether he could secure a witness for that afternoon, the court ultimately granted the defendant's request to continue the case to the next day, July 20.

Prior to adjournment, the prosecutor asked the court to ask defense counsel "if he's going to need any of the police officers because what happens is, he subpoenas them . . . [t]hey cannot get a hold of [defense counsel], and then, they end up calling me to find out about whether or not they are required to be here . . . ." The prosecutor noted that three police officers who had been subpoenaed by the defendant to appear that morning had been released from their subpoenas.[13] For that reason, the prosecutor wanted to know whether those officers would be needed the next day, as their previous

[13] Those officers were Peck, Dirga, and Lemieux.

attempts to contact defense counsel had been unsuccessful. In response, defense counsel assured the court that he would "make personal phone calls to each and every one of them, to the chief of the police department, whatever it takes if they're saying they're having a problem reaching me." Court then adjourned at 11:33 a.m. on July 19.

The following day, defense counsel began his case by calling Leary, whose testimony concluded at 11:25 a.m. Defense counsel then informed the court that he "ha[d] several witnesses . . . coming at two o'clock" who were all law enforcement officers. When the court inquired as to whether counsel had a witness who could fill the gap before the afternoon recess, defense counsel replied: "I believe that [the prosecutor] represented that one of the subpoenaed witnesses, Detective Yepes, is not available?" In response, the prosecutor reiterated that the testimony at trial already had established that Yepes was currently out of state and would be for the entire month of July, and that the prosecutor previously had apprised defense counsel of that fact "quite some time ago." The court then recessed for ten minutes at 11:55 a.m. after asking defense counsel to contact his witnesses to determine whether any could testify before the 1 p.m. lunch recess. When the proceeding reconvened at 12:31 p.m., defense counsel represented to the court that he believed his witness was "on his way up" to the courtroom. At that time, the marshals indicated to the court that the witness in question was not in the building. The court thus adjourned for the lunch recess. Prior to doing so, the court instructed defense counsel to contact *all* of his witnesses during the lunch recess to ensure they were ready to testify "one after the other" beginning at 2 p.m. At that time, defense counsel represented to the court that he already had done so.

When the proceeding resumed after the luncheon recess, the court asked defense counsel to call his next

witness. Counsel then replied, "I'm not sure he's available but, at this time, the defense would call Detective George Yepes." The court immediately excused the jury and the following colloquy occurred:

"[The Prosecutor]: Your Honor, this is done very blatantly for effect before the jury.

"The Court: Well, I'm going to address that in a minute. . . . [Defense counsel], [i]f you are going to make—

"[Defense Counsel]: I'm sorry?

"The Court: If you're going to call a witness that you know that's not available—

"[Defense Counsel]: Well, my understanding was, he's coming back Thursday.

"[The Prosecutor]: No, no, no, no.

"[Defense Counsel]: Unless I go[t] that confused.

"[The Prosecutor]: That wasn't . . . the testimony."

The court then asked Attorney Corey Heiks, cocounsel for the defense, who had called Yepes as a witness, to address the issue. Heiks stated that defense counsel's "office has properly sent out subpoenas, one of which being Detective George Yepes. It's our understanding Detective Yepes would be coming back from Florida by Thursday. Here we are Friday, every reasonable inclination that he would be here and available. The Middletown Police Department accepted service . . . of the subpoena for him. . . . [The] defense's strategic purpose of the . . . order of witnesses that he was very imperative and we would like to call now because he was the supervisor. We heard testimony that all the officers were doing what Detective Yepes instructed them to do. [He] . . . and, I believe, it was Peck, they're the ones that are privy with the incident

report, the only one, to my understanding, that has ever been made. We know two officers didn't bother making reports, and that's why, at this time, I feel that Detective Yepes would be available and we'd able to proceed forward."

In response, the prosecutor stated: "I told . . . [defense counsel] before the jury selection process even commenced that [Yepes] was away for the entire month of July in Florida, so he knew it. Do you know when they dropped off the subpoena for [Yepes], knowing that? This Monday, July 16th. Okay? And he—there was testimony from a witness who stated that [Yepes] was going to be out for the month of July. So, for them to then say, we heard he was coming back Thursday, is simply not true. . . . They knew he was gone for the month of July. There was testimony of that. I told [defense counsel] he would be gone for the month of July." The court asked defense counsel if he had in-hand service for Yepes, and defense counsel replied that he did not and instead served the subpoena on the Middletown Police Department, which accepted service on his behalf. The court then asked defense counsel to call their next witness, and the defense called Detective Michael Fonda, who was present and testified.

