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IN THE

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OF THE

STATE OF CONNECTICUT

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State v. Komisarjevsky

STATE OF CONNECTICUT v. JOSHUA
KOMISARJEVSKY
(SC 18973)

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

Syllabus

Convicted of numerous crimes, including six counts of capital felony, in connection with the invasion of the P family home in the town of Cheshire that resulted in a triple murder, sexual assaults, kidnappings, and arson, the defendant appealed to this court. The defendant, along with his accomplice, S, entered the home around 2 a.m. and proceeded to tie up the members of the P family, which consisted of J, her husband, W, and their daughters, H and M. Discovering that there was no money in the house, and concerned that his and the defendant's DNA would be found there, S drove J's car to a nearby gas station to buy gasoline and then, around 9 a.m., took J to a bank so she could withdraw a large sum of cash. While S was gone, the defendant sexually assaulted M and took sexually explicit photographs of her with his cell phone. After returning to the home, S sexually assaulted J and strangled her to death. Upon realizing that W was escaping and that the police, responding to a 911 call from the bank, were surrounding the house, S poured gasoline throughout the home, ignited it, and fled with the defendant in J's car. The defendant and S crashed the vehicle and were apprehended, while H and M perished in the ensuing fire. S was tried first and convicted.

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson, Justices Palmer, D'Auria, Mullins, Ecker, and Judges Alvord and Keller. Although Justice Mullins was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

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Prior to the defendant's trial, the defendant filed a motion to change the venue from the judicial district of New Haven, arguing that the pretrial publicity surrounding his case, exacerbated by coverage of S's trial, would prevent him from empaneling an impartial jury. The trial court denied the motion. The jury returned a guilty verdict, and the trial court rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Held:*

1. The trial court did not violate the defendant's right to a fair trial by an impartial jury in denying his motion to change the venue from the judicial district of New Haven or in denying his challenges for cause to twelve prospective jurors:
 - a. There was no merit to the defendant's claim that the pretrial publicity surrounding his case created an irrebuttable presumption of prejudice that would have required moving the trial from New Haven, because, although certain factors relevant to determining whether prejudice should be presumed favored the defendant, namely, the nature of the media coverage and whether the passage of time had alleviated the impact of the prejudicial publicity, the extensive jury selection process employed by the trial court in this case, along with the characteristics of New Haven's population, strongly favored the state with respect to whether to presume prejudice: certain media coverage of the incident, particularly remarks from a state senator calling for the defendant to be hanged in the street by his genitalia and commentary from a bipartisan array of state politicians citing the home invasion in support of the death penalty, evoked the sort of community wide rush to judgment that can trigger a presumption of prejudice, and, because the defendant's case was tried only several months after S was convicted and sentenced, the passage of time between the home invasion and the defendant's trial did not mitigate the impact of that prejudicial publicity; nevertheless, when compared to other geographic regions that courts have considered sufficiently populous to permit the selection of an impartial jury, the size and diversity of New Haven, which had an urban and suburban population of 846,000 at the time of trial, greatly increased the feasibility of identifying an impartial jury, and the jury selection process in the present case, which allowed the attorneys for the state and the defendant to assess each prospective juror's familiarity with the case and ability to render an impartial verdict, which afforded each party forty peremptory challenges instead of the minimum thirty required in capital cases, and which left open the possibility of a change in venue in the event that individual voir dire did not result in the empaneling of an impartial jury in New Haven, outweighed the inflammatory nature of the publicity associated with the case such that the defendant failed to surmount the extremely high bar necessary to establish the existence of presumptive prejudice.
 - b. The extensive pretrial publicity surrounding the defendant's case did not result in actual prejudice that deprived the defendant of a fair trial, as

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the voir dire process by which the jury was selected was constitutionally adequate: the individual voir dire process did not consist of the blind acceptance of prospective jurors' assurances of impartiality but involved a lengthy and thorough probing of their responses to questions by the state, the defendant, and the trial court, the defendant did not exhaust his peremptory challenges until the voir dire of the backup alternate jurors, after the regular and alternate jurors had been selected, or challenge for cause any juror who actually deliberated in his case, and the trial court implemented thorough measures to ensure the jury's continued impartiality through daily admonishments counseling the avoidance of any publicity; moreover, a detailed, juror by juror analysis of the jury selection record, which focused on the extent of each juror's exposure to pretrial publicity and its effect on his or her case knowledge and impartiality, revealed that each juror who deliberated at trial and sentencing repeatedly expressed his or her ability to be fair and impartial, to apply the appropriate burden of proof and the presumption of innocence, and not to be swayed by sympathy or to be affected emotionally after viewing disturbing evidence; furthermore, the fact that some of the jurors expressed sympathy for W and the P family did not indicate that they were so impartial that they could not set aside their impressions to return a verdict on the basis of the evidence, none of the jurors was personally affected by the events at issue, and the fact that several prospective jurors lost their composure and made inappropriate outbursts, including crying openly in court and making menacing comments about or toward the defendant, did not deprive the defendant of a fair trial because the trial court questioned the prospective jurors who had witnessed the outbursts to ensure that the outbursts would not affect the jurors' impartiality; accordingly, in light of the deference appellate courts afford to a trial court's assessment of the impact of pretrial publicity on juror impartiality, this court concluded that the trial court had correctly determined that the pretrial publicity did not result in actual jury prejudice.

c. The defendant could not prevail on his claim that the trial court had abused its discretion in denying his challenges for cause to twelve potential jurors because any error was harmless; an improper denial of a for cause challenge is not prejudicial unless the defendant shows that the ruling resulted in an identifiable, objectionable juror actually serving on the jury that decided the case, and none of the twelve jurors that the defendant challenged for cause actually deliberated on his case or decided his guilt.

2. The trial court did not abuse its discretion in denying the defendant's motions for a continuance, to reopen the evidence, and for a mistrial, which were all based on his contention that the state had improperly failed to disclose until after the close of evidence approximately 130 pages of letters written by S while S was incarcerated, as there was no miscarriage of justice or prejudice resulting from the late disclosure of

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the letters: even if the letters, which, according to the defendant, contained S's admissions that he was the mastermind behind the home invasion and that he previously had raped, tortured, and murdered seventeen other women and girls, were admissible, nothing contained therein was exculpatory or directly supported the defendant's theory that he did not intend for anyone to be killed, as the letters indicated that the home invasion was a joint venture and contradicted certain theories of defense proffered at trial, namely, that the defendant did not engage in anal intercourse with M and that it was S who had poured the gasoline throughout the house; moreover, the trial court properly found that the letters likely would have reinforced the basis for a guilty verdict and would have served to establish certain aggravating factors needed to secure a death sentence during the penalty phase.

3. The defendant could not prevail on his claim that the state had violated his due process rights under *Brady v. Maryland* (373 U.S. 83) by failing to disclose recordings of certain communications made by various Cheshire police officers during and after the response to the home invasion:
 - a. The trial court correctly determined that it was the defendant's burden to prove, by a preponderance of the evidence, the existence of a police communications log, which J's sister, C, claimed to have received via e-mail several months after the home invasion and which purportedly established that police officers were present at the P home when S and J returned from the bank, the preponderance standard having been consistent with the one required by federal and sister state courts for a defendant to prove the existence of purported *Brady* evidence and with the standard used by Connecticut courts to make other preliminary determinations of fact involving a defendant's constitutional rights; moreover, the trial court did not commit clear error in finding that the defendant had failed to prove the existence of the e-mail or the communications log it contained by a preponderance of the evidence because, even though the trial court found that the testimony of C was credible and that she had no motive to help the defendant by fabricating evidence, C had deleted the e-mail and lost her only printout of it, making it impossible to determine its provenance, C did not know who sent the e-mail, a search of the Cheshire Police Department's records did not reveal a corresponding communication, despite C's belief that someone from the department had sent it, and the log had not been turned over to the defense; furthermore, any error on the part of the trial court in sustaining the state's objection, during an evidentiary hearing, to a question about whether the e-mail appeared to have been created by the police was harmless.
 - b. Certain undisclosed communications regarding the Cheshire Police Department's response to the bank's 911 call, which the parties agreed constituted impeachment evidence insofar as it supported the defendant's theory that the testifying officers' embarrassment over the alleg-

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edly inadequate response colored their testimony, were not material, and, therefore, the state's failure to disclose them did not violate *Brady*; none of the communications would have impeached the veracity of the officers who testified with respect to the principal issues disputed during the guilt phase of the trial, namely, whether the defendant committed an anal sexual assault of M and his intent to kill J, H, and M, as DNA evidence recovered from M's body provided overwhelming support for the jury's verdict with respect to the defendant's sexual assault of M, any inadequacy in the police response bore no relation to the defendant's theory that the DNA had been contaminated by a laboratory technician, and none of the circumstantial evidence on which the state relied to prove the defendant's intent depended in any way on the observations or veracity of the officers who testified.

c. Statements made by certain police officers describing the defendant as "simple as they come" and "nobody home," and S as looking "evil," were not material for *Brady* purposes: the officer who described the defendant's demeanor observed the defendant only fleetingly in a police station hallway and took no part in the response to the home invasion, the investigation, or any interviews with the defendant, and it was not reasonably likely that the officer's testimony would have influenced the jury on the issue of the defendant's demeanor in light of more probative evidence in the record, namely, a detective's testimony that the defendant was emotionless following his arrest and the recording of the defendant's statement to the police; moreover, the statement describing S as looking evil was a casual observation that, in the absence of anything further, did nothing to inform the jury's assessment of what actually happened in the P residence or to support the defendant's theory that S was the mastermind behind the home invasion and that the defendant wanted no part in killing J, H, or M.

4. There was no merit to the defendant's claim that the state had violated his due process right to a fair trial by presenting evidence that it knew or should have known to be false or misleading, namely, the testimony of an expert witness, B, that an inflammatory photograph of female genitalia found on the defendant's cell phone depicted M, as that testimony was not material: even if B's testimony was false or substantially misleading, there was no reasonable probability that it would have affected the jury's verdict, it having been undisputed that the other five photographs in the exhibit containing the purportedly inflammatory photograph were in fact of M, which corroborated the defendant's statement to the police that he had taken photographs of M for his personal use, and the content of the image did not bear on the principally contested issues in the guilt phase, that is, whether the defendant had sexually assaulted M anally and whether he had the requisite intent to kill; moreover, if the person depicted in the photograph was not M, it necessarily had to have been H, which would have introduced an additional sexual assault victim to the case.

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5. The defendant's challenge to the statute (§ 18-10b) imposing certain restrictive conditions of confinement on inmates, like the defendant, who have been convicted of capital felony or murder with special circumstances was not reviewable on direct appeal: the record was insufficient to resolve the defendant's claims that the conditions of confinement set forth in § 18-10b are unconstitutional on the grounds that they constitute an ex post facto law, violate equal protection, and are excessive and disproportionate, as there was no evidence beyond an averment of information and belief with respect to the claimed disparate treatment of defendants who had received life sentences after the abolition of the death penalty, as compared to capital defendants who previously had received life sentences, and there was no evidence as to the conditions of confinement actually imposed on the defendant, who was incarcerated in Pennsylvania; moreover, the proper vehicle by which the defendant may challenge his conditions of confinement is a petition for a writ of habeas corpus, and the defendant can present evidence that is relevant to his claim before the habeas court, which is empowered to make factual findings on the basis of that evidence.

Argued October 17, 2019—officially released April 12, 2021**

Procedural History

Information charging the defendant with six counts of the crime of capital felony, four counts of the crime of kidnapping in the first degree, three counts of the crime of murder, and one count each of the crimes of sexual assault in the first degree, burglary in the second degree, arson in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue, J.*, denied the defendant's motions for a change of venue, to sequester the jury, to continue jury selection, to strike the jury panel, for additional peremptory challenges and to excuse tainted jury panels; thereafter, the case was tried to the jury before *Blue, J.*; subsequently, the court denied the defendant's motions for a continuance, to open the evidence, and for a mistrial; verdict of guilty; thereafter, during the penalty phase of the proceedings, the jury found the existence of an aggravating factor or factors that outweighed any mitigating factors; sub-

** April 12, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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sequently, the court, *Blue, J.*, rendered judgment in accordance with the jury verdict and the jury's findings during the penalty phase, and imposed a sentence of death with respect to the six capital felony counts, and the defendant appealed to this court; thereafter, the court, *Blue, J.*, granted in part the defendant's motions for augmentation and rectification of the record; subsequently, the court, *Blue, J.*, granted the defendant's motion to correct an illegal sentence. *Affirmed.*

John Holdridge, with whom were *Erica Barber* and, on the brief, *Moira L. Buckley*, for the appellant (defendant).

Marjorie Allen Dauster, former special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Michael Dearington*, former state's attorney, *Gary Nicholson*, former senior state's attorney, *Robert Scheinblum*, senior assistant state's attorney, and *Leonard C. Boyle*, former deputy chief state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether Connecticut's individual voir dire process protected the right of the defendant, Joshua Komisarjevsky, to a fair trial by assessing and mitigating the prejudicial effects of pretrial publicity about this particularly notorious case involving a home invasion in Cheshire that resulted in multiple fatalities. The defendant appeals¹ from the judgment of conviction, rendered after a jury trial, of, among other crimes, six counts of capital felony in violation of General Statutes (Rev. to 2007) § 53a-54b. On appeal, the defendant claims, inter alia, that the trial court improperly (1) denied his motions to change the venue of his trial from

¹ The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (4).

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the judicial district of New Haven (New Haven), (2) denied his challenges for cause to twelve prospective jurors, and (3) denied his motions to reopen the evidence, for a mistrial, or for a continuance because of the state's belated disclosure of certain letters written by the defendant's accomplice, Steven Hayes. The defendant also contends that the trial court unconstitutionally applied the stringent conditions of confinement set forth in General Statutes § 18-10b² to the defendant

² General Statutes § 18-10b provides in relevant part: "(a) The Commissioner of Correction shall place an inmate on special circumstances high security status and house the inmate in administrative segregation until a reclassification process is completed under subsection (b) of this section, if . . . (2) the inmate is in the custody of the Commissioner of Correction for a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012, for which a sentence of death is imposed in accordance with section 53a-46a and such inmate's sentence is (A) reduced to a sentence of life imprisonment without the possibility of release by a court of competent jurisdiction, or (B) commuted to a sentence of life imprisonment without the possibility of release.

"(b) The commissioner shall establish a reclassification process for the purposes of this section. The reclassification process shall include an assessment of the risk an inmate described in subsection (a) of this section poses to staff and other inmates, and an assessment of whether such risk requires the inmate's placement in administrative segregation or protective custody. If the commissioner places such inmate in administrative segregation pursuant to such assessment, the commissioner shall require the inmate to complete the administrative segregation program operated by the commissioner.

"(c) (1) The commissioner shall place such inmate in a housing unit for the maximum security population if, after completion of such reclassification process, the commissioner determines such placement is appropriate, provided the commissioner (A) maintains the inmate on special circumstances high security status, (B) houses the inmate separate from inmates who are not on special circumstances high security status, and (C) imposes conditions of confinement on such inmate which shall include, but not be limited to, conditions that require (i) that the inmate's movements be escorted or monitored, (ii) movement of the inmate to a new cell at least every ninety days, (iii) at least two searches of the inmate's cell each week, (iv) that no contact be permitted during the inmate's social visits, (v) that the inmate be assigned to work assignments that are within the assigned housing unit, and (vi) that the inmate be allowed no more than two hours of recreational activity per day.

"(2) The commissioner shall conduct an annual review of such inmate's conditions of confinement within such housing unit and the commissioner

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when he was resentenced after his death sentence was vacated. Finally, the defendant contends that the state deprived him of his due process right to a fair trial by (1) failing to disclose certain communications among various Cheshire police officers during and after the response to the home invasion, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (2) failing to correct materially false expert testimony about a highly inflammatory photograph of female genitalia found on the defendant's cell phone in violation of *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). We disagree with all of these claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. In 2007, the P family, consisting of W, an endocrinologist, J, his wife, who was a nurse, and their two daughters, seventeen year old H, and eleven year old M, lived in a house at 300 Sorghum Mill Drive in Cheshire. In the early evening of July 22, 2007, the defendant went to the Stop and Shop supermarket at the Maplecroft Plaza in Cheshire to meet a contractor who owed him wages for construction work. While in the Stop and Shop parking lot, he saw J and M, who were there shopping for dinner. Intrigued by J's car, a Chrysler Pacifica, the defendant followed J and M to the P residence, and was further impressed by their apparent prosperity.

The defendant then contacted Hayes, with whom he had been communicating by text message about plans to make money in some way. After spending the evening caring for his daughter, the defendant returned to the

may, for compelling correctional management or safety reasons, modify any condition of confinement, subject to the requirements of subparagraphs (A) to (C), inclusive, of subdivision (1) of this subsection. . . ."

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Stop and Shop parking lot at approximately 10 p.m., where he met Hayes. After driving around for a while in the defendant's van discussing ways to make money, including robbing people who were using ATMs or coming out of bars, the defendant remembered J and M from earlier in the evening and told Hayes about them. After some discussion, Hayes and the defendant came to believe that there might be a lot of money in the P family home.

After driving around for a while longer, the defendant and Hayes went to Sorghum Mill Drive in the defendant's van, parked around the corner from the P family residence, and donned rubber gloves and face masks improvised from cut up shirts and a hat. Hayes brought with him a pellet gun that he had purchased the day before at a nearby Wal-Mart while accompanied by the defendant; the pellet gun looked like a nine millimeter pistol.

At approximately 2 a.m. on July 23, 2007, the defendant and Hayes approached the P residence and walked around the house. They noticed that W was sleeping on a couch in the sunroom. The defendant then entered the house through an unlocked bulkhead door to the basement. The defendant found a baseball bat in the basement and carried it with him to the sunroom, where he repeatedly struck W in the head with the bat, causing W to make an "unearthly scream." After W, who was bleeding profusely and confused, backed into the corner of the couch and quieted down, the defendant let Hayes into the house through the back door.

After W stirred and sat up, Hayes pointed the pellet gun at him. The defendant then ordered W to lie down on the couch and covered his bleeding head with a towel; Hayes and the defendant bound W's wrists and ankles with a cotton rope clothesline that the defendant had found on the basement stairs. The defendant told

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Hayes to “put a bullet in” W if he were to move, and said to W, “if we get the money, nobody will be hurt” In response to the defendant’s questions about whether anyone else was in the house, W told him that J, H, and M were upstairs. Hayes and the defendant then tied up J and M, who were sleeping in the same bed in the master bedroom, and went into H’s bedroom and tied her up, as well.

After talking with J and searching the house, the defendant and Hayes concluded around 4 a.m. that there was no money there, but they realized from the check register and receipts in J’s purse that W and J had approximately \$40,000 in their Bank of America accounts; they asked W and J about that money at various points during the encounter. The defendant and Hayes decided to wait until the bank opened at 9 a.m., at which point Hayes would take J there to withdraw \$15,000, an amount that they believed would not raise a “red flag” The defendant and Hayes then went back upstairs and retied the ropes binding J, H, and M, making sure to secure them to their bedframes. The defendant and Hayes took all of the family’s portable and cell phones that they could find and drove the Pacifica and the defendant’s van to a nearby condominium complex on Mountain Road, where, to avoid triggering any of the neighbors’ suspicions, they parked the defendant’s van before returning to the house in the Pacifica.

At approximately 5 a.m., the defendant and Hayes moved W from the sunroom down to the basement in order to avoid the possibility that a neighbor might see him through the sunroom window. They tied W to a support pole in the basement with a rope, sat him on a pillow, and rebound his feet with a plastic zip tie. Shortly thereafter, J, acting at Hayes’ direction, called W’s medical office and asked a nurse to cancel his morning schedule because he was ill.

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During the encounter, the defendant spoke to M several times about her summer plans and schooling; he also brought her water and provided her with bathroom breaks. In the meantime, tensions continued to rise between Hayes and the defendant because Hayes expressed concern to the defendant about having left traces of their DNA in the house; Hayes then proposed burning down the house and kidnapping the victims using the family's vehicles. A short time later, Hayes became angrier because he believed that the defendant had used his real name in front of the victims, and he proposed killing them instead. Hayes found several one gallon bottles of windshield washer fluid in the garage and emptied them into the kitchen sink. At approximately 8 a.m., Hayes drove the Pacifica to a nearby Citgo service station and filled four of the containers with gasoline, communicating with the defendant several times on his cell phone while he was out. Hayes then returned to the house and left those four containers in the garage.

Shortly before 9 a.m., Hayes and J drove in the Pacifica to the Bank of America branch located at the Maplecroft Plaza near the Stop and Shop. To emphasize the gravity of the situation to J, Hayes called the defendant on his cell phone while they were driving to the bank and asked about W, H, and M. When they arrived, J entered the bank by herself and told Kristin Makhzangi, a teller, that she needed to withdraw \$15,000 because two men were holding her family hostage in their house. Because there was not enough money in the account that J desired to use, and J lacked the identification required to make withdrawals from her other accounts, Makhzangi relayed this information to Mary Lyons, the branch manager. Lyons then came out to speak with J, who told her that the two men had been polite and had promised to free the P family upon receiving the money. Lyons subsequently approved the

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withdrawal of \$15,000 from a home equity line of credit and notified the Cheshire police at approximately 9:21 a.m. of the ongoing hostage situation at the P family house; she provided the police with descriptions of J and Hayes, whom she had seen waiting in the Pacifica. In the meantime, Makhzangi gave J \$15,000 in cash, packaged in three straps of \$50 bills, from the vault. At 9:23 a.m., J exited the bank, where Hayes picked her up in the Pacifica, and drove back to the P family house.

While Hayes was out of the house purchasing gas and going to the bank with J, the defendant went to check on W and H, who were still tied up in the basement and on her bed, respectively. The defendant then went to M's bedroom and, after some additional conversation, cut her clothes off and sexually assaulted her anally.³ The defendant also took several sexually explicit photographs of M using the camera on his cell phone. After committing the sexual assault, the defendant allowed M to shower and poured bleach on her shorts in an attempt to eliminate traces of his DNA.

When Hayes and J returned from the bank with the money, he and the defendant retied J's hands and feet and put her on the couch in the living room. Hayes and the defendant then moved into the dining room and argued again about whether it was necessary to kill the family to avoid detection. Hayes initially planned to

³ Whether the defendant had sexually assaulted M anally was a disputed issue during the guilt phase of the trial. In his statement, the defendant admitted to sexually assaulting M by performing oral intercourse on her, stating that he believed she was between the ages of fourteen and sixteen years old. He denied performing other sexual acts with M. The jury, however, reasonably could have concluded that the defendant had anal intercourse with M on the basis of the testimony of H. Wayne Carver II, then the state's chief medical examiner, that semen containing the defendant's DNA was found in M's anus during her autopsy, with the lack of visible injuries to that area not inconsistent with penetration having occurred. The state's DNA testing eliminated Hayes, along with W, J, and H, as potential sources of the DNA found in M.

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strangle the family using nylon stockings, and he paced around the house to “psyche himself up” Hayes then went into the living room where he was alone with J for approximately fifteen minutes, at which point he sexually assaulted her vaginally and strangled her to death.

Meanwhile, W’s weight had caused the ropes binding him to loosen as he slumped over while drifting in and out of consciousness; when he awoke, he was able to free himself from the bindings. W heard numerous noises from his position in the basement, including loud thumps and the Pacifica leaving from the garage. Rather than confront the defendant and Hayes himself, W chose to escape the basement via the bulkhead door, and he crawled to the home of his next door neighbor, David Simcik, for help. When Simcik saw W, he told his wife to call 911 because of W’s visible injuries. While Simcik’s wife was on the phone with the police dispatcher, two Cheshire police officers, Dennis Boucher and Thomas Wright, appeared, having been dispatched in response to the call from the bank,⁴ and asked whether there was anyone still in the house. W informed them that J, H, and M were still in the house. W was subsequently transported by ambulance to St. Mary’s Hospital in Waterbury, where he was admitted for several days and treated for head injuries, including the loss of five to seven pints of blood.

In the meantime, the defendant, who had heard the basement bulkhead door opening, yelled to Hayes that

⁴ The Cheshire Police Department initiated a radio broadcast alerting all units about the ongoing hostage situation at 9:26 a.m. Captain Robert Vignola, who was the incident commander, testified that responding police units acted to create a perimeter and surround the house, and to close the surrounding roadways; they had been ordered not to approach the house by Captain Ren Marchand, who was at the police station and had relied on information that J had relayed to Lyons that the defendant and Hayes had not mistreated them to that point but would kill them if the police were called.

W was escaping. Instead of chasing W, the defendant, who saw J's lifeless body on the living room floor, told Hayes that they had to leave immediately. Hayes took a bag that had the money from the bank, gave it to the defendant, and told him to start the car. While the defendant looked for the car keys, he saw Hayes pouring copious quantities of gasoline from the windshield washer fluid containers around the house, including in the living room, stairways, hallway, and master bedroom. At this time, H and M were still restrained in their bedrooms. Realizing that the police were starting to arrive and surround the house, the defendant started the Pacifica in the garage as Hayes flicked a lit match into the kitchen, igniting a pool of gasoline on the floor and causing flames to travel toward the front hallway of the house. The first responding police officers were unable to gain access to the interior portions of the house because of heat and flames from the rapidly spreading fire, in which H and M perished.⁵

After Hayes jumped into the passenger seat of the Pacifica, the defendant backed down the driveway at a high rate of speed, first striking the front passenger side of an unmarked police car driven by Captain Robert Vignola, a Cheshire police detective, which had pulled up to block the driveway, and then a small stone wall at the front of the lawn. Vignola and Boucher, along with another officer, Sergeant Philip Giampietro, drew their weapons and approached the passenger side of the Pacifica while commanding the defendant and Hayes to exit the vehicle with their hands up. The defendant, however, was able to recover control of the Pacifica and drove it at a high rate of speed down Sorghum Mill Drive, first at Sergeant Christopher Cote, who was

⁵ Testimony from H. Wayne Carver II, then the state's chief medical examiner, and Malka Shah, an assistant medical examiner, established that H and M, who also sustained severe burns, were killed by asphyxiation from inhaling smoke containing toxic carbon monoxide.

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standing in the road with a long rifle but was able to jump out of the way, and then toward a bend in the road where he crashed into a pair of police cruisers that had parked in a V formation to block the road, causing the airbags to deploy and the vehicle to stop. At that point, multiple police officers apprehended the defendant and Hayes. When questioned after being grabbed forcefully by Joseph Vitello, a Cheshire police detective, the defendant told the officers that there were no other accomplices, that he believed J was dead, and that there were “two girls in the upstairs . . . front facing bedrooms, and that they were still alive.”⁶ The officers placed the defendant and Hayes under arrest. After his arrest, the defendant waived his rights and gave a detailed statement to the investigating officers, including Vitello and Rafael Medina, a state police detective, which was admitted into evidence at trial.⁷

The state charged the defendant with six counts of capital felony in violation of General Statutes (Rev. to 2007) § 53a-54b, three counts of murder in violation of General Statutes § 53a-54a (a), four counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B), one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of burglary in the second degree in

⁶The officers spoke to the defendant after Hayes did not answer any of their questions, stating only that “things just got out of control.”

⁷The defendant moved to suppress this statement and an additional statement that he had made concerning two break-ins in the neighborhood that the state wished to offer as uncharged misconduct evidence. The defendant argued that he had not made a voluntary, knowing, and intelligent waiver of his privilege against self-incrimination pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct.1602, 16 L. Ed. 2d 694 (1966), because he had made those statements while sleep deprived and under the influence of injuries sustained in the vehicle crash while fleeing. Following an evidentiary hearing on August 23, 2011, the trial court denied the motion to suppress, concluding that the defendant’s arguments were speculative and unsupported by the evidence. The defendant does not directly challenge the trial court’s ruling on the motion to suppress in this appeal, although it is implicated by one of his *Brady* claims. See part III C 2 of this opinion.

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violation of General Statutes § 53a-102, one count of arson in the first degree in violation of General Statutes § 53a-111 (a) (1), and one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2).

The defendant and Hayes were tried separately in New Haven. Hayes was tried first in the fall of 2010; he was found guilty by a jury of, inter alia, multiple counts of capital felony and sentenced to death. In mid-2011, following extensive pretrial motions practice, the defendant's case was tried to a jury, which returned a verdict of guilty on all counts. After a penalty phase trial with respect to the capital felony counts, the trial court sentenced the defendant in accordance with the jury's verdict to six consecutive death sentences, followed by a term of imprisonment of 140 years. This direct appeal followed. See footnote 1 of this opinion.

While this appeal was pending, this court held in *State v. Santiago*, 318 Conn. 1, 9–10, 122 A.3d 1 (2015), and reaffirmed in *State v. Peeler*, 321 Conn. 375, 377, 140 A.3d 811 (2016), that the imposition of the death penalty on offenders convicted of capital felonies prior to the prospective abolition of the death penalty by statute on April 25, 2012, would violate the Connecticut constitution's prohibition of cruel and unusual punishment. Accordingly, the trial court granted the defendant's motion to correct an illegal sentence and vacated his death sentences; the trial court resentenced him to a total effective sentence of six consecutive sentences of life imprisonment without the possibility of release, followed by a term of imprisonment of 140 years.⁸

On appeal, the defendant claims that (1) the trial court improperly denied his motion to change the venue

⁸ In resentencing the defendant, for double jeopardy purposes, the trial court vacated three of the defendant's murder sentences and his sexual assault sentence pursuant to this court's decision in *State v. Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

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of his trial from New Haven given the effects of prejudicial pretrial publicity, (2) the trial court improperly denied his challenges for cause to twelve prospective jurors, (3) the trial court improperly denied his motions for relief following the state's disclosure of certain letters written by Hayes while he was incarcerated, (4) the prosecutor deprived him of his due process right to a fair trial by failing to disclose certain communications among various Cheshire police officers in violation of *Brady*, (5) the prosecutor failed to correct materially false expert testimony in violation of *Napue* and *Giglio*, and (6) the trial court unconstitutionally applied the stringent conditions of confinement pursuant to § 18-10b to the defendant after his death sentences were vacated. Additional facts and procedural history will be set forth in the context of each claim on appeal.

I

PRETRIAL PUBLICITY AND JURY SELECTION CLAIMS

We begin with the defendant's claims arising from adverse pretrial publicity about this case, which he contends sent the New Haven area into "paroxysms of inquisitional paranoia and communal hysteria." Specifically, the defendant argues, inter alia, that the trial court improperly denied (1) his motions for a change of venue and for a new trial, and (2) his challenges for cause to numerous jurors.⁹

A

Additional Relevant Facts and Procedural History

On February 4, 2011, the defendant filed a motion to change the venue of the trial from New Haven to the judicial district of Stamford-Norwalk (Stamford). In

⁹ We note that the defendant suggests, but does not address in detail, additional claims of error arising from the pretrial publicity and jury selection, which we decline to review. See footnote 27 of this opinion.