Following Fonda's testimony, the defense called Schreiner as a witness, but Schreiner was not present. After the court excused the jury, defense counsel represented that Schreiner properly had been subpoenaed and was in the state but that efforts to contact him in order to secure his timely presence had been unsuccessful. Defense counsel thus asked the court to issue a capias for Schreiner. The court replied that it was unwilling to issue a capias in the absence of proof of in-hand service of the subpoena.[14] Defense counsel

[14] In a colloquy with defense counsel, the court also explained the significance of a capias:

"The Court: If you're asking the court to arrest somebody—

"[Defense Counsel]: Not arrest him, just order him here.

"The Court: Well, that's what a capias is."

represented that a member of the police department had stated that he would accept service of the subpoena and "would inform everybody" of it. When the court asked if he had another witness, defense counsel responded, "[w]ell, actually, no. [Schreiner would] be the last witness, but he's not here and he refuses to come, I guess." The prosecutor then requested that the court ask defense counsel what method was used to contact Schreiner because the officer had testified at trial days earlier and "could have been apprised" of "when, approximately, he would be needed." Furthermore, the prosecutor reiterated that, "as I told you yesterday, I have had several officers say to me they could not get in touch with [defense counsel]." The court then stated that it was going to take a fifteen minute recess and instructed defense counsel to "do what you need to do to get the next witness in here if that's what you wish to do . . . ."

When court resumed, defense counsel represented that he had spoken to an officer at the Middletown Police Department, who was under the impression that Schreiner and Yepes were in the state and may be present at 4 p.m. that day. When defense counsel suggested continuing the case until the following Monday as one of the options moving forward, the court responded by recounting the proceedings thus far and emphasized that defense counsel had been on notice that the state was going to rest the day before, that the court already had given defense counsel a continuance for that day, and that defense counsel had assured the court that he had three witnesses who would take one hour each. The court also repeated its belief that it could not issue a capias without in-hand service of the subpoena and stated that, "[d]ropping a subpoena to the local police department, it may or may not be enough [in order] to issue a capias." Defense counsel then stated that he had "made every effort" and that he had "proof via

e-mails, via phone calls . . . .'' Defense counsel further assured the court that subpoenas had been issued after the court reminded him that proof of phone calls was inadequate for a capias.

After the prosecutor noted that there was no corroboration of service, the court asked defense counsel if he had a copy of the subpoena that he issued to Schreiner. Defense counsel stated, ''[y]es, I do.'' The court then demanded to see it. Instead of producing the subpoena, however, defense counsel stated that he could ''produce phone records since [the prosecutor] is, basically, saying that I'm a liar.'' Defense counsel then offered to have the marshal come in and ''tell exactly how she served, and who she served,'' to which the court replied: ''[T]hat's not what I asked you. I asked you if you have a subpoena.'' Defense counsel then represented that he did have a subpoena ''but not in my possession at this moment.''

The court reiterated that it would like to see whether counsel had copies of the subpoena. Defense counsel responded, ''okay,'' after which the record indicates there was a pause before counsel continued: ''Your Honor, would e-mail be sufficient? If they give me copies from e-mail or they—[do you] want to see the actual hard copy?'' Defense counsel then stated that ''[a] marshal was not available to bring them today, but . . . is available next week . . . or I could drive back to my office. . . . We have copies there . . . .'' In light of the foregoing, the court decided to adjourn for the weekend and informed defense counsel that it was his obligation to have his witnesses at court the following Monday. The court further instructed the parties to prepare written briefs on what options were available for the court if the defendant's witnesses were not present at that time.

When trial resumed on Monday, July 23, 2018, the court asked if the defense had any witnesses. Defense

counsel replied that he would have witnesses only if Yepes was present and represented that Yepes, like Schreiner, had been lawfully subpoenaed.[15] The prosecutor at that time represented that a subpoena had been delivered to the Middletown Police Department seven days earlier, but that Yepes "was never notified of when he was supposed to be here" because "[h]e's been out of state." The prosecutor also informed the court that the state had secured the presence of Schreiner, whom the defendant requested to call days earlier, and asked the court to ask defense counsel if he intended to call Schreiner as a witness. Defense counsel indicated that he planned to call Schreiner after Yepes' testimony concluded. The court then asked defense counsel to make an offer of proof regarding Yepes' anticipated testimony. Defense counsel stated: "Well, [Yepes] is the one that everybody said he told them what to do and he is in charge and he signed off on everything. Nobody else has a report. Okay? Nothing else is involved in a report except for him. Okay? That's my offer of proof." When the court informed counsel that Yepes was not the officer who had authored the report, defense counsel simply responded, "[o]kay." The court then asked defense counsel if Yepes' testimony "would be cumulative to what other Middletown police officers have already testified to," and counsel replied, "[m]aybe." The court then asked counsel if he was asking for a continuance, and defense counsel replied, "No. . . . I don't want a continuance. I want Detective Yepes."