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that motion, the defendant argued that Stamford was “the most potentially neutral site” given the “unprecedented, prejudicial publicity surrounding this case, as exacerbated by the recent trial of . . . Hayes,” during which Hayes attempted “to deflect responsibility for his crimes” In support of the motion, the defendant also filed an accompanying memorandum of law and a study that was undertaken by two psychology professors at the John Jay College of Criminal Justice of the City University of New York, Steven Penrod¹⁰ and Margaret Bull Kovera,¹¹ who conducted a telephone survey to analyze the effect of pretrial publicity in this case on potential jurors in several judicial districts, namely, New Haven, Fairfield, Stamford, and Danbury.¹² The study was intended to determine the proportion of qualified jurors¹³ who had heard about this case, the extent and sources of their knowledge about the case, and the degree to which they believed the defendant

¹⁰ Penrod, who holds the position of distinguished professor, has focused his experimental research on jury decision making, including the effect on juries of exposure to pretrial publicity. He has administered surveys to assess the effects of pretrial publicity in approximately twenty-five civil and criminal cases over a twenty-five year period in connection with providing expert testimony on pretrial publicity and venue matters.

¹¹ Kovera consulted with Penrod in developing the study. She has conducted numerous studies on jury decision making and the effects of pretrial publicity, and has published two books and more than fifty scientific journal articles and book chapters. Like Penrod, she also has testified as an expert witness in numerous venues, including Iowa, New York, Maryland, and Canada.

¹² At the hearing on the motion to change venue, Penrod testified that the defendant’s attorneys had selected the four judicial districts. Penrod was familiar with them because he had also performed a similar study in connection with Hayes’ trial.

¹³ Penrod stated that his researchers did not ask questions about case knowledge until after they had preliminarily established that the juror would be qualified to serve on a jury in Connecticut by verifying their age, United States citizenship, residence in the district being studied, and their qualification to serve on a death penalty jury under United States Supreme Court case law. The study excluded without further inquiry those survey respondents who reported knowing any person involved in the case, including attorneys and witnesses.

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was guilty and had arrived at some judgment “about what the appropriate penalty would be for this case.” The study concluded that New Haven was “resoundingly the least favorable judicial district in terms of juror taint, whereas [Stamford was] the most favorable relative to affording [the defendant] the best opportunity to empanel a fair and impartial jury.”¹⁴

At a hearing on the motion to change venue, Penrod explained the study.¹⁵ He described the pretrial publicity as “[o]verwhelmingly negative” with respect to the defendant, with guilt and death penalty judgments running approximately 20 percent higher than they had in a similar study he had performed slightly more than one year before in connection with Hayes’ trial. Approximately 97 percent of qualified jurors in Stamford recognized the case, and approximately 98 percent of qualified jurors in New Haven recognized it, either immediately by name or after being prompted with one cue, namely, that it was a home invasion. The lowest recognition level was in Danbury, with approximately 94 percent recognition. The recognition of this case in all four districts studied was comparable to the state court prosecution of Terry Nichols, who had bombed the Alfred P. Murrah Federal Building in Oklahoma City, after his conviction in fed-

¹⁴ The defendant suggested the judicial district of Fairfield as an alternative to Stamford.

¹⁵ In addition to Penrod, Celia Lofink, a psychologist who had assisted the defendant’s legal team by tracking media coverage of this case, testified at the hearing. Lofink testified that her research, conducted by capturing Google Alerts to news articles using the defendant’s last name and W’s name indicated that there were 1808 media reports about this case from the date of the offense through the date of the hearing. Lofink’s results reflected worldwide coverage, although the majority of the articles were from Connecticut. Lofink then presented the court with a chronologically organized table identifying each article by title and source, along with a flash drive containing the text and any reader comments accompanying those articles, both of which were admitted into evidence as court exhibits. Lofink testified, however, that she was not aware of any technology that would allow her to determine how many people had actually read each article.

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eral court, the Menendez brothers,¹⁶ and John Walker Lindh, the “American Taliban,”¹⁷ in their respective jurisdictions. Penrod opined that the “least prejudicial” of the four studied judicial districts would be Stamford because it is “generally the lowest across the board” with respect to judgments about the defendant’s guilt and knowledge about the case. Penrod stated, however, that this was a matter of “relative disadvantage,” given that this case reflected “the highest levels of prejudgment of guilt” he had ever seen.

Turning to a district by district analysis of the respondents’ knowledge about the case,¹⁸ Penrod noted that,

¹⁶ The case of Lyle and Erik Menendez, two young men who killed their wealthy parents in Beverly Hills, California, in 1989, involved a nationally televised trial at which they claimed self-defense from physical and sexual abuse. They were tried jointly, with a separate jury for each brother; the juries hung at the first trial, but the brothers were convicted at their second trial before a single jury. See Biography.com Editors, Erik Menendez Biography (last modified November 17, 2020), available at <https://www.biography.com/crime-figure/erik-menendez> (last visited April 8, 2021).

¹⁷ John Walker Lindh is an American citizen who was captured in Afghanistan in 2001, where he had lent aid to Osama Bin Laden’s terrorist organization, Al Qaeda, and participated in a prison uprising that led to the death of a Central Intelligence Agency officer. See, e.g., C. Rosenberg, “‘American Taliban,’ Held 17 Years, Nears Release,” N.Y. Times, May 22, 2019, p. A1.

¹⁸ Once a survey respondent established some knowledge of the case, the survey progressed to open-ended questions to assess additional knowledge of the incident, followed by specific inquiries about whether the respondent (1) had read a book written about the case, (2) had seen a television interview of W by Oprah Winfrey, (3) had heard about journals the defendant had written in prison, (4) had learned of the Hayes trial and verdict, (5) had followed the media coverage of this case, (6) could be fair and impartial and render a verdict based only on the evidence presented at trial in this case, and (7) believed that the defendant should be executed.

With respect to more granular knowledge of the case, the most prominent answer among the 1284 people across the four judicial districts who recognized the case was that 60 percent provided some information about the victims, with 42 percent being aware that the victims were the wife and daughters, and 25 percent, the next largest category, being aware that the husband escaped. Fifty-five percent had some information about the perpetrators, with more than half remembering that there were multiple perpetrators, 9 percent being aware of their status as parolees, and 10 percent being aware of Hayes’ conviction. With respect to the crime itself, 58 percent were

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although there was a very similar reported rate of following the news media generally, approximately 70 percent of New Haven respondents followed this case “very closely” or “somewhat closely,” as compared to approximately 49 percent in Stamford.¹⁹ He determined that Stamford respondents had a much lower rate of case knowledge than those in New Haven, with 2.5 percent knowing the names of the defendant and Hayes spontaneously and 58 percent after receiving a cue, as compared to 22 percent and 89 percent in New Haven, respectively. In Stamford, 73 percent were aware of Hayes’ conviction, in comparison to 88 percent in New Haven; with respect to Hayes’ death sentence, the awareness rates were 39 and 66 percent, respectively. Forty-nine percent of the New Haven respondents had seen or heard about W’s interview with Oprah Winfrey approximately one month before the survey took place, as compared to 31 percent in Stamford. Thirty-one percent of the respondents in New Haven had heard about the defendant’s prison journals, in comparison to 11 percent in Stamford. Interestingly, more respondents in Stamford believed that the crimes were “disturbing/graphic” than those in New Haven, 5.6 and 4.9 percent, respectively, which is a difference that Penrod did not believe was statistically significant.

Moving beyond general awareness to impartiality, in Stamford, 65 percent of the respondents had “very nega-

aware of some detail, with 30 percent being aware of the sexual assaults, robbery, or fire. Thirty-three percent categorized the crime as “horrible” or “heinous.”

Turning to death qualification, Penrod stated that, across the four judicial districts, approximately two-thirds of those persons surveyed would not automatically vote for the death penalty, and approximately 75 percent would not allow their personal views on the death penalty to preclude them from rendering a guilty verdict.

¹⁹ In New Haven, more respondents could offer greater detail about the case, with most able to offer an average of five or six details rather than the two or three provided by respondents in the other districts.

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tive” impressions of the defendant, as compared to 76 percent in New Haven; there were 6 and 5 percent reports of “somewhat negative” impressions, respectively, for each jurisdiction.²⁰ In Stamford, 50 percent of the respondents believed that the defendant was “definitely guilty” of murder, and 22 percent “probably guilty,” as compared to 60 and 25 percent, respectively, in New Haven.²¹ In New Haven, 71 percent of those surveyed reported that they could decide the case based solely on the evidence, as compared to 80 percent in Stamford. Thirty-two percent said that they could “definitely” be “fair and impartial” in New Haven with respect to the defendant, and 18 percent “probably” so, as compared to 44 and 22 percent in Stamford, respectively. Penrod stated that the “most significant” difference between New Haven and Stamford was the number of respondents who believed that they could render a not guilty verdict, which was 15 percent in New Haven and 30 percent in Stamford. In Penrod’s view, this suggested that there were “twice as many people” prepared not to convict in Stamford, with Stamford below New Haven with respect to virtually every measure of knowledge about the case.²² Ultimately, Penrod described Stamford as “a venue that is . . . less prejudice[d] against the defendant [and that] has a smaller fund of knowledge [on] which that prejudice is based.”

²⁰ Conversely, in New Haven, 2.5 percent of the population reported a “positive” impression of the defendant, as compared to 1.6 percent in Stamford. In New Haven, 27 percent of the respondents could not suggest the most compelling evidence against the defendant, as compared to 48 percent in Stamford.

²¹ Fifteen percent of the respondents in Stamford did not know how to answer the question regarding their certainty as to the defendant’s guilt, as compared to 6 percent in New Haven.

²² Penrod stated in response to questions from the trial court that the margin of error was 5 or 6 percent depending on various underlying factors in the study. With that margin of error factored in, Penrod still believed that it was a significant enough difference to move the trial from New Haven to Stamford, particularly given the lower volume of coverage in the Stamford Advocate as compared to the New Haven Register.

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During cross-examination, Penrod acknowledged that the publicity concerning this case was “extensive” across all four of the surveyed districts, with the lowest level of recognition being approximately 94 percent in Danbury and the highest being approximately 98 percent in New Haven. Penrod also acknowledged that, with respect to some specific factors, there was greater recognition in Stamford than in New Haven, and that approximately 70 percent of the respondents in New Haven reported that they could render a verdict based just on the evidence, with approximately 50 percent of the respondents in New Haven “definitely” or “probably” able to give the defendant a fair trial, despite that being a “somewhat lower” percentage answer than in Stamford.²³

²³ Penrod explained that the intersection of those who believed that they could be fair and impartial, yet who had also prejudged the defendant’s guilt, raised concerns of “conformity prejudice,” in which jurors “worry about how they will be perceived in the broader community if they come back with a verdict that’s at odds with community expectations about things.” Penrod described conformity prejudice as a concept that is rooted in social norms about jury service as a civic responsibility, and as indicating that pretrial publicity has an “endur[ing]” effect that lasts through the presentation of trial evidence and into deliberations. The concept of conformity prejudice extends from guilt to the death penalty determination. Penrod believed that conformity prejudice was a “reasonable concern” in this case because there was “so much knowledge about the case” and a “clear sentiment toward guilt,” with “part of that knowledge . . . about the nature of the case and the perception of it being a gruesome case.” He explained that the concept of conformity prejudice drove the decision to move Timothy McVeigh’s federal trial for the Oklahoma City bombing from Oklahoma City to Denver, given the concern that it would be difficult for jurors to return to the community having not returned its desired verdict—a concern that Penrod believed extended to this case.

With respect to conformity prejudice, Penrod noted that studies have shown a differing response rate to the question about whether the respondent can be fair and impartial, where people are significantly—nearly 60 percent—more likely to admit difficulties remaining impartial during a survey than they would in response to a question from a judge during jury selection. Penrod also testified that studies indicate that people have difficulty recognizing their own biases, including those arising from the effects of pretrial publicity, and are attuned to give “socially desirable response[s]” to questions on this topic. Penrod observed that the very effect of the juror

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Significantly, Penrod also acknowledged that studies indicated that more extensive voir dire processes were beneficial for the purpose of exploring a potential juror's knowledge and attitudes about the case, and that there has not been research exploring the effect of voir dire lasting more than one hour in counteracting the effects of pretrial publicity. He agreed that Connecticut's individual voir dire process is good—and “more than minimal” for counteracting adverse pretrial publicity—and would be “[u]nquestionably” more effective than the phone survey. Penrod also conceded that it was not “impossible” to select a fair and impartial jury from New Haven but simply that it would be “more likely” to occur in Stamford, which would also present “significant difficulties” in that respect. Penrod agreed with the trial court's observation that the difficulties of teasing out prejudices during voir dire would be present in either location.

After the hearing, the trial court denied the defendant's motion for a change of venue. In its memorandum of decision, the trial court emphasized that the cases had been widely reported on throughout the state—and, indeed, the world—observing that many of the media materials provided had been published on the Internet, as well as in print. The trial court noted that “at least 97 percent of Connecticut residents have at least heard” of the defendant and Hayes. Relying on *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), and *State v. Reynolds*, 264 Conn. 1, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004), the trial court declined to presume the existence of prejudicial publicity prior to voir dire, emphasizing

oath administered by an authority figure, namely, the trial judge—even during voir dire—might be to reinforce, rather than to alleviate, the effect of conformity prejudice.

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(1) that the large, diverse pool of jurors in New Haven, with a population of more than 846,000 people, rendered it distinct from the contaminated pool in the much smaller rural community at issue in *Rideau*, (2) that the survey respondents' perceptions of guilt did not arise from admissions of guilt, (3) the lapse of four years from the crime to the time of trial, and (4) the fact that the jury in Hayes' case, which had received similar publicity, had returned a verdict finding him not guilty of one count of arson, which suggested that jury impartiality was possible despite the extensive publicity. The trial court contrasted Connecticut's "particularly searching" individual voir dire process with the "vastly more truncated federal jury selection process found constitutionally adequate in *Skillling*" and emphasized that "the parties will have ample opportunity to inquire about the effects of pretrial publicity on the individuals involved." The court further stated that it would revisit its decision should voir dire not produce the requisite number of impartial jurors.

Jury selection began on March 16, 2011, and ended on June 14, 2011.²⁴ The court agreed with the parties' recommendation to seat twenty-one jurors, twelve regular, six alternate, and three backup alternates. The trial court allotted each party forty peremptory challenges, ten more than the thirty mandated in death penalty cases under General Statutes 54-82h (a).²⁵ The twelfth regular juror was selected on May 10, 2011; at that point, the state had used twenty-one peremptory challenges and the defendant twenty-eight. On June 8, 2011, after the six alternates had been chosen, the defendant had one peremptory challenge remaining. He requested

²⁴ We discuss the voir dire of individual jurors in detail in part I D of this opinion.

²⁵ The trial court had denied the defendant's request for a total of sixty peremptory challenges, which would be twice the number statutorily granted to the state.

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forty more for the selection of the three backup alternates.²⁶ The trial court denied that motion. Once jury selection was concluded on June 14, 2011, with the three backup alternates selected, each party had exhausted its challenges. None of the alternates was ultimately required to deliberate, and the defendant did not challenge for cause any juror who actually decided his guilt.

On May 16, 2011, the defendant also filed a motion to continue the then pending jury selection in this case for approximately three months, arguing that Senator Edith Prague, a prominent state legislator and longtime opponent of the death penalty, had publicly announced her decision to withdraw her support for abolition of the death penalty after meeting with W. In announcing her decision, Senator Prague made comments, later reported in the *Hartford Courant*, the *New Haven Register*, and other print and broadcast media, that “[t]hey should bypass the [defendant’s] trial and take that second animal and hang him by his penis from a tree out in the middle of Main Street.’” Senator Prague reiterated her comments in television news interviews over the following days; she expressed no regret for having made them and emphasized her support for the P family, calling the defendant a “‘monster’” The defendant argued that this call for a “lynching” lent “legitimacy” to similar views expressed in reader comments in online news stories about this case and further infected the venire. The defendant argued that a three month continuance would reduce the prejudicial effect of Prague’s call for a lynching by allowing it to “slip from the mind of potential jurors.” The trial court denied that motion.

²⁶ The defendant argued that the additional challenges were necessary to preserve his right to an impartial jury in light of pretrial publicity that resulted in both overt and conformity prejudice. For a discussion of conformity prejudice, see footnote 23 of this opinion.

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Over the monthslong jury selection process, the conduct of several prospective jurors—none who ultimately served as jurors—evidenced the emotional impact of this case. Questioning during voir dire revealed that some prospective jurors had discussed with each other their distaste for the defendant, including a belief that he should immediately receive the death penalty. Other prospective jurors became emotional, with some refusing to enter the courtroom and others berating the defendant and openly stating their beliefs, either in open court or to court staff, that the defendant should “fry,” or offering to execute him personally. For example, one prospective juror, J.M.-M., after being peremptorily challenged by the defendant, screamed at him and called him a “[k]iller, asshole.” Another, B.G., after being excused for hardship, offered to “take care of him right here.” Similarly, two alternate jurors, D.V. and J.B., who had been selected based on their assurances that they could withstand pressure and decide the case impartially, were stricken from the panel after they returned to court to express concern about their impartiality after friends and coworkers had questioned them about the case and offered unsolicited opinions.

On September 12, 2011, the defendant renewed his motion for sequestration of the jury pursuant to Practice Book § 42-22, arguing that sequestration was necessary to preserve his right to an impartial jury in light of the pretrial publicity and the notorious nature of the case. The trial court denied this motion.

On September 15, 2011, the defendant again moved for a change of venue from New Haven to Stamford, and to strike the selected jury panel, arguing that the subjective assessment of juror impartiality via the voir dire process was insufficient to protect his rights to a fair trial, as was demonstrated by the previously described statements of prospective jurors J.M.-M. and B.G. and alternate jurors D.V. and J.B. The defendant

argued that the conduct of these individuals, along with the comments of others during voir dire, was indicative of the adverse effects of the pretrial publicity. The trial court denied this motion. After he was found guilty, the defendant renewed these pretrial publicity claims in his motion for a new trial, which the trial court also denied.

B

Review of the Defendant's Pretrial Publicity Claims and General Governing Principles

On appeal, the defendant relies on, among other cases, the United States Supreme Court's decisions in *Skilling v. United States*, supra, 561 U.S. 358, and *Rideau v. Louisiana*, supra, 373 U.S. 723, and contends that, given the extensive, frenzied, and inaccurate media publicity in this "extreme" case, an irrebuttable presumption of prejudice mandated moving the trial from New Haven to Stamford, which was the Connecticut venue mostly likely to yield an impartial jury. Arguing that *Skilling* is distinguishable because it was a white collar case that took place in the much larger city of Houston, Texas, the defendant argues that emotional outbursts in open court by multiple prospective jurors, with some openly weeping or shouting at him, demonstrated the impact on the New Haven juror pool of the media coverage of this crime, including Hayes' earlier trial. The defendant contends that any presumption of prejudice cannot be rebutted because the voir dire in this case demonstrated that six of the eighteen seated jurors had preconceived notions that the defendant was guilty, "virtually all had substantial knowledge of the case," and many had been told by family, friends, and other people that the defendant was guilty and should be sentenced to death. Overall, the defendant argues that "the voir dire proceedings establish beyond dispute that the jury selection process did not produce a jury untainted by pretrial publicity and community animus,"

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with the seated jurors' self-assessments that "they could be fair . . . [being] far from conclusive proof of their impartiality."²⁷ (Internal quotation marks omitted.)

In response, the state, citing, as an example, the Boston Marathon bombing case; see *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) (order denying petition for mandamus); contends that the trial court properly applied the factors articulated by the Supreme Court in *Skilling v. United States*, supra, 561 U.S. 382–83, in denying the motion for a change of venue, given the relatively large and diverse jury pool in New Haven, the "porosity of geographic boundaries due to the effects of the Internet" on the media coverage of this case, Penrod's study indicating that prospective jurors had greater awareness of the crime in general, rather than of the defendant personally, the fact that coverage of Hayes' preceding trial and conviction would not disadvantage the defen-

²⁷ The defendant also appears to raise, as independent claims of error, arguments that the trial court improperly (1) declined to discontinue jury selection after Senator Prague made her lynching comments, (2) denied his motions to dismiss various panels of prospective jurors based on certain outbursts in court by prospective jurors, (3) declined to award him additional peremptory challenges, (4) denied his motions to sequester the jury, (5) denied his request to use a jury questionnaire, (6) denied his motion to preclude supporters of the P family from wearing pins from the P Family Foundation in the courtroom, (7) denied his motion to remove newspaper boxes located outside the courtroom, (8) failed sua sponte to require that jurors inform the court of exposure to publicity or communications about the case, or to staunch the flood of comments by the state or to permit the defendant relief from the gag order to respond publicly, and (9) failed sua sponte to instruct the venirepersons not to discuss the case among themselves. To the extent that these nine arguments constitute independent claims of error outside the purview of the constitutional claims regarding actual or presumed prejudice, we decline to reach them because we agree with the state's argument that they are inadequately briefed, with virtually no independent legal analysis. See, e.g., *Lafferty v. Jones*, 336 Conn. 332, 375 n.30, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021); *State v. Buhl*, 321 Conn. 688, 725–26, 138 A.3d 868 (2016). We do, however, consider their factual predicates within the context of the actual and presumptive prejudice claims, which we address in great detail.

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dant's apparent strategy of asserting that Hayes was the ringleader, and the fact that Hayes' jury had rendered a partial acquittal at his trial. The state also relies heavily on the "unique" protections provided by Connecticut's constitutionally mandated individual voir dire process; *Rozbicki v. Huybrechts*, 218 Conn. 386, 392 n.2, 589 A.2d 363 (1991); see Conn. Const., amend. IV; to demonstrate that any prejudice was rebuttable due to a lack of actual prejudice because the jury, as empaneled after a monthslong voir dire, was one that the defendant himself had "accepted" as "actually . . . impartial," and the trial court took precautions to protect that impartiality. The state posits that the jurors selected, although aware of the crimes generally, knew nothing about the primary contested issue in this case, namely, the role and relative culpability of each accused. We agree with the state and conclude that the trial court did not violate the defendant's right to a fair trial by an impartial jury when it denied his motions for a change of venue from New Haven to Stamford because there was neither presumptive nor actual prejudice resulting from the pre-trial publicity.

We begin with the standard of review and background legal principles. "In requesting a change of venue, a defendant bears the burden of showing that he could not otherwise receive a fair and impartial trial. The trial court exercises its discretion in deciding whether to grant such a change of venue. . . . The trial court's discretion is governed by Practice Book [§ 41-23], which provides: Upon motion of the prosecuting authority or the defendant, or upon his own motion, the judicial authority may order that any pending criminal matter be transferred to any other court location: (1) If the judicial authority is satisfied that a fair and impartial trial cannot be had where the case is pending Despite the broad discretion vested in the trial court in considering such a motion, its denial has constitutional

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implications and appellate review requires an independent evaluation of the circumstances upon which the claim of an unfair trial is based. . . .

“For an appellate court to reverse a conviction on the [ground] of prejudicial pretrial publicity, a defendant generally must prove actual juror prejudice. . . . A defendant need not, however, show actual prejudice in extreme circumstances whe[n] there has been inherently prejudicial publicity such as to make the possibility of prejudice highly likely or almost unavoidable. . . . A defendant cannot rely, however, on the mere fact of extensive pretrial news coverage to establish the existence of inherently prejudicial publicity. Prominence does not, in itself, prove prejudice. . . . Rather, [t]he defendant must demonstrate that the publicity was so inflammatory or inaccurate that it created a trial atmosphere utterly corrupted by press coverage.” (Citations omitted; internal quotation marks omitted.) *State v. Reynolds*, supra, 264 Conn. 222–23; see *Skilling v. United States*, supra, 561 U.S. 380–81; *Murphy v. Florida*, 421 U.S. 794, 798–99, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 362–63, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); *State v. Pelletier*, 209 Conn. 564, 569–71, 552 A.2d 805 (1989). Indeed, “[t]o place our analysis of the defendant’s claim regarding the extensive publicity in context, we must recognize the first amendment right of a free press to observe and publicize criminal trials. . . . It follows naturally that the public will hear and read reports of such proceedings. Dissemination of such information and the accompanying publicity itself, therefore, [are] not constitutionally objectionable. Extensive publicity implicates the defendant’s due process rights only if it rises to a level sufficient to preclude a fair trial for the accused.” (Citation omitted; footnote omitted.) *State v. Crafts*, 226 Conn. 237, 257, 627 A.2d 877 (1993).

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Before we turn to the record in this case, we find instructive a detailed review of *Skilling v. United States*, supra, 561 U.S. 358, which is the United States Supreme Court’s most recent decision concerning pretrial publicity. In *Skilling*, the court considered whether Jeffrey K. Skilling, the chief executive officer of Enron Corporation (Enron), had received a fair trial on criminal charges arising from the collapse of that business in the federal district that included Houston, which had been its home. *Id.*, 367–68. Given the extensive and negative pretrial publicity about the case because of the severe economic consequences Enron’s collapse had on the Houston area; *id.*, 368–70; Skilling argued “that his trial ‘never should have proceeded in Houston.’ . . . And even if it had been possible to select impartial jurors in Houston, [t]he truncated voir dire . . . did almost nothing to weed out prejudices,’ . . . so ‘[f]ar from rebutting the presumption of prejudice, the record below affirmatively confirmed it.’ ” (Citation omitted.) *Id.*, 377. The Supreme Court observed that “Skilling’s [fair trial] claim thus raise[d] two distinct questions. First, did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling’s jury?” *Id.*

The court began its analysis in *Skilling* with the “foundation precedent” of *Rideau v. Louisiana*, supra, 373 U.S. 723, in which “Wilbert Rideau robbed a bank in a small Louisiana town, [kidnapped] three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession. Without informing Rideau, no less seeking his consent, the police filmed the interrogation. On three separate occasions shortly before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. Rideau moved for a change of venue, arguing that he could not receive a

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fair trial in the parish where the crime occurred, which had a population of approximately 150,000 people.” *Skilling v. United States*, supra, 561 U.S. 379. The Supreme Court held that Rideau could not receive a fair trial because “[w]hat the people [in the community] saw on their television sets . . . was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder. . . . [T]o the tens of thousands of people who saw and heard it . . . the interrogation in a very real sense *was* Rideau’s trial—at which he pleaded guilty. . . . [The court] therefore [did] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire, that [t]he kangaroo court proceedings trailing the televised confession violated due process.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.*, quoting *Rideau v. Louisiana*, supra, 725–27.

The United States Supreme Court also considered in *Skilling* “two later cases in which media coverage manifestly tainted a criminal prosecution,” namely, *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), and *Sheppard v. Maxwell*, supra, 384 U.S. 333, both of which featured media coverage and reporting to the extent that the reporters and television crews physically overran the courtroom itself, creating “[b]edlam” and a “‘carnival atmosphere’” around the trial. *Skilling v. United States*, supra, 561 U.S. 379–80. Relying on *Murphy v. Florida*, supra, 421 U.S. 798–99, however, the court emphasized in *Skilling* that its “decisions . . . cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process. . . . Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.”²⁸ (Citations omitted;

²⁸ For a review of other United States Supreme Court pretrial publicity decisions relied on in *Skilling*, compare *Patton v. Yount*, 467 U.S. 1025,

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emphasis in original; footnotes omitted; internal quotation marks omitted.) *Skilling v. United States*, supra, 380–81. Accordingly, the court emphasized in *Skilling* that a “presumption of prejudice . . . attends only the extreme case.” *Id.*, 381.

The Supreme Court rejected *Skilling*’s argument “that [it] need not pause to examine the screening questionnaires or the voir dire before declaring his jury’s verdict void.” *Id.* The court emphasized that “[i]mportant differences separate *Skilling*’s prosecution from those in which [the court has] presumed juror prejudice,” contrasting Houston’s population of more than 4.5 million with the smaller communities at issue in its other cases, particularly *Rideau*. *Id.*, 381–82; see also footnote 28 of this opinion. The court observed that, with Houston’s “large, diverse pool of potential jurors, the suggestion that [twelve] impartial individuals could not be empan-

1032–34, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) (deferring to trial court’s decision to credit jurors’ statements of impartiality in retrial of defendant accused of murdering high school student in case of local notoriety, given passage of 4 years from time of crime to trial and 1.5 years from reversal of initial conviction to trial, despite fact that all but 2 of 163 panel members questioned had heard of case, and 8 of 14 seated jurors and alternates had at one time believed defendant to be guilty), and *Murphy v. Florida*, supra, 421 U.S. 800–801 (“The voir dire indicates no such hostility to [the] petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which [the] petitioner was charged and each had some knowledge of [the] petitioner’s past crimes, but none betrayed any belief in the relevance of [the] petitioner’s past to the present case. Indeed, four of the six jurors volunteered their views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime—a predisposition that could . . . operate [only] in [the] petitioner’s favor.” (Footnotes omitted.)), with *Irvin v. Dowd*, 366 U.S. 717, 719, 727–28, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (pretrial publicity was prejudicial in case involving detailed reporting of defendant’s extensive criminal history, details of his confession to murder and robbery spree, and his offer to plead guilty to avoid death penalty in newspaper that was circulated to 95 percent of small, rural community of only 30,000 people, with 8 of 12 seated jurors believing he was guilty, despite assurances of impartiality).

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eled is hard to sustain.” *Skilling v. United States*, supra, 561 U.S. 382.

The Supreme Court also considered the nature of the media coverage, observing that, “although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Rideau’s dramatically staged admission of guilt, for instance, was likely imprinted indelibly in the mind of anyone who watched it.” *Id.*, 382–83. The court also observed that, “unlike cases in which trial swiftly followed a widely reported crime . . . over four years elapsed between Enron’s bankruptcy and Skilling’s trial. Although reporters covered [Enron related] news throughout this period, the decibel level of media attention diminished somewhat in the years following Enron’s collapse.” (Citation omitted.) *Id.*, 383. The court further determined that Skilling was not prejudiced by the “[well publicized] decision” of a codefendant Enron executive to plead guilty because the District Court “took appropriate steps to reduce that risk,” such as delaying jury selection proceedings by two weeks and expanding voir dire inquiries to address recent publicity, including any news about the codefendant. (Internal quotation marks omitted.) *Id.*, 384–85. “Finally, and of prime significance,” the court emphasized that the jury’s verdict in *Skilling* demonstrated the jurors’ impartiality, insofar as they found him not guilty “of nine [insider trading] counts. Similarly, earlier instituted [Enron related] prosecutions yielded no overwhelming victory for the [g]overnment.” *Id.*, 383. Thus, the court concluded that “Skilling’s trial, in short, share[d] little in common with those in which [the court] approved a presumption of juror prejudice,” emphasizing that “pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. . . . In this case . . . news sto-

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ries about Enron did not present the kind of vivid, unforgettable information [the court has] recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact." (Citation omitted; internal quotation marks omitted.) *Id.*, 384.