When defense counsel then confirmed that he had another witness, the court asked counsel to call that

[15] Defense counsel also indicated that he had prepared a brief "on subpoenas . . . and how a police officer is supposed to be served." In response, the court stated: "That's not really what I asked to be briefed. What I asked to be briefed is, if you did not have any witnesses present today, how should we proceed with trial?" Defense counsel then responded by suggesting that the court consider entering a missing witness nolle as to Yepes; the court responded that it did not have the discretion to do so.

witness. Defense counsel declined to do so, stating: "I am not calling a witness out of order. You can't—you can't force that." In response, the court again asked defense counsel if he was requesting a continuance, and defense counsel replied: "No. I'm asking for Detective Yepes to be here. If you want to continue the case until Detective Yepes is back from Florida, I'm fine with that." The court overruled that objection and ordered the defense to call its next witness, whereupon Schreiner took the witness stand.

Following Schreiner's testimony,[16] the court asked defense counsel if he had any further witnesses, and, in the presence of the jury, he replied: "Yes, I do. Detective Yepes." The jury once again was excused, and the court again asked defense counsel if he wanted a continuance. Defense counsel declined that offer, stating: "No. I'm asking for Detective Yepes to be present, as he should be under the law." The court again asked defense counsel if he had effected in-hand service of the subpoena; defense counsel replied that he had not but maintained that he was not required to do so under the rules of practice. The court at that time stated that it could not issue a capias for a witness who had not been served in hand.

When defense counsel thereafter informed the court that he had no witnesses other than Yepes, the court again asked for an offer of proof. Defense counsel replied: "All the officers involved in that investigation, all reported verbally to Detective Yepes, who was in charge. None of them have writings." When pressed by the court, defense counsel stated that he was unsure

[16] The sum and substance of Schreiner's testimony in the defendant's case-in-chief amounted to confirmation that Yepes was in charge of the investigation and that Schreiner believed that Yepes currently was out of state on the basis of what Yepes had told him before his vacation.

who had written the incident report,[17] but he believed that Dirga and Yepes may have signed it.

The court at that time recounted for the record the extensive procedural history underlying the issue, emphasizing that defense counsel had been aware prior to trial, and before the subpoena was issued, that Yepes was out of state and that defense counsel had the opportunity to cross-examine the other police officers involved in the search of the apartment. The court noted that, on July 9, 2018, "we had a hearing on motions" at which the prosecutor "informed the parties that [Yepes] was out of state. . . . Evidence commenced . . . on [July] 16. Tuesday, we took a recess and . . . Thursday, July 19, the state rested in the morning, one witness. I asked [defense] counsel that morning . . . how many witnesses [he] intended to call. I was told three witnesses. I asked how long were those witnesses going to last, and I was told about an hour each, not including what the state would cross-examine. . . . Counsel indicated that he needed a continuance to get his witnesses. I granted that continuance. . . . At approximately twelve o'clock that day of July 19, I granted [another] continuance for the defense to begin [its case on] Friday morning. Friday, the defense had one witness in the morning. I asked where the other witnesses were. [Defense counsel was] not aware of where they were. I granted a continuance until two o'clock where [the defendant] produced one witness. At that time, the defense still did not have any other witnesses. So, at 3 p.m., I granted [an additional] continuance [until the following Monday] for the defense to produce its other witnesses. This morning, [the defense] produced one witness who, really, had no testimony. The only remaining witness from this defense is [Yepes], a witness [who] is in Florida, was in Florida by the time

[17] The incident report in question was not admitted into evidence and is not part of the record in this appeal.

. . . the . . . subpoena was issued [and] continues to be in Florida. . . . Counsel for the defense had had ample opportunity to cross-examine all of the other police officers involved [in the May 31, 2017 search of the apartment], by their own admission.

"The defense feels that it's necessary to call [Yepes, who] . . . I would classify as a cumulative witness. I've asked the defense if they're asking for another continuance. They're not asking for another continuance, but [are insisting on the testimony of Yepes, who] is not in the state of Connecticut. So, then, the question is, how do we proceed."