The Supreme Court next turned to the actual prejudice claims and examined the voir dire in *Skilling* to consider whether an impartial jury had in fact been selected. *Id.*, 385. Emphasizing the customary deference given by appellate courts to trial courts' assessments of juror impartiality; see *id.*, 386–87; the court engaged in a detailed examination of the juror selection process, including the use of individual voir dire in conjunction with a "comprehensive questionnaire drafted in large part by *Skilling*," which was used as an initial screening tool "to identify prospective jurors excusable for cause and served as a springboard for further questions put to remaining members of the array. Voir dire thus was . . . the culmination of a lengthy process." (Internal quotation marks omitted.) *Id.*, 388; see *id.*, 389 ("[i]nspection of the questionnaires and voir dire of the individuals who actually served as jurors satisfie[d] [the court] that . . . the selection process successfully secured jurors who were largely untouched by Enron's collapse"); *id.*, 395 (The court emphasized the role of the individual voir dire process "to uncover concealed bias. This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service."). The court further rejected *Skilling*'s claims that several specific jurors who sat at his trial were biased, noting that he had challenged only one of them for cause. See *id.*, 395–99.

In the wake of *Skilling*, it has become axiomatic that, although "any [high profile] case will receive significant media attention" and "people in general, and especially

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the well-informed, will be aware of it . . . [k]nowledge . . . does not equate to disqualifying prejudice. Distinguishing between the two is at the heart of the jury selection process.” *In re Tsarnaev*, supra, 780 F.3d 15; see also *State v. Reynolds*, supra, 264 Conn. 224 (“[j]urors need not be totally ignorant of the facts and issues involved in a criminal trial and the fact that some jurors have some prior knowledge about the case does not itself constitute identifiable jury prejudice” (internal quotation marks omitted)). With these principles in mind, we now examine the record in this case to determine whether it is one in which the “community’s knowledge . . . has . . . crossed from familiarity . . . to . . . prejudice”; *In re Tsarnaev*, supra, 23; mindful that “the prospect of seating an unbiased jury” is the key to the presumed prejudice inquiry, with the actual prejudice inquiry “turn[ing] on [the] perception of the adequacy of the [jury selection] process” itself. (Internal quotation marks omitted.) *Skilling v. United States*, supra, 561 U.S. 385 n.19.

C

Presumed Prejudice

In determining whether prejudice should be presumed, we consider the following factors articulated by the United States Supreme Court in *Skilling*, namely, (1) “the size and characteristics of the community in which the crime occurred,” (2) the nature of the media coverage, (3) whether the passage of time has alleviated the impact of any prejudicial publicity, and (4) whether the jury’s actions and verdict, along with the jury selection procedures utilized, were consistent with imposing a presumption of prejudice. *Skilling v. United States*, supra, 561 U.S. 382–83.

Courts applying the *Skilling* factors have deemed the size and characteristics of the community to be of paramount importance. “The larger the community, the

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more likely that impartial jurors can be found within it. . . . And [i]t is well recognized that in a small rural community in contrast to a large metropolitan area, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time. . . . Thus both the size and the character of the county's population, while not determinative, are factors to be considered." (Citation omitted; internal quotation marks omitted.) *State v. Sowell*, 148 Ohio St. 3d 554, 565, 71 N.E.3d 1034 (2016), cert. denied, U.S. , 138 S. Ct. 101, 199 L. Ed. 2d 63 (2017). Although smaller than the Houston and Boston metropolitan areas considered in *Skilling v. United States*, supra, 561 U.S. 382, and *In re Tsarnaev*, supra, 780 F.3d 21, New Haven, with an urban and suburban population of 846,000, is significantly larger than other regions that courts have deemed sufficiently populous to permit the selection of an impartial jury, even in cases of local, and often national, notoriety, particularly when expanded voir dire procedures are employed. See, e.g., *United States v. Philpot*, 733 F.3d 734, 738, 741 (7th Cir. 2013) (Northwest Indiana, with jury pool drawn from two counties with population of about 600,000, was not "a small town" that would support presumption of prejudice in political corruption case); *United States v. Jacques*, Docket No. 2:08-cr-117, 2011 WL 1706770, *1, *6, *9 (D. Vt. May 4, 2011) (declining to move venue of trial for widely known rape and murder of twelve year old girl from Vermont to New York given federal district division's population of 500,000 and court's intention to enlarge jury pool and use expanded voir dire process to assess effect of pretrial publicity); *Luong v. State*, 199 So. 3d 139, 144, 147-50 (Ala. 2014) (Mobile County, Alabama, had diverse pool of more than 400,000 citizens that functioned to mitigate against extensive pretrial publicity in death penalty case of defendant accused of throwing his four young children from bridge); *People*

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v. *Peterson*, 10 Cal. 5th 409, 416, 441, 472 P.3d 382, 268 Cal. Rptr. 3d 56 (2020) (concluding that 700,000 residents of San Mateo County constituted sufficiently large pool from which to draw jury in high profile death penalty case concerning husband who killed his pregnant wife and unborn child), cert. denied, U.S. , 141 S. Ct. 1440, 209 L. Ed. 2d 159 (2021); *State v. Robinson*, 303 Kan. 11, 54–55, 74–77, 363 P.3d 875 (2015) (no presumed prejudice in county of nearly 500,000 residents, despite survey indicating 94 percent awareness and overwhelming belief in defendant’s guilt in case involving sexually motivated serial killings of multiple women), cert. denied, U.S. , 137 S. Ct. 164, 196 L. Ed. 2d 138 (2016); *State v. Kaarma*, 386 Mont. 243, 251–52, 254–55, 390 P.3d 609 (no presumed prejudice in Missoula County, Montana, with population of approximately 110,000 and six major media outlets, despite 90 percent juror awareness of homicide case, given availability of questionnaire and individual voir dire), cert. denied, U.S. , 138 S. Ct. 167, 199 L. Ed. 2d 40 (2017); *State v. Gribble*, 165 N.H. 1, 5, 19–20, 66 A.3d 1194 (2013) (size of Hillsborough County, New Hampshire, which has population of more than 400,000 and includes city of Manchester, mitigated effects of pretrial publicity in home invasion case involving murder of woman and attempted murder of her daughter, even after trial and sentence of coconspirator). But cf. *Commonwealth v. Toolan*, 460 Mass. 452, 464, 951 N.E.2d 903 (2011) (observing that “[t]he small size of the Nantucket community weighed in favor of finding local prejudice” in light of its “just over 10,000 permanent residents” and fact that “[t]he extensive links among the victim’s family, members of the [overall] jury venire, and trial witnesses demonstrate[d] the network of social relations connecting this community, of which the victim was a valued member, and to which the defendant was an outsider”). The size and diversity of

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New Haven, with its population of 846,000 at the time of trial, greatly increase the feasibility of identifying an impartial jury, meaning that this *Skilling* factor weighs very strongly in favor of the state, particularly given the much smaller populations that have been deemed adequate to mitigate the prejudicial effect of substantial and adverse pretrial publicity.²⁹

With respect to media coverage and public awareness, as a general proposition, even a high volume of coverage about a sensational or particularly violent crime does not by itself tip this *Skilling* factor to favor

²⁹ This principle has, of course, also been applied in notorious cases in larger metropolitan areas. See *United States v. Warren*, 989 F. Supp. 2d 494, 499–500, 502–504 (E.D. La. 2013) (denying motion to transfer venue for New Orleans police officers’ retrial in Danziger Bridge shooting case after Hurricane Katrina because district had population of 1.5 million, nearly three years had passed since first trial, and court would utilize questionnaires and individual voir dire to identify potential jury prejudice); *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1220–27 (D. Utah 2010) (no presumed prejudice in Elizabeth Smart kidnapping case given district’s population of 2.8 million, despite fact that 9000 to 10,000 residents participated in search for her); *State v. Sowell*, supra, 148 Ohio St. 3d 565–66 (“widespread” pretrial publicity of serial rapist/murder case did not deprive defendant of fair trial when jury was selected after extensive voir dire, which included individual questioning as to effect of pretrial publicity, from county that included city of Cleveland with population of more than 1.2 million).

We acknowledge, however, that even a relatively large population may not necessarily obviate the need to move a trial in a particularly notorious case. See *United States v. Casellas-Toro*, 807 F.3d 380, 386–88 (1st Cir. 2015) (size of District of Puerto Rico, with 3 million residents, was balanced by its “compact, insular” population and media market, especially when federal trial held after conviction of reviled defendant in commonwealth court was “relatively unknown” outside of Puerto Rico); *People v. Boss*, 261 App. Div. 2d 1, 3–6, 701 N.Y.S.2d 342 (1999) (trial of police officer defendants charged with murder of Amadou Diallo should be moved from New York City given overwhelming and sensational pretrial publicity—including advertisements taken out by American Civil Liberties Union against defendants, commentary by public officials and opinion writers, and mass demonstrations—on point that “the two undisputed facts, namely that [forty-one] shots were fired and that . . . Diallo was unarmed, conclusively establish [the] defendants’ guilt and are dispositive of all possible factual and legal issues,” including “[routine] . . . assertions [by prospective jurors] that [the] defendants were motivated by racial prejudice”).

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a criminal defendant who is the subject of that publicity. See *State v. Carr*, 300 Kan. 1, 67, 69, 331 P.3d 544 (2014) (“[A] quadruple [execution style] homicide and an attempted [first degree] premeditated murder preceded by hours of coerced sex acts and robberies naturally [gave] rise to press coverage that some may fairly characterize as at least occasionally sensational [and led to increased purchases of home security systems]. It can hardly help but be so. . . . Yet, overall . . . the primarily factual tone of the press coverage . . . compensated for its sheer magnitude, and the second *Skilling* factor did not weigh in favor of presumed prejudice.” (Citation omitted.)), rev’d on other grounds, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016); see also *State v. Reynolds*, supra, 264 Conn. 223 (“[o]ne who is reasonably suspected [of] murdering [a police officer in the line of duty] cannot expect to remain anonymous” (internal quotation marks omitted)). This is particularly so, given that the impact of media coverage has become increasingly difficult to assess. Unlike the relatively limited local television coverage considered by the United States Supreme Court in *Rideau v. Louisiana*, supra, 373 U.S. 725–27, in which the viewership was geographically confined and readily ascertainable, we must also consider the reality of life in the twenty-first century. “Simply because prospective jurors may have heard about a case through media reports does not render them incapable of jury service, since, in today’s information age, [when] news of community events [is] disseminated virtually instantaneously by an ever multiplying array of delivery methods, it would be difficult to find [twelve] jurors who do not at least have some knowledge of the facts of an important and tragic incident like this one.” (Internal quotation marks omitted.) *State v. Addison*, 165 N.H. 381, 431, 87 A.3d 1 (2013); see *State v. Gribble*, supra, 165 N.H. 20 (describing difficulty of estimating exposure to pretrial publicity given publi-

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cation of news on Internet, which could be read nationwide, as compared to local print media or local television); cf. *United States v. Casellas-Toro*, 807 F.3d 380, 386–88 (1st Cir. 2015) (considering “[the] compact, insular community” in Puerto Rico in presuming prejudice in notorious murder case, especially when defendant was “relatively unknown outside Puerto Rico” (internal quotation marks omitted)); *United States v. Keleher*, Docket No. 20-019 (FAB), 2020 WL 4784749, *10 (D.P.R. August 17, 2020) (The court questioned whether the First Circuit’s description in 1987 of Puerto Rico as “‘a compact, insular community’” that is “‘highly susceptible to the impact of local media’” remains accurate given “[t]he advent of the [I]nternet and social media (and other developments) Like the residents of Boston, it is possible that Puerto Ricans now ‘obtain their news from a vast array of sources.’”). Thus, caution about changing venue is appropriate “in any case that draws significant national attention” because, “[i]f exposure to a certain level of pretrial publicity renders a community presumptively unable to convene an impartial jury, then no venue will be acceptable, and no trial will be possible” (Internal quotation marks omitted.) *Luong v. State*, supra, 199 So. 3d 147.

That having been said, we acknowledge that at least some of the coverage in the media in the present case went beyond the reporting of even the most disturbing facts and, instead, was at times evocative of the “lynch mob mentality” or “[community wide] rush to judgment” identified by the United States Supreme Court as being sufficiently prejudicial to trigger a presumption of prejudice. (Internal quotation marks omitted.) *State v. Gribble*, supra, 165 N.H. 27. Commentary from a bipartisan array of prominent political figures made clear the extent to which this case affected the debate about criminal justice public policy and, particularly, the

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death penalty. Most graphic were the widely reported comments of Senator Prague, who, as we previously noted, was a formerly ardent death penalty opponent who changed her position on the issue after meeting with W, and then stated for the public record—while jury selection was ongoing in this case—her widely reported view that the defendant should be hanged in a public street by his genitalia. Indeed, then Governor M. Jodi Rell specifically cited this case in vetoing legislation repealing the death penalty. See Connecticut Executive Branch, Press Release, Governor Rell Vetoes HB 6578, An Act Concerning the Penalty for a Capital Felony (June 5, 2009), available at <https://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204> (last visited April 8, 2021). Similarly, former Governor Dannel Malloy stated in his 2010 campaign for office that he would support legislation prospectively repealing the death penalty, with a prospective only repeal aimed specifically at ensuring the executions of the defendant and Hayes. In our view, targeted public commentary of this ilk—above the line from the comments section and made by prominent public officials—is sufficient to tip the press coverage *Skilling* factor in the defendant’s favor, even accounting for the twenty-first century reality of the omnipresent media coverage of notorious criminal cases.

Turning to the remaining *Skilling* factors, we agree with the defendant that the passage of several years from when the home invasion occurred did not, by itself, blunt the potentially prejudicial impact of the coverage, insofar as this case was tried several months after Hayes’ conviction and death sentence, the media coverage of which operated to revive any dissipation that had taken place. Cf. *Skilling v. United States*, supra, 561 U.S. 383–85 (passage of four years between Enron bankruptcy and trial minimized prejudice to Skilling, although another Enron executive’s “[well publi-

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cized] decision to plead guilty shortly before [Skilling's] trial created a danger of juror prejudice" that was addressed by continuances and enhanced voir dire (internal quotation marks omitted)); *State v. Gribble*, supra, 165 N.H. 22–23 (effect of media coverage on home invasion case tried approximately four months after verdict in coconspirator's trial, which had "received substantial publicity," was mitigated because defendant pleaded not guilty by reason of insanity and, therefore, did not contest most factual allegations).

Most significant, however, the jury selection process used in this case very strongly favors the state with respect to whether to presume prejudice. Having denied the motion to change venue without prejudice, the trial court properly relied on the prospect of Connecticut's attorney led, individual voir dire process to give the parties and the court a comprehensive opportunity to assess each prospective juror's familiarity with the case and ability to render an impartial verdict; that process far exceeded the more truncated process deemed constitutionally adequate in *Skilling*.³⁰ See, e.g., *Skilling*

³⁰ Although not directly relevant to whether the defendant could get a fair trial in New Haven, we also find it significant that Penrod's study reflected extremely high levels of case awareness among potential jurors in Stamford. This means that an exercise of discretion to transfer this case to Stamford would not have obviated the need for a searching and lengthy voir dire process like that employed in New Haven to identify twelve suitable jurors plus alternates. That suggests, of course, that transferring the case to Stamford would not have dramatically reduced obstacles to picking an impartial jury or have reduced the need for a searching voir dire process to reach that end. See *United States v. Tsarnaev*, 968 F.3d 24, 55 (1st Cir. 2020) (District Court did not abuse discretion in denying motion to change venue of Boston Marathon bombing trial from Boston, Massachusetts, because polling data showed "public awareness and attitudes were not materially different in, for example, Springfield or New York City," rendering it "not a case where almost everybody locally knows something and very few elsewhere know of it"), petition for cert. granted (U.S. March 22, 2021) (No. 20-443); *State v. Robinson*, supra, 303 Kan. 71 (noting high case recognition in counties outside venue of origin in upholding denial of motion to transfer venue on statutory grounds); cf. *United States v. Casellas-Toro*, supra, 807 F.3d 386–88 (prejudicial publicity warranted transfer when defendant was

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v. *United States*, supra, 561 U.S. 387–89 (court led, individual voir dire over five hour period following submission of questionnaires). Indeed, the trial court prudently enhanced the utility of this extensive and searching individual voir dire process by awarding each of the parties forty peremptory challenges, which exceeded the minimum of thirty mandated in capital cases by § 54-82h (a). Coupled with the size and diversity of New Haven’s population, this extensive process strongly supports a conclusion that there was no presumptive prejudice in this case.³¹ See *In re Tsarnaev*,

son of federal judge in Puerto Rico, which had “insular” population and media market, coverage of trial was massive and carried live on television, Internet, and radio, with entire baseball stadium erupting in cheers when he was convicted of related charges in commonwealth court, despite its size of three million residents, particularly given that case was “relatively unknown” outside of Puerto Rico); *United States v. Gordon*, 380 F. Supp. 2d 356, 365 (D. Del. 2005) (transferring political corruption case from Wilmington, Delaware, to Philadelphia, Pennsylvania, because of “the extensive publicity [the] case has received” in Delaware, including “hundreds of newspaper articles and editorials, which strongly support[ed] the view that a substantial percentage of Delawarians [were] likely to have concluded that the defendants [were] guilty as charged,” almost everyone in county where alleged crimes occurred had heard about case and substantial majority already had formed opinions about it, and case could be tried in nearby Philadelphia, where it had “generated little or no publicity” without undue inconvenience), rev’d on other grounds, 183 Fed. Appx. 202 (3d Cir. 2006).

³¹ In the present case, the jury found the defendant guilty on all counts, rather than having returned a split verdict, the latter of which has been deemed indicative of impartiality weighing against the presumption of prejudice. See, e.g., *Skilling v. United States*, supra, 561 U.S. 383–84; *State v. Carr*, supra, 300 Kan. 74. Nonetheless, our review of the record demonstrates that the evidence was overwhelming. Indeed, the defendant conceded the vast majority of the factual issues in the guilt phase—in particular, his participation in the home invasion—choosing to challenge only whether he had sexually assaulted M anally, rather than orally as he had confessed, and whether he had the requisite intent to kill. Accordingly, we conclude that the jury’s verdict does not support a finding of presumptive prejudice. See *State v. Townsend*, 211 Conn. 215, 228–29, 558 A.2d 669 (1989) (noting that publicity about plea negotiations and defendant’s offer to plead guilty to murder in exchange for five year sentence was “not as inherently prejudicial as in a case in which a defendant denies any involvement in a crime, but nonetheless has considered pleading guilty in exchange for a reduced sentence,” because defendant did not “[dispute] the events leading up to

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supra, 780 F.3d 24–26 (relying on likelihood of extensive voir dire process in Boston Marathon bombing case); *State v. Reynolds*, supra, 264 Conn. 223–24 (relying on individual voir dire process to mitigate effect of pretrial publicity in extensively publicized death penalty trial arising from killing of police officer); *People v. Avila*, 59 Cal. 4th 496, 499–500, 505–508, 327 P.3d 821, 173 Cal. Rptr. 3d 718 (2014) (upholding denial of change of venue prior to jury selection for death penalty trial arising from widely publicized rape and murder of five year old girl, which had been commented on by President George W. Bush and highlighted by local radio show encouraging execution of defendant, because county was one of California’s most populous, and “prospective jurors would sympathize with [her] fate wherever the trial was held,” two years and nine months had passed since the crime, and “it was reasonable for the trial court to conclude that actual voir dire—during which the court and parties could question the jurors [face-to-face]—was a more reliable way to measure the effect of pretrial publicity than a survey conducted by a person chosen by one of the parties”), cert. denied, 575 U.S. 940, 135 S. Ct. 1712, 191 L. Ed. 2d 685 (2015); *State v. Kaarma*, supra, 386 Mont. 251–52, 254–58 (trial court properly denied motion for change of venue from county with population of approximately 110,000, despite fact that there had been 500 articles about delib-

the victim’s death” but, instead, appeared to challenge whether he had “the requisite intent for murder”); see also *Luong v. State*, supra, 199 So. 3d 148 (Given “[the defendant’s] admission that he threw each of his children off the bridge, the fact that [the defendant] was not acquitted of any of the charged offenses does not either support or rebut a presumption of jury bias or impartiality. The evidence in [the] case simply did not create any inference from which the jury could conclude that he killed some, but not all, of his children.”); *State v. Gribble*, supra, 165 N.H. 23 (defendant’s admission to participation in crimes and plea of not guilty by reason of insanity reduced prejudice from media reporting on coconspirator’s trial that “described the defendant’s involvement in the crime” because he “admitted as much when he pleaded not guilty by reason of insanity”).

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erate homicide case with sympathy to victim and coverage of defendant's prior bad acts, and 90 percent of polled potential jurors had heard of case, because trial court properly used detailed questionnaires and individual voir dire to assess impact of pretrial publicity); *State v. Addison*, supra, 165 N.H. 430–31 (no presumptive prejudice requiring transfer from Manchester, New Hampshire, for death penalty trial for murder of city police officer, despite fact that 98 percent of prospective jurors knew about case, because individual voir dire enhanced with questionnaire and increased number of peremptory challenges could be used to ensure impartial panel); *State v. Clinton*, 153 Ohio St. 3d 422, 433–35, 108 N.E.3d 1 (2017) (no presumptive prejudice, despite extensive publicity about prosecution for aggravated murder and sexual assault of victim and her two minor children, because, although most jurors knew something about facts of case, trial court took steps to address impact of pretrial publicity, including having potential jurors complete extensive publicity questionnaire, and using individual voir dire to weed out prospective jurors with excessive knowledge of case or apparent belief in defendant's guilt), cert. denied, U.S. , 139 S. Ct. 259, 202 L. Ed. 2d 173 (2018). Finally, the trial court also prudently left open the possibility of changing the venue should the individual voir dire process indicate that an impartial jury could not be empaneled in New Haven. See *State v. Reynolds*, supra, 224.

As the California Supreme Court recently observed in upholding the denial of a second change of venue in the Scott Peterson death penalty trial,³² which was a case of similar national notoriety arising from a husband's murder of his pregnant wife, the "publicity . . .

³² The Peterson trial originally was moved from the rural jurisdiction in which the murder happened to San Mateo County, which had a larger population. See *People v. Peterson*, supra, 10 Cal. 5th 438.

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generated” in this case, “like the trials of O.J. Simpson, the Manson family, and any number of other so-called trials of the century before them, was intrinsic to the case, not the place,” particularly given “the explosion of cable television and the Internet as sources of information, facilitating nationwide coverage of the case,” meaning it was “speculation to suppose [the] results of jury selection would be any different anywhere else.” (Emphasis in original; internal quotation marks omitted.) *People v. Peterson*, supra, 10 Cal. 5th 440. Put differently, the endless and instant flow of information—and in some cases disinformation—enabled by twenty-first century media, does not stop at the political boundaries of our judicial districts. “Instead, in a [high profile] case such as this one, provided a sufficiently large pool is available . . . the better answer is not to change venue . . . but to rigorously vet potential jurors to screen out those tainted and irrevocably biased by pretrial publicity, to find [twelve], plus alternates, who can decide only on the evidence admitted at trial.” *Id.*, 441. We conclude, therefore, that the defendant has not surmounted the “extremely high” bar; (internal quotation marks omitted) *State v. Robinson*, supra, 303 Kan. 76; see also *Skilling v. United States*, supra, 561 U.S. 381; necessary to establish the existence of presumptive prejudice in this case, insofar as the other *Skilling* factors function to outweigh the inflammatory nature of the publicity that attended this case with respect to the possibility of empaneling an impartial jury.

D

Actual Prejudice

We next consider whether pretrial publicity resulted in actual prejudice in this case.³³ This requires us to

³³ Having concluded that no presumption of prejudice arose on the record in this case, we need not directly consider the question of whether any such presumption is rebuttable, an issue not resolved by the United States Supreme Court in *Skilling*; see *Skilling v. United States*, supra, 561 U.S.

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examine the record of jury selection to determine whether it “adequately detect[ed] and defuse[d] juror bias.” *Skilling v. United States*, supra, 561 U.S. 385. Particularly in cases with extensive pretrial publicity and notoriety, individual voir dire, which is mandated by article four of the amendments to the Connecticut constitution; see, e.g., *Rozbicki v. Huybrechts*, supra, 218 Conn. 392 and n.2; is critical to ensure the selection of jurors who are sufficiently impartial to serve. See *Commonwealth v. Toolan*, supra, 460 Mass. 468 (failure to conduct individual voir dire regarding exposure to pretrial publicity denied defendant his right to fair trial given risk of prejudice occasioned by “small, socially interconnected community” in Nantucket and extensive pretrial publicity).

As a matter of both well established Connecticut and federal constitutional law, “[n]o [hard and fast] formula dictates the necessary depth or breadth of voir dire. . . . Jury selection . . . is particularly within the province of the trial judge. . . .

“When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes [especially] good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror. . . .

385 n.18; and not clearly addressed by that court’s earlier precedents, which were inconsistent with respect to whether to examine the transcript of voir dire after determining that prejudice existed. See, e.g., *United States v. Casellas-Toro*, supra, 807 F.3d 388–89. Those few courts that have directly considered this issue have, however, concluded that the presumption is in fact rebuttable, both before and after *Skilling* was decided, in a process akin to the actual prejudice inquiry. See *United States v. Wilcox*, 631 F.3d 740, 749 (5th Cir.), cert. denied, 563 U.S. 1015, 131 S. Ct. 2921, 179 L. Ed. 2d 1260 (2011); *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006); *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), cert. denied, 459 U.S. 846, 103 S. Ct. 102, 74 L. Ed. 2d 92 (1982); *Luong v. State*, supra, 199 So. 3d 167 (Parker, J., dissenting).

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Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the [on the spot] comprehension of the situation possessed by trial judges.

“Reviewing courts are properly resistant to second-guessing the trial judge’s estimation of a juror’s impartiality, for that judge’s appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror’s inflection, sincerity, demeanor, candor, body language, and apprehension of duty. . . . In contrast to the cold transcript received by the appellate court, the [in the moment] voir dire affords the trial court a more intimate and immediate basis for assessing a venire member’s fitness for jury service.” (Citations omitted; internal quotation marks omitted.) *Skilling v. United States*, supra, 561 U.S. 386–87; see also *State v. Griffin*, 251 Conn. 671, 710, 741 A.2d 913 (1999) (“[t]he trial court is vested with wide discretion in determining the competency of jurors to serve”); *State v. Pelletier*, supra, 209 Conn. 572 (describing trial court’s “broad discretion” with respect to “determining the credibility of prospective jurors and their ability to be impartial”).

In assessing for actual prejudice, we are cognizant that a lengthy voir dire process is frequently necessary to seat a sufficient number of impartial jurors and that a lengthy duration is not, by itself, indicative of “pervasive prejudice permeating through the jury pool,” insofar as “a jury selection process of several weeks in length is not unusual in either contemporary or historical terms. [M]ajor cases have been known to require six weeks or more before the jury is seated.” (Footnote omitted; internal quotation marks omitted.) *In re Tsarnaev*, supra, 780 F.3d 25–26; see *id.*, 26 (“it defies logic to count the efforts the [D]istrict [C]ourt has taken to carefully explore, and eliminate, any prejudice as *show-*

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ing the existence of the same” (emphasis in original)). This is particularly so in death penalty cases, which add significant lines of questioning to the juror qualification process.³⁴ See *id.*, 26 and n.15.

Accordingly, we now turn to a detailed analysis of the jury selection process in the present case. Our juror by juror³⁵ analysis to determine whether the trial court empaneled an impartial jury focuses on the jurors who actually deliberated at trial and sentencing. See, e.g., *State v. Gould*, 322 Conn. 519, 531, 142 A.3d 253 (2016) (“[p]rejudice is assessed with reference to the jurors who [found] the defendant [guilty] because [t]he constitutional standard of fairness requires [only] that a defendant have a panel of impartial, indifferent jurors” (internal quotation marks omitted)).

For the sake of relative brevity, our review does not extensively consider the jurors’ personal background histories, focusing instead on the portions of voir dire relevant to the major issues in this appeal, namely, the extent of their exposure to pretrial publicity and the effect of that exposure on their case knowledge and impartiality. Although the death penalty is no longer at issue in this case, we include in footnotes a review of each juror’s views on that topic, insofar as that subject would have strongly informed the parties’ decision

³⁴ We note that the First Circuit recently concluded that the Boston Marathon bomber, Dzhokhar Tsarnaev, was entitled to a new penalty phase trial. *United States v. Tsarnaev*, 968 F.3d 24, 56 (1st Cir. 2020), petition for cert. granted (U.S. March 22, 2021) (No. 20-443). Although the court held that the District Court had not abused its discretion in declining to move the trial out of Boston, Massachusetts; *id.*, 55–56; it also concluded that the extent of the voir dire conducted—the presumed adequacy of which had been a key to its earlier mandamus decision in *In re Tsarnaev*, *supra*, 780 F.3d 25–26, not to move the trial from Boston—was in fact inadequate to ensure the impartiality of the jurors. See *id.*, 58–59.

³⁵ “In accordance with our usual practice, we identify jurors by initial[s] in order to protect their privacy interests.” (Internal quotation marks omitted.) *State v. Holmes*, 334 Conn. 202, 207 n.6, 221 A.3d 407 (2019).

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whether to accept a particular juror.³⁶ Finally, we note that each selected juror repeatedly expressed his or her ability (1) to be fair and impartial, (2) to understand and apply the reasonable doubt burden of proof as to each element of each charged offense, along with the presumption of innocence, and (3) not to be swayed by sympathy for the P family or to be affected emotionally after viewing disturbing crime scene or autopsy photographic evidence. None of the jurors who were asked whether they had participated in the P family memorial or charitable activities responded in the affirmative. None of the jurors who were asked had changed their home security habits as a result of this case. Finally, the trial court instructed each selected juror not to talk about the case with anyone or to do independent research, and to avoid media coverage of the case during the time between jury selection and the start of trial. We now turn to an examination of each juror's individual voir dire.³⁷

³⁶ With respect to the death penalty, all of the jurors testified that they (1) understood the jury's exclusive role in the sentencing decision, (2) would keep an open mind during a sentencing phase despite evidence heard during the guilt phase supporting convictions of intentional murder and the sexual assault of an eleven year old girl, and (3) would keep an open mind with respect to the claimed mitigating factors, including relatively minor involvement in the crime, reduced mental capacity, and a troubled childhood.

³⁷ Out of an abundance of caution, and to give the most expansive consideration possible to the defendant's actual prejudice claims, we also reviewed the voir dire of the six alternate jurors, along with the three backup alternate jurors. See, e.g., *State v. Crafts*, supra, 226 Conn. 260. We do not discuss them in detail, insofar as "[p]rejudice is assessed with reference to the jurors who [found] the defendant [guilty] because [t]he constitutional standard of fairness requires [only] that a defendant have a panel of impartial, indifferent jurors." (Internal quotation marks omitted.) *State v. Gould*, supra, 322 Conn. 531. None of the six alternates who sat at trial, G.B., C.T., C.H., Ch.G., C.J., and R.D., was needed to deliberate in this case. Similarly, the three backup alternate jurors, I.L., M.S., and M.M., were dismissed prior to the start of the trial and did not sit with the jury for any part of this case. Our review of their voir dire testimony indicates that, consistent with the regular jurors, each of the alternates and backup alternates expressed relatively modest levels of knowledge about this case and the defendant's background in particular, did not know anything about the defendant's background, stated

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1

Review of Jurors

a

M.N.