The court then suggested that the only option for the defendant to secure Yepes' testimony would be to ask for a continuance and reiterated that "[i]t's 10:30 a.m. [The defendant has] called one witness who, really, had nothing to say." Defense counsel at that time stated that "the only way to resolve this properly, for [the defendant] to get a fair trial, is to continue the case when Detective Yepes is available." The prosecutor objected to that continuance request on the grounds that (1) the state had notified defense counsel prior to trial that Yepes was going to be in Florida for the month of July and defense counsel had been afforded ample time to secure his attendance on or before July 23, (2) Yepes' proffered testimony would be cumulative given that other Middletown police officers already had testified as to their observations of Yepes, (3) counsel had failed to produce a marshal to testify as to when the subpoena had been served, (4) there was a lack of evidence on the return of process on the subpoena, (5) a continuance would disrupt the trial because Yepes was not scheduled to return from Florida until weeks later on August 6, 2018, and (6) it was likely that jurors would become unavailable given the parameters they had been given regarding the approximate length of the trial.

The court thereafter denied defense counsel's request for a continuance. In so doing, the court emphasized that counsel already had been afforded multiple continuances in order to produce his witnesses, his request was untimely, the probable duration of the continuance pending Yepes' return would be too long, Yepes' testimony, as proffered, "would be cumulative" of evidence already before the jury, and that counsel had had the opportunity to cross-examine and confront six to eight police officers. The court further concluded that the denial of the request for a continuance "would not impair the defendant's ability to defend himself with respect to these matters."

After the state's rebuttal witness and the defendant's surrebuttal witness had finished testifying, defense counsel again indicated for the record that he wanted to call Yepes. The evidence thereafter was submitted to the jury, which returned a verdict of guilty, and this appeal followed.

B

With that context in mind, we turn to § 52-143, which governs the issuance of a capias in this state.[18] That statute "authorizes the trial court to issue a capias to compel the appearance of a witness who fails to appear without justification. The statute does not, however, make it *mandatory* for the court to issue a capias when a witness under subpoena fails to appear; issuance of a capias is in the discretion of the court . . . [which] has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . Judicial discretion is always a legal discretion, exercised

[18] General Statutes § 52-143 (e) provides in relevant part: "If any person summoned by . . . any public defender . . . fails to appear and testify, without reasonable excuse . . . the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section . . . may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify."

according to the recognized principles of equity. . . . [T]he action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Emphasis in original; internal quotation marks omitted.) *State* v. *Payne*, 40 Conn. App. 1, 18, 669 A.2d 582 (1995), aff'd, 240 Conn. 766, 695 A.2d 525 (1997), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 849 A.2d 760 (2004). At the same time, if the trial court "never exercised any discretion because it believed its authority to do so was lacking," our review on appeal is plenary. (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 238, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

1

Relying on *State* v. *Burrows*, 5 Conn. App. 556, 500 A.2d 970 (1985), cert. denied, 199 Conn. 806, 508 A.2d 33 (1986), the defendant argues that the court improperly declined to issue a capias in the absence of in-hand service of Yepes.[19] Although he acknowledges that our review of such claims generally is governed by the abuse of discretion standard, the defendant maintains that, under *Burrows*, the court's mistake of law effectively obviates that standard of review because the court could not have exercised any discretion when it believed it lacked the authority to do so. In response, the state concedes that in-hand service is not required but argues that, under the particular circumstances of this case, the issuance of a capias alone, without the granting of a continuance for the time needed to enforce

[19] In *Burrows*, this court concluded that "the trial court erred when it ruled it had no power to issue a capias because of the admitted lack of in-hand service of the intended witness." *State* v. *Burrows*, supra, 5 Conn. App. 560.

it, would have been a futile act. Furthermore, because the defendant has not challenged the propriety of the court's denial of his request to continue the trial until Yepes returned to Connecticut several weeks later, which request was intertwined with the capias issue, the state submits that the defendant cannot establish a violation of his right to compulsory process. On the particular facts of this case, we agree with the state.

The right to compulsory process is memorialized in the sixth amendment. As our Supreme Court has explained, "[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense." (Internal quotation marks omitted.) *State* v. *Tomas D.*, 296 Conn. 476, 497, 995 A.2d 583 (2010), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012). In *Tomas D.*, our Supreme Court emphasized that the right to compulsory process is *not* unqualified, and instructed that "a defendant may not successfully establish a violation of his rights to present a defense and to compulsory process without first taking reasonable steps to exercise those rights." Id., 498. More specifically, the court observed that, "[t]o exercise his sixth amendment compulsory process rights diligently, a defendant is required to utilize available court procedures, such as the issuance of subpoenas, as well as requests for continuances or material witness warrants that may be reasonably necessary to effectuate the service process." Id.; see also *State* v. *Lubesky*,