The first regular juror selected was M.N., a physician.³⁸ When the trial court asked M.N. whether he could be fair and impartial with respect to both the guilt and penalty determinations, he stated: “[C]learly, I’ve heard of this case, and, when it first happened, I read about it in the news and saw some stories on TV. Nonetheless, I realize that things may not always be the way they are represented in the media, and I understand that my charge would be to evaluate things based solely on the evidence, evidence that would be presented during court, and I will try my hardest to do that.” M.N. had read about the case in the New York Times and on Google News, and had “occasionally” seen stories about it on television news. When asked about what he knew about the case, M.N. stated: “I think that the home was, I guess, the term has been used in the media, the home was invaded, three of the four individuals were raped and killed, and the fourth individual was beaten, and then the house was put to fire.” M.N. was familiar with Cheshire, having lived in a nearby town, but did not know the area where the crime occurred. M.N.’s last exposure to information about the case was during Hayes’ trial; he was aware that Hayes was convicted

limited support for the death penalty as a general matter, and had an open mind and understanding of the state’s burden of proof with respect to both the guilt and penalty phases in this case. We acknowledge, however, that the defendant raised challenges for cause to several of these alternate and backup alternate jurors based on case knowledge, which the trial court rejected on the basis of its assessment of the jurors’ understanding of and ability to apply the presumption of innocence; the defendant did not exercise peremptory challenges as to any of them. See part I E of this opinion.

³⁸ M.N. did not have any personal or professional contacts with W.

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but did not know the sentence imposed. Both parties accepted M.N. without challenge.³⁹

b

T.A.

The second regular juror chosen was T.A., a college student studying criminal justice and social work who interns with a program that assists sex offenders with transitioning from incarceration to the community. T.A. obtained most of his news, including knowledge about this case, from television and stated that none of that coverage would keep him from being fair and impartial, particularly because he viewed the media as having “a tendency of twisting and turning things” When asked to rate how frequently he had heard about this case on a scale of one to ten, he rated it between five and seven. T.A. did not make a point of following the coverage and had not read any of the books written about the case. When questioned about his case knowledge, T.A. stated that “a murder occurred in Cheshire, and it was pertaining to the family members that, you know, one person or two people, you know, were the culprits of a murder.” T.A. believed that “three or four” people were killed in the incident and that two perpetrators had been arrested. T.A. also knew that the other person who was arrested had been convicted and sentenced to death. T.A. was familiar with Cheshire but not the street where the crime took place. T.A. stated

³⁹ With respect to the death penalty, M.N. believed that “it’s something that should be reserved only for heinous crimes that were done . . . intentionally and thought out beforehand.” He quantified his support for it as a three on a scale of one to ten. When asked hypothetically about whether the death penalty was “the only appropriate penalty” for a premeditated murder, M.N. stated that his view would “depend on additional details,” such as whether the victim in the hypothetical had suffered “additional pain and torture” When asked about this case, he stated: “The accused’s crimes are horrible, and those are the kind of crimes that I think are the ones where the death penalty is appropriate, but I would consider mitigating circumstances if I was instructed to do so.”

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that none of that knowledge would keep him from being fair and impartial because being a juror “pertains to evidence and the law, so you can’t really manipulate evidence or the law”; he informed defense counsel that he would consider this case on its own facts because he did not “know [Hayes’] case. I don’t know what . . . evidence . . . was presented to the jury to make [it] decide that” He had not had “big” discussions about the case with other people, having talked about it once with his brother; T.A. did not remember his brother’s opinion, which he emphasized would not affect his decision making as a juror in any event. Both parties accepted T.A. as a juror.⁴⁰

c

T.M.

The third regular juror selected was T.M., an investigator for a state agency working on “family issues,” whose responsibilities required her to testify in court regularly.⁴¹ T.M. testified that she followed local television news, along with some Internet news, but did not read the New Haven Register “much.” T.M. had not followed the news about this case “consistently” and had no impressions about it other than that “innocent people” had “suffered” She had not read any

⁴⁰ T.A. had “no qualms with” the death penalty because it was provided by law, and he quantified his support for it as a five on a scale of one to ten. His moderate support for the death penalty was dependent on the circumstances of the case. When asked about his ideal world, T.A. stated he would not have the death penalty because it is inconsistent with his ideals as a social worker to help people after understanding their actions. T.A. also acknowledged the need for proof of aggravating and mitigating factors, stating that, before making the death penalty decision, he would want to know “what caused that person to do that type of crime or . . . his history”; he believed a person’s past could “definitely” shape his or her life.

⁴¹ T.M. had previous personal experience with homicide trials, having testified as an alibi witness at the murder trial of a close friend one decade before, at which her friend was convicted.

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books written about this case. When asked what she knew about the case, T.M. stated that, from what she had “been subjected to probably in the news and then hearing it at work or wherever,” her impression was that “the woman was followed from Stop and Shop to her residence. I guess they waited outside and, at some point . . . they kind of scoped out the neighborhood, the area. Later that night, they broke into a basement where [W] was, beat him up, tied him up, went upstairs or proceeded upstairs and raped the young girls, [J], beat them up, killed them, murdered them, and set the house on fire, tried to escape. Or, excuse me, missing the part where I guess she went to the bank to take out ‘x’ amount of dollars or, you know, she was being robbed.” T.M. emphasized, however, that she did not have any preconceived ideas about the defendant’s guilt or innocence and that she could put her knowledge aside and keep an open mind because she has “to hear both sides.” T.M. was aware that the defendant had been caught at the scene, which indicated to her that he was at the very least “a suspect at this point,” although he “may” or “may not” have committed the crimes. T.M. did not see W’s appearance on *The Oprah Winfrey Show*, although she had seen him on the news. Her impression was that W was “suffering from a great loss” but that she could still assess his credibility objectively.⁴² T.M. had heard some discussions about Hayes’ trial and death sentence but did not believe that should affect the defendant’s trial because he is a “[d]ifferent individual,” and she did not “know the facts,” including “what part” the defendant had played, or even “if he played a part.” T.M. had no preconceived notion as

⁴² T.M. also stated candidly that W’s presence during the proceedings “might” influence her by “putting [herself] in his shoes I would feel bad. I would be hurting for him and with him.” The trial court, however, credited T.M.’s statement that, although her “heart goes out to him and his family,” that sympathy “wouldn’t influence [her] decision based on what happened with the trial”

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to the sentence that the defendant should receive if convicted of a capital offense, and she did not know anything about him personally.

T.M. also testified that, prior to voir dire, two or three of the other prospective jurors had discussed the case, opining that “the police should have been there . . . right away or should have done something that day. That the two men [who] participated and that they’re evil, things like that.” Those jurors thought that the defendant and Hayes were “caught red-handed, so [they were] guilty,” with one stating that the defendant should receive life imprisonment. None of those prospective jurors personally knew the P family or any of their friends or colleagues. T.M. testified that these discussions would not keep her from being fair and impartial and deciding the case on the evidence heard in court.

T.M. also had discussed the case with family and friends because it was a “hot topic” in the New Haven area; although none of them had expressed a desire to have the defendant executed, neither had any expressed a belief that he was innocent. T.M. had never expressed an opinion personally to anyone about the defendant’s guilt or potential sentence. Her impression was that “[t]here’s different opinions” within the community, acknowledging that many people believed that the defendant should be executed. T.M. emphasized that none of the community members’ views would influence her decision in any way and that she could withstand any pressure that she might feel because, “at trial, you can’t listen to someone who’s not, you know, involved in the issue or, you know, here every day, so, no. I would have to go based on the facts that . . . I learn during the trial. It wouldn’t have anything to do with it.” T.M. said that she routinely pushes other people’s opinions aside to reach decisions in both her professional and personal lives. T.M. expressed confidence in her ability to stand her ground and to consider other

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people's opinions during a difficult deliberation. Both sides accepted T.M. as a juror.⁴³

d

K.A.

The fourth regular juror selected was K.A., a physician.⁴⁴ When asked about her familiarity with the case, K.A. replied that she “under[stood] a family was lost that day” and that “a family, a woman and her daughters were murdered in their own homes,” as well as that “I don’t remember the details, but I know that there was also sexual abuse to some of them, including the daughters.” K.A. had not followed the case closely or read anything about it recently.

K.A. had not discussed the case recently, although her husband “ha[d] brought it up” to her “[i]ntermittently,” in the context of his own religious “struggle[s]” with the death penalty and his sympathy for the P family. K.A. further stated that this conversation had taken place in the context of the Hayes verdict and that her husband was “a bit disappointed with himself” for being “comfortable” with Hayes’ death sentence. K.A. did not know enough about Hayes’ case to take a position during that conversation. K.A. stated that her husband believed that the defendant was guilty, as well, but that his opinion had “[n]ot much” effect on her—and he would “back [her] up on that,” as she listens to him “[c]onstructively” and will make up her own mind. When questioned by defense counsel, K.A. stated that

⁴³ With respect to the death penalty, T.M. knew from a college research project that it is “expensive.” T.M. did not “feel strongly either . . . way” and was “in between” on the death penalty, although she “would rather not see anybody [get] the death penalty.” She characterized her support as a three or four on a scale of one to ten, with it being potentially appropriate depending on the circumstances of the case.

⁴⁴ K.A. did not know W personally or professionally and could not think of any mutual acquaintances.

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the fact that she was a mother to two young children would not keep her from being fair and impartial.

K.A. averred that she was proud of the criminal justice system because “it’s part of what’s so great about this country altogether,” as “it is pretty noble that we try to give everybody the opportunity to . . . make their case . . . for what’s happened rather than just assuming . . . these are [the] facts or this is how the facts are presented and . . . clearly this person must be guilty. I think it’s ambitious and noble that we go beyond that and try to make it a systematic presentation of what the facts truly were rather than the circumstantial evidence.” Both the state and the defendant accepted K.A. as a juror.⁴⁵

e

V.K.

The fifth regular juror selected was V.K., a mental health counselor who works primarily with children and adolescents.⁴⁶ V.K. testified several times that she would not have any problem being fair and impartial to both sides, despite the fact that her sister is a victim’s advocate who works with sexual assault victims. V.K. testified that she was living in Spain when the murders happened, and she had not heard anything about the

⁴⁵ When asked about the death penalty, K.A. stated her “ethical” opinion that “it is not a good solution to [crime] in our country or anywhere.” She placed her support of it at a five on a scale of one to ten. Nevertheless, K.A. stated she did not know it was “a legal issue” and, consistent with her desire to be “fairly objective in [her] day-to-day activities,” emphasized that she could follow the instructions of the court because “I believe in our system.”

⁴⁶ We note that V.K. was the last prospective juror of the day on April 7, 2011, but that the transcript of her voir dire is apparently incomplete, proceeding directly to adjournment from the defendant’s questioning of her. There is no transcript of V.K.’s being accepted as a juror or the trial court’s instructions to her. Neither party has claimed, however, that this omission has rendered the record inadequate for review or that there was a challenge to the qualification of V.K.—or any other regular juror—to serve.

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case at that time. When asked what she knew about the case, V.K. stated that “it happened in Cheshire,” “[t]wo daughters and . . . the mother were murdered,” and “the father I guess was there, but he survived. Um, and their house was burnt down. And I guess there [were] two suspects.” V.K. was aware that the first suspect had been tried and convicted, and she believed—but did not “know”—that he had been sentenced to death. V.K. had not followed Hayes’ trial or other local news, choosing to follow only “important national news” and “international news” V.K. did not know anything about the defendant, favorable or otherwise, including what his involvement was in the crime. V.K. was not aware that books had been written about this case.

V.K. had not discussed the case with friends, family, or coworkers, although she perceived that everyone in the community believed that the defendant was guilty. She would, however, be able to “make a sound judgment based on the evidence that was presented to me” and to “stand by what I chose,” despite the beliefs of other community members. V.K. would not let the community’s apparent wishes factor into her decision making, believing that her professional background left her suited to resist peer pressure. She would make her decision based solely on the evidence in the courtroom, “[m]ostly because I don’t know anything of the case . . . so I really would need to hear all of the evidence to make a sound judgment.” V.K. would be “honored if [she were] asked” to serve on the jury because she believed it to be an “important” civic obligation for her to “do my part as a citizen.” She acknowledged that, while waiting, she had discussed the case with some of the other prospective jurors, who had made “[m]ostly negative” comments about it, opining that they “could never be . . . unbiased [toward] it and that they felt [the defendant] was guilty.” V.K., however, did not

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express any opinion about this case in those discussions. V.K. was accepted as a juror.⁴⁷ See footnote 46 of this opinion.

f

M.B.

The sixth regular juror selected was M.B., a retired municipal social services employee. M.B. learned about this case by reading the newspaper. When asked what she knew about it, M.B. stated: “What I read is that there were two people who broke into a home and assaulted [J] and [W] and set the house on fire, and the people who were in the home at the time, only one person escaped, and the other three perished. . . . [W]hat I know about it is what I’ve read. . . . I don’t know exactly what I think about it” M.B. was aware that the defendant had been arrested “directly after he . . . left the house” and knew from reading the newspaper that he had an accomplice named Hayes who had already been tried, convicted and, she thought, sentenced to death. Both parties accepted M.B. as a regular juror.⁴⁸

⁴⁷ With respect to the death penalty, V.K. had not “really . . . thought about it,” but she described her support for it as “in the middle,” quantified as a five on a scale of one to ten. When asked whether she believed that the death penalty could be appropriate in some cases, V.K. stated that “it would really matter on what the case . . . was” When asked whether she could think of a situation herself in which the death penalty would be appropriate, V.K. stated that “I really . . . can’t answer that. I really don’t know.” When asked to consider whether she would impose the death penalty in the case of a horrendous crime, she replied in the negative “because I don’t really believe in killing somebody like for an eye for an eye kind of . . . philosophy” Nevertheless, V.K. also stated that she could imagine a situation in which the evidence would support a vote for the death penalty and that she would follow the instructions of the court and apply them to the evidence.

⁴⁸ M.B. testified that she had “mixed feelings” about the death penalty, describing it as a “weighty” and “very difficult” decision. She quantified her support for the death penalty as a five or six on a scale of one to ten but stated that she would not have it in a country where she made the law. Although M.B.’s husband favored the death penalty, including for the defen-

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g

L.C.

The seventh regular juror selected was L.C., an architect employed by a university. L.C. had heard about this case but did not watch television news and typically just skimmed local newspapers for stories about her employer. When asked what she knew about the case, L.C. stated that “there was a murder in Cheshire,” but she could not “exactly remember the date . . . and I know the name of the family from seeing it, you know, hearing it.” L.C. had not read any books about the case. L.C. knew that there was another trial related to the case because she passed the courthouse each day on her way to work, and she was “racking my brains at lunchtime” to remember that “there was a conviction, but I don’t remember the sentence.” She had flipped past, but had not read, stories about the Hayes trial; she contrasted her lack of awareness of this case to that of another homicide that she had followed more closely because it had happened at the university where she worked and had “affected us so much.” When questioned by defense counsel, L.C. explained that she could be impartial because “I haven’t followed [the case] that much . . . compared to most people in Connecticut I’m probably not very knowledgeable about it. And . . . it’s what our legal system is. I mean, that is what one is supposed to do, and . . . I am a very ethical person.” She presumed that the defendant was innocent, and she was “embarrassed to admit” that she did not recognize him, had not heard his name before, and could not “remember the name of the first guy”

L.C. had briefly discussed the case with her husband in July, 2007, because they were “horrified . . . that these deaths had happened, but, other than that . . .

dant, she testified that his belief would not influence her because “I have a strong sense of myself.”