195 Conn. 475, 478–80, 488 A.2d 1239 (1985) (rejecting compulsory process claim arising from inability to find state witness who already had testified because defendant failed to request continuance or move for mistrial); *Schwartzmiller* v. *State*, 108 Idaho 329, 330–31, 699 P.2d 429 (App. 1985) (defendant's "diligence in exercising his sixth amendment right" is "relevant factual [inquiry]"), review denied, Idaho Supreme Court, Docket No. 15231 (June 20, 1985); *State* v. *Timblin*, 254 Mont. 48, 51, 834 P.2d 927 (1992) (compulsory process inquiry includes consideration of "defendant's diligence in exercising [s]ixth [a]mendment rights"). In concluding that the defendant's right to compulsory process was not violated, our Supreme Court held that the failure to seek a continuance to secure the live testimony of a witness is "a significant factor in concluding that the defendant's federal compulsory process rights have not been violated . . . ." *State* v. *Tomas D.*, supra, 500.

In this case, the record reveals that, although the court articulated its mistaken belief that in-hand service of the subpoena was required to effectuate a capias, the court's consideration of the defendant's sixth amendment right to compulsory process—specifically, the right to offer testimony of certain witnesses and to compel, if necessary, their attendance—was intertwined with its deliberation on whether to grant a continuance until Yepes returned to Connecticut. The court specifically found that "[t]he only remaining witness from this defense is a witness that is in Florida, was in Florida by the time . . . the . . . subpoena was issued, [and] continues to be in Florida. . . . Counsel for the defense had had ample opportunity to cross-examine all of the other police officers involved . . . in the [May 31, 2017 search of the apartment], by their own admission. . . . The defense feels it is necessary to call [Yepes, who] . . . I would classify as a cumulative witness. I've asked the defense if they're asking for

another continuance. They're not asking for another continuance, but the witness is not in the state of Connecticut. So, then, the question is, how do we proceed." The court then stated that the only option for the defendant to be able to produce Yepes would be to ask for a continuance and reiterated that "[i]t's 10:30 a.m. We've called one witness who, really, had nothing to say."

Having previously insisted on the issuance of a capias, defense counsel responded that "the only way to resolve this properly, for [the defendant] to get a fair trial, is to continue the case when Detective Yepes is available."[20] Following the state's objection to another continuance, the court then considered the factors set forth in *State* v. *Godbolt*, 161 Conn. App. 367, 374–75, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).[21] The court emphasized that the defendant already had been afforded two continuances in

[20] Notwithstanding the requirement articulated in *State* v. *Tomas D.*, supra, 296 Conn. 498, 500, that a defendant must take reasonable steps to exercise the rights to present a defense and compulsory process, including the request for a continuance, defense counsel in the present case subsequently characterized the court's action as "forcing [him] to . . . ask for a continuance."

[21] In *State* v. *Godbolt*, supra, 161 Conn. App. 367, this court stated: "A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself . . . . We are especially hesitant to find an abuse of discretion

order to produce his witnesses; his request was untimely; the probable duration of the continuance until Yepes' return weeks later would be too long; Yepes' testimony, as proffered, "would be cumulative" of evidence already before the jury; and the defense had the opportunity to cross-examine and confront one-half dozen other police officers. Accordingly, the court concluded that the denial of defense counsel's request for a continuance "would not impair the defendant's ability to defend himself with respect to these matters" and, thus, denied the request.[22]

On our exhaustive review of the record, we conclude that the court properly proceeded to consider the issue of whether a continuance of two weeks was necessary in light of the right to compulsory process concerns raised by defense counsel and his repeated attempts to call Yepes as a witness. The record indicates that the court had before it uncontroverted evidence that Yepes had been out of state at all relevant times and would remain so for another two weeks until August 6, 2018. In light of Yepes' unavailability, and mindful of the extensive factual and procedural history regarding the issue, the court concluded that a continuance was the only viable option for securing his presence as a witness. The court further determined, despite the compulsory process concerns articulated by defense counsel, that a continuance was not warranted under the facts of this case. Given the particular procedural history of this case, the court's findings of fact, which were based

where the court has denied a motion for continuance made on the day of the trial. . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Internal quotation marks omitted.) Id., 374–75.

[22] The defendant has not challenged the propriety of that determination in this appeal.

on sworn testimony before it with respect to Yepes' unavailability, the interwoven nature of defense counsel's capias and continuance requests, and the fact that the defendant has not challenged the court's decision denying his request for a continuance, we conclude that the defendant has not demonstrated that his right to compulsory process was violated in the present case.

2

Even if we were to conclude otherwise, the defendant could not prevail. The state alleges, as an alternative ground of affirmance, that any violation of the defendant's right to compulsory process stemming from the court's refusal to issue a capias did not constitute harmful error. We agree.

In *State* v. *Burrows*, supra, 5 Conn. App. 559–60, this court held that the state bears the burden of proving that a violation of a defendant's right to compulsory process was harmless beyond a reasonable doubt. We conclude that the state has met that burden in this case.

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the [witness] in the prosecution's case, whether the [testimony of the witness] was cumulative, the presence or absence of evidence corroborating or contradicting the [witness] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [witness] on the trier of fact and the result of trial." (Internal quotation marks omitted.) *State* v. *Quail*, 168 Conn. App. 743, 762–63, 148 A.3d 1092, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016).

First, with respect to the importance of Yepes' testimony, we are persuaded that Yepes' testimony would have been cumulative of evidence that was already before the jury. Although Yepes was the officer who found the cocaine, Dirga testified on direct examination that he personally observed Yepes when he discovered the cocaine in the upper left dresser drawer, and Dirga was cross-examined by the defense. While Yepes was present when the defendant confessed that the gun was his, the defendant's confession was witnessed by other officers whom the state called to testify. Lemieux and Peck testified at trial that they heard the defendant's confession as well. Defense counsel, when questioned by the trial court about the materiality of Yepes' testimony, also conceded that Yepes' anticipated testimony might have been "cumulative to what other Middletown police officers have already testified to." In light of the foregoing, while denying the defendant's request for a continuance on July 23, 2018, the court made a finding that Yepes was a witness whose testimony would have been cumulative of other evidence already before the court. Accordingly, this factor weighs in favor of the state.

Next, with respect to the strength of the prosecution's case, we first conclude that the refusal to issue a capias or grant defense counsel a continuance to secure Yepes' testimony was harmless with respect to the criminal possession of a revolver charge because the defendant had confessed to the police that the gun belonged to him.[23] It is well established that "[a] confession, if sufficiently corroborated, is the most damaging evidence of guilt . . . and in the usual case will constitute the overwhelming evidence necessary to render harmless any errors at trial." (Internal quotation marks omitted.) *State* v. *Williams*, 202 Conn. App. 355, 370, 245 A.3d

[23] In this appeal, the defendant has not raised any claim regarding that confession.

830, cert. denied, 336 Conn. 917, 245 A.3d 802 (2021); see *State* v. *Iban C.*, 275 Conn. 624, 645, 881 A.2d 1005 (2005); see also *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("[a] confession is like no other evidence"). With respect to the possession with intent to sell conviction, as discussed in part I B of this opinion, the jury reasonably could have found that the defendant had constructive possession of the cocaine that the police found in the upper left dresser drawer, particularly because the officers also discovered in the defendant's bedroom a drug baggie in a pair of men's pants matching the defendant's physical description that tested positive for cocaine residue. In addition, the officers found other evidence commonly associated with drug dealing during their search of the apartment, including the defendant's revolver, the large amount of cash in various denominations that was located in the same storage container as the revolver, the digital scale in a bag with the defendant's clothes, the presence of a pit bull, and the two cell phones found on the defendant.

Finally, we conclude that the potential impact of Yepes' testimony was largely inconsequential. In *State* v. *Burrows*, supra, 5 Conn. App. 560, this court determined, in considering the defendant's alibi defense, that "the expected testimony of the witness [for whom the court refused to issue a capias] . . . loom[ed] as a large exculpatory element in the trial of the defendant." As a result, this court concluded that the absence of the witness' testimony would have had an impact on the trial and, thus, constituted harmful error. See id. Unlike in *Burrows*, the defendant here never proffered that Yepes' testimony would undermine the state's evidence against him. Indeed, given that Yepes discovered the cocaine and heard the defendant confess that the gun was his, the evidence in the record before us indicates that, had Yepes been compelled to testify, his testimony

likely would have been adverse to the defense, and the defendant never articulated to the court a reason for it to believe otherwise. Accordingly, we conclude that the state has demonstrated that any violation of the defendant's right to compulsory process stemming from the court's refusal to issue a capias was harmless beyond a reasonable doubt.

The judgment is reversed only as to the conviction of risk of injury to a child and the case is remanded with direction to render judgment of acquittal on that count and to resentence the defendant accordingly; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GERRY L. GOODE (AC 43841)

Prescott, Alexander and DiPentima, Js.