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we really haven't talked about it," including the verdict or penalty in Hayes' case. She did not have any conversations with other coworkers, friends, or family members about the case. L.C. assumed that the community "want[ed] some sort of retribution for the deaths of . . . a woman and her two children," but believed it was her "professional duty" to withstand any pressure during or after the trial.

L.C. stated that the other prospective jurors did not discuss the case while they were waiting, other than complaining about logistics and the inconvenience of waiting. Both parties accepted L.C. as a juror.⁴⁹

h

R.F.

The eighth regular juror selected was R.F., a municipal employee with a college degree in public health. R.F. had been exposed to "bits and pieces over the course of . . . several months and years" about the case from television coverage. R.F. had "heard" about the case and "read [about it in] the newspaper" and very briefly while looking at books at Barnes & Noble bookstore; he had been aware of it from the day of the incident when it was discussed in the breakroom at his job, as well as in subsequent discussions with his coworkers and his family about current events. When asked whether he had a "preconceived idea" about the defendant's guilt from that coverage, he acknowledged

⁴⁹ With respect to the death penalty, L.C. stated that, "in the past, I was not in favor of it" because she questioned whether it was "morally right for us as a society to put someone to death," but she had become more "ambivalent" about the issue over time. She quantified her current support for the death penalty as a five on a scale of one to ten, acknowledging that there might be some extreme situations in which the death penalty could be appropriate, but emphasized her "hope that I could be very sure that . . . it was beyond any reasonable doubt." When asked by defense counsel, L.C. stated that her change in opinion about the death penalty had nothing to do with this case.

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that “[p]robably, I would think he was guilty from what I’ve read in the paper and what I’ve seen on TV,” but he also had no “preconceived idea” of an appropriate punishment. R.F.’s last reading about the case concerned Hayes’ trial and subsequent suicide attempt.

When asked to provide a narrative of what he knew about the case, R.F. stated that “the victims were at . . . a food store of some sort and they were followed home and then they broke in [at] some point later on,” and “tied them up. . . . I think they raped the wife . . . and then they took her to the bank, I believe, to try and withdraw money. They came back. He tried to start a fire or did start a fire. They killed three of them, and then they tried to drive away. The police stopped them.” R.F. did not know which perpetrator had started the fire or purchased the gasoline, and he could not remember what was said in the newspaper about it; he did not “know the details” of which parts were perpetrated by the defendant. R.F. was aware of Hayes’ name and trial and the fact that he was found guilty and sentenced to death, as well as that the defendant and Hayes were arrested together, but, when questioned about whether that would affect his impartiality or decision in this case, emphasized repeatedly that he “would just ignore that” and that it “wouldn’t affect” him.

R.F. stated that, despite previous discussions with family and coworkers about the “gruesome” nature of the case, he did not “really remember” any opinions about what should be done to the defendant or Hayes, and he emphasized that he personally would “come in with an open mind” and continue to presume that the defendant was innocent. R.F. also understood that his decision had to be based on the evidence presented in court rather than “[p]ast history” such as newspapers or conversations, describing himself as “pretty open-minded,” despite his exposure to coverage of the case in newspapers and on television, and conversations

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with his parents, who thought it was “a pretty much open and shut case”

R.F. believed that the community was “angry” about the case, and he indicated that some of his coworkers had expressed opinions about it. R.F. had never posted anything on social media about the case. Acknowledging that it would be “difficult,” R.F. stated that he could reach a verdict independently, having made “unpopular decisions” in the past that had made people “very angry with me,” and believing that his friends and family would not hold his decision against him. R.F. had not heard other waiting, prospective jurors talk about the case, other than complaining about how long the voir dire process was taking. It did not bother him that two potential jurors had left crying in his presence because he could “understand them getting emotional about it, but it didn’t really affect me.” Both the state and the defendant accepted R.F. as a juror.⁵⁰

i

L.K.

The ninth juror selected was L.K., a university employee with a masters degree in psychology. L.K. had not “read about the trial . . . or the case or anything in a while.” When asked to provide a narrative of what she knew about the case, which was a product of reading newspapers, CNN’s website, and watching local television news, L.K. stated: “[F]rom what I’ve heard, there were two men who went into a house, and I believe the—the father, who is [W], was, I think, asleep in

⁵⁰ R.F. believed that the death penalty “should be used on . . . a case-by-case basis,” for serious cases such as those involving “several murders, maybe like Ted Bundy,” with his support for the death penalty being “a five or a six” on a scale of one to ten. R.F. had not given a lot of “serious thought” to the legality or morality of the death penalty or the pending public policy debate. He personally believed that the death penalty did not serve a “legitimate purpose” because he viewed life in prison as potentially worse, based on what he had seen of prisons on television.

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another room, and they came in, and I'm not sure if they had, you know, hit him or something happened, but then they ended up—the—the mother—I don't know if the girls woke up, too, but they ended, like, at—that was, like, in the evening, I think.

“And then the next day I know that . . . the wife and mom went to the bank to withdraw a sum of money, and I think that she told the tellers there that—I don't know if she told them details or that she was being held captive or whatever, but she indicated something to them, and they did report that to the police.

“And then I know that there are charges—I think there were charges of sexual assault as well, and then I know that the house was burned down and [W] did manage to escape, but that the other three died in the fire.” L.K. testified that she was “sketchy” about the details of the arrests of Hayes and the defendant. She did not “recall” who had performed specific acts in the house. The last thing she read about the case was that Hayes had been tried and convicted, and she “believe[d] he was sentenced to death.” L.K. had not seen W's appearance on *The Oprah Winfrey Show*; she had seen him elsewhere on television and only had the “general impression” that he “was a man who lost his family.”

When asked whether she could decide the case based solely on the evidence presented in court, given that some of it might be consistent with what she knew and some might be different, L.K. replied that she could do that, along with affording the defendant his presumption of innocence. She understood that “serving on a jury and being part of this is . . . just about what is presented here,” and she would “come in with the understanding that [the] knowledge that I've heard and learned or opinions that I may have come or thought about are left . . . outside because I can only evaluate or think about what is shown to me in . . . this court-

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room.” When asked whether the Hayes’ verdict would affect her thinking, L.K. observed that, “in an ideal world, you know, we would have people who knew nothing and just walked in . . . but that’s not the world we live in. And, so, you need to take knowledge and prior things that you know and realize that this trial is not for the person, that person was convicted, that was what happened with him, this is for someone else. It’s an important thing to evaluate critically. . . . [M]y goal in coming in and being a juror would be to just listen to what I am told here.” L.K. acknowledged that, based on the prior coverage and Hayes’ verdict, before coming to court and hearing the instructions, she would have felt that the defendant “probably was guilty but that, you know, he hasn’t been tried.” She was “comfortable” that she could put aside any “preconceived ideas” that she had about the case.

L.K. had spoken about the case over the last few years with friends, family, and coworkers because “it’s been a very big case” and believed that “the community wants justice [Y]ou know it was a horrific crime.” She believed that the general feeling was that “whoever did that should absolutely be punished for it.” L.K.’s decision would not be influenced by what she thought the community would want, emphasizing: “I don’t want to be chosen, but . . . being a part of this jury . . . it’s an important thing to do. I don’t think that I could walk away or feel at rest with myself if . . . I didn’t do it the way it was supposed to be done. . . . [T]hese are big decisions that have to be made and . . . this was a horrific crime, and this is someone’s life that we’re . . . sitting here discussing, and I think that it would be very important for me to do it in the way that is the law and that has to be done. I couldn’t rest with myself if I didn’t.” Both the state and the defendant accepted L.K. without challenge.⁵¹

⁵¹ With respect to the death penalty, L.K. stated that she could follow the law and make the “right decision,” but that she had “always . . . felt” that

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j

S.H.

The tenth juror selected was S.H., a truck mechanic. S.H. read the New Haven Register and the Meriden Record-Journal daily but did not remember the last thing he had read or seen on television news about the case. S.H. did not regularly search the Internet for news or use it otherwise. He did not know that jury selection was going on in this case until he reported for jury duty. When asked what he knew about the case, S.H. stated that he had “read the early headlines and maybe a little bit of the follow-up on that” in July, 2007. S.H. “underst[ood] a couple of guys broke into a house . . . I guess they tried to make it look like a robbery, I believe, and they killed some people.” He believed that three people had died and that two had been arrested. S.H. thought that “a mother and a daughter [were killed] but [was] not sure beyond that.” He did not know how the victims died or the respective roles of the individuals arrested. S.H. did not know about the Hayes trial. S.H. did not know the defendant’s name or background. He had not discussed the case with anyone and had no sense of what the community wanted done with the case. S.H. was familiar with Cheshire but had never been near the crime scene. Both parties accepted S.H. as a juror.⁵²

she was not personally “a big supporter of it” L.K. quantified her support for the death penalty as a three or four on a scale of one to ten, observing that, although “there are certain crimes that it definitely fits,” she was concerned about the imperfection of the criminal justice system and making sure that innocent people were not executed. She emphasized that she did not “think that death is the only appropriate punishment,” deeming that decision dependent “on . . . the situation, based on mitigating factors,” and stated that “I do not think that I would walk in and because . . . people had been murdered just say that the death penalty was the option.”

⁵² With respect to the death penalty, S.H. testified that “I guess debates [have] been going on for years with that. I don’t feel on or off about it.” He clarified that he did not “have an opinion to weigh either way” on the issue and lacked sufficient knowledge to quantify his support on a scale of one to ten. S.H. testified that he would be able to participate in a death penalty

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k

J.H.

The eleventh juror selected was J.H., a corporate compliance officer and insurance fraud investigator. J.H. subscribed to the Meriden Record-Journal but did not read it every day—she received it primarily to help her parents keep up on the obituaries. When asked what she knew about the case, J.H. stated that she had “read somewhat about it in the newspaper” but “was not really following the case, and that it was a terrible tragedy.” Providing an additional narrative, J.H. recalled that “two individuals broke into the home of [W], and subsequently his wife and two daughters were killed.” When asked about whether she knew anything about a trip to the bank, J.H. remembered having “read something about going to the bank,” but that was “unclear to [her].” She did not know how the deaths occurred but remembered reading “something” about allegations of sexual assault. J.H. did not know how the suspects were caught. She knew that the case of the other suspect was “settled recently” and that he was found guilty, but she did not “know any more than that,” including the punishment he received. She also did not know anything about the different activities of the two men in connection with the crime. When asked whether she knew anything about the defendant’s background, J.H. “recall[ed] something about a father, but . . . nothing really more than that.” She had not seen W on television. J.H. did not read any books about the case or ever call into a radio talk show to discuss it. She was a “little bit” familiar with Cheshire but did not know the location of the crime scene.

J.H. had discussed the case with family members when it first happened, “not at length, but just to be

deliberation, including a vote to impose either it or a life sentence, but would have to “hear argument” about it.

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very sympathetic.” She did not discuss it with coworkers. She thought the community wanted “[j]ustice” but “couldn’t presume to know” what that meant in this case. J.H. stated that she was “used to controversy” and that the feelings of the community “wouldn’t change my vote or my opinion” because a juror hearing evidence for several months is in a different position than the general public. J.H. emphasized that she would confine her decision to the evidence presented in court and would not consider the “fair amount of sympathy” that she was sure she would feel. Both parties accepted J.H. as a juror.⁵³

l

C.A.

The twelfth regular juror selected was C.A., a tennis coach. C.A. testified that he had heard “[n]ot a lot, but some” about the case. He read the New York newspapers “[f]airly regularly,” and the New Haven Register “periodically,” as well as watched local television news and saw some news on the Internet. C.A. had seen news stories about the case but had not followed the case regularly or made a point of learning about it. C.A. knew there was “a lot of attention, a lot of media coverage,” but did not “remember . . . any specific details that stood out because it was hard to piece kind of all of it together” When asked what he knew about the events, C.A. recalled “[o]nly that it was a . . . very, very heinous crime” and that “[t]here was a home break-

⁵³ J.H. described herself as “on the fence” about the death penalty because of her Catholic faith; she acknowledged that, “if a personal tragedy did happen to me, I can’t say how I would react in that circumstance.” She quantified her support for the death penalty as a five on a scale of one to ten, calling it a “difficult question” that she never had to consider before. If given a choice to create her own laws, J.H. said “it would be hard for me to enact the death penalty.” J.H. further testified that she was “really undecided” about the death penalty morally but could follow the law and return a death verdict if “that was the appropriate penalty,” although she recognized that “it will be very difficult to be in this position.”

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in, people were killed, a wife and daughters were killed, the house was set on fire, and [that] relatively, as far as I know, is it.” He did not know how the house was set on fire or where the suspects were arrested. C.A. had heard the defendant’s name before in the news but did not have any impression of him from that coverage. C.A. could not remember the last thing he had heard about the case. He was not familiar with the neighborhood in Cheshire where the crime occurred. C.A. was aware that there had been another trial but did not know the name of the other defendant or the result of his case.

In stating his ability to presume the defendant innocent and to decide the case based only on the evidence in court, C.A. recognized that “the case itself hasn’t come to trial,” and “everybody deserves a fair shot in the court, not necessarily in the court of opinion or in the court of television, newspaper, media, whatever.” C.A. described himself as “a facts person,” stating that “I want to hear everything before I make judgments.”

C.A. testified that the other prospective jurors had not discussed the case while they were waiting. He did not know what the community wanted to happen with the case and had not discussed it with his family or friends. C.A. suggested that, “maybe, the people in Cheshire who are close to the situation and have knowledge of it would . . . want a certain verdict, but I don’t know if I can answer that for the community at large, basically, you know, make a general statement like that.” C.A. stated that, if he did come to learn of those opinions, they would not affect his decision in this case. Both parties accepted C.A. as a juror.⁵⁴

⁵⁴ With respect to the death penalty, C.A. had “periodically” engaged in discussions of it over the years, and he did “not believe in the death penalty except for cases . . . with very extreme circumstances.” He quantified his support for the death penalty as a five on a scale of one to ten, stating that he had become less supportive of the death penalty as he got older, perhaps because of his Catholic faith. C.A. believed that the state should have the power to kill a citizen only under “certain circumstances,” such as for crimes

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2

Actual Prejudice Analysis

We conclude that the defendant suffered no actual prejudice from the extensive pretrial publicity about this case, as both the jury and the voir dire process by which it was selected compared very favorably to that which the United States Supreme Court deemed constitutionally acceptable in *Skilling v. United States*, supra, 561 U.S. 358. First, the individual voir dire process did not consist of blind acceptances of prospective jurors' assurances of impartiality but involved a lengthy and thorough probing of their responses to questions by the state, the defendant, and the trial court. The defendant did not exhaust his peremptory challenges until the voir dire of the backup alternate jurors—after the regular and alternate jurors had been selected—and did not challenge for cause any juror who actually deliberated in this case. We also “note that the trial court took unusually thorough measures to ensure the jury's continued impartiality through the use of extensive daily admonishments counseling the avoidance of any publicity.” *State v. Crafts*, supra, 226 Conn. 261.

Although some of the jurors in this case expressed abstract sympathy for W and the P family based on what had happened to them—none of which was disputed at trial—these statements paled in contrast to those made by certain jurors deemed impartial in *Skilling*, several of whom had been *personally affected* by the Enron collapse. See *Skilling v. United States*, supra, 561 U.S. 396 (noting that District Court properly rejected challenge