Syllabus

Convicted, after a jury trial, of the crime of criminal damage to a landlord's property in the first degree, the defendant appealed to this court claiming that the state presented insufficient evidence to establish the element of specific intent. The defendant entered into a residential lease with the victim for a property in Windsor. Subsequently, the victim went to the property during the lease term and discovered that it was damaged. The victim informed the defendant that he wanted to return with a home improvement contractor to estimate the damage to the property. The defendant refused to allow the victim subsequent access to the property, and, when the victim and the contractor eventually returned, a police officer had to accompany them. *Held* that the defendant could not prevail on his claim that the state presented insufficient evidence to establish that he specifically intended to damage the victim's property: the state produced testimonial and photographic evidence of the substantial damage to the entirety of the victim's property, and this severe damage provided the jury with a basis to reasonably find the necessary specific intent to find the defendant guilty, and the jury reasonably could have inferred, from the extent of the damage, that the damage was not caused

by accident or neglect; moreover, the defendant's conduct after damaging the victim's property indicated his consciousness of guilt, which the jury could have relied on to infer his specific intent.

Argued September 9—officially released October 5, 2021

Procedural History

Substitute information charging the defendant with the crimes of criminal damage to a landlord's property in the first degree and larceny in the sixth degree, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the jury before *Prats*, *J.*; verdict and judgment of guilty of criminal damage to a landlord's property in the first degree, from which the defendant appealed to this court. *Affirmed.*

Brian D. Russell, for the appellant (defendant).

Meryl Gersz, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Donna Mary Parker*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Gerry L. Goode, appeals from the judgment of conviction, rendered after a jury trial, of criminal damage to a landlord's property in the first degree in violation of General Statutes § 53a-117e.[1] On appeal, the defendant claims that the state presented insufficient evidence to establish the element of specific intent. We disagree, and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. On September 2, 2014, the defendant entered into

[1] General Statutes § 53a-117e (a) provides: "A tenant is guilty of criminal damage of a landlord's property in the first degree when, having no reasonable ground to believe that he has a right to do so, he intentionally damages the tangible property of the landlord of the premises in an amount exceeding one thousand five hundred dollars."

a residential lease with the victim, Daniel C. Nolan, with respect to property located at 26 Whitney Circle in Windsor. The property was in good condition at the time the lease commenced, and the defendant was obligated to maintain the property in a clean and safe condition.

In December, 2017, the defendant called the victim to request reimbursement for a repair to the furnace. The victim agreed to pay the defendant but also indicated that he wanted to inspect the property. The defendant initially demurred, but after several delays, he acquiesced to the victim's request. The victim went to the property at the end of December, 2017, to discover that the property was "very much trashed [and] destroyed." After some discussion, the victim informed the defendant that he wanted to return with a home improvement contractor to estimate the damage to the property. The defendant refused to allow the victim subsequent access to the property, so when the victim and the contractor eventually returned, a police officer had to accompany them. The victim also commenced eviction proceedings, which ultimately resulted in the defendant leaving the property on July 11, 2018.

Following the defendant's departure, the victim took numerous photographs depicting the damage to the entirety of the property. The victim contacted the police and Officer Michael Tustin commenced an investigation. Tustin described the entire property as "very damaged" and noted the "ripped up" carpets, the very strong smell of urine and feces, missing pieces of sheetrock from the walls, exposed electrical cable, the presence of garbage throughout, and significant water damage. The victim needed professional services to restore the property, which took approximately eight and one-half months. The restoration cost $25,600.

The state charged the defendant with criminal damage of a landlord's property in the first degree in violation of § 53a-117e, and larceny in the sixth degree in violation of General Statutes § 53a-125b. Following a two day trial, the jury found the defendant guilty with respect to the former and not guilty as to the latter. The court imposed a sentence of two and one-half years of incarceration, execution suspended, and three years of probation. This appeal followed.

The defendant's sole claim on appeal is that the state failed to produce sufficient evidence that he specifically intended to damage the victim's property. "Our Supreme Court has noted that [a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. . . . In particular, before [an appellate] court may overturn a jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at the conclusion the jury did. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . .

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all

possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Stephenson*, 207 Conn. App. 154, 164–65, A.3d (2021).

We agree with the parties that § 53a-117e is a specific intent crime, because it requires, inter alia, that a tenant intentionally damage a landlord's property in an amount exceeding $1500. See, e.g., General Statutes § 53a-3.[2] "Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . [T]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence . . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Pjura*, 200 Conn. App. 802, 808–809, 240 A.3d 772, cert. denied, 335 Conn. 977,

[2] General Statutes § 53a-3 provides in relevant part: "(11) A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

241 A.3d 131 (2020); see also *State* v. *Best*, 337 Conn. 312, 320, 253 A.3d 458 (2020) (state of mind of one accused of crime is often most significant and, at same time, most elusive element of crime charged, and, because it is practically impossible to know what accused is thinking or intending at given moment, state of mind usually proved by circumstantial evidence); *State* v. *Morlo M.*, 206 Conn. App. 660, 690, A.3d (2021) (intent almost always proved by circumstantial evidence).

The state produced both testimonial and photographic evidence of the substantial damage to the entirety of the victim's property. This included holes in the sheetrock, shattered mirrored closet doors, broken closet doors, burn marks on a butcher block kitchen countertop, a damaged refrigerator, damage to vanities and kitchen cabinets, a broken railing, garbage throughout the property, mold and water damage, cracked and broken tile flooring, broken towel bars, damaged carpeting, hardwood and trim, and animal feces[3] in most of the rooms of the property. The severe and widespread damage provided the jury with a basis to reasonably find the necessary specific intent to find the defendant guilty of violating § 53a-117e. In other words, the jury reasonably could have inferred from the extent of the damages in different areas of the property that the damage was not caused by accident or neglect but, instead, was done with the specific intent to cause the damage. See, e.g., *State* v. *Stephenson*, supra, 207 Conn. App. 166 ("[w]e therefore also must bear in mind that jurors are not expected to lay aside matters of common knowledge or their own observations and experiences [and] [c]ommon sense does not take flight when one enters a courtroom" (internal quotation marks omitted)).

[3] Although the lease permitted the defendant to have two declawed cats on the property, when the victim inspected the property in December, 2017, he observed that dogs were present.

Finally, the defendant's conduct after damaging the victim's property indicated his consciousness of guilt, which the jury could have relied on to infer his specific intent. See id., 171–72. Specifically, the defendant failed to notify the victim of the damage, initially delayed granting the victim access to the property, and refused to allow the victim and a contractor into the property until the police were called. On the basis of the totality of the evidence produced at trial by the state, and the reasonable inferences drawn therefrom, the jury reasonably could have found that the defendant specifically intended to damage the victim's property. For these reasons, we conclude that the defendant's sufficiency claim is without merit.

The judgment is affirmed.

MEMORANDUM DECISIONS

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MEMORANDUM DECISIONS

LEONARD TALTON *v.* COMMISSIONER OF CORRECTION (AC 41603)

Alvord, Cradle and DiPentima, Js.

Argued September 16—officially released October 5, 2021

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

Per Curiam. The appeal is dismissed.

LUCIA CINOTTI *v.* MICHAEL DIVERS (AC 43200)

Alvord, Cradle and DiPentima, Js.

Argued September 16—officially released October 5, 2021

Plaintiff's appeal from the Superior Court in the judicial of Fairfield, *Egan*, *J.*

Per Curiam. The judgment is affirmed.

ANDRES R. SOSA *v.* COMMISSIONER OF CORRECTION (AC 43449)

Cradle, Alexander and Harper, Js.

Argued September 22—officially released October 5, 2021

Petitioner's appeal from the Superior Court in the judicial district of New Haven, *Hon. Jon C. Blue*, judge trial referee.

Per Curiam. The appeal is dismissed.

SCOTT SWAIN *v.* COMMISSIONER
OF CORRECTION
(AC 42277)

Alexander, Clark and Pellegrino, Js.

Submitted on briefs September 23—officially released October 5, 2021

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

Per Curiam. The appeal is dismissed.

HSBC BANK USA, N.A. *v.* CHRISTOPHER
CARDINAL ET AL.
(AC 43833)

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

Submitted on briefs September 23—officially released October 5, 2021

Named defendant's appeal from the Superior Court in the judicial district of Danbury, *Kowalski*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

DAVID BRIDGES *v.* COMMISSIONER
OF CORRECTION
(AC 41507)

Alexander, Clark and Pellegrino, Js.

Argued September 23—officially released October 5, 2021

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

Per Curiam. The judgment is affirmed.

DAVID BRIDGES *v.* COMMISSIONER
OF CORRECTION
(AC 41890)

Alexander, Clark and Pellegrino, Js.

Argued September 23—officially released October 5, 2021

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

Per Curiam. The appeal is dismissed.

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NOTICE

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

July 16, 2021: Raymond T. Trebisacci - 102073

July 16, 2021: Robert A. Schrage - 417998

July 30, 2021: Philip T. Newbury, Jr. - 300144

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 287 Main Street, Second Floor, Suite Two, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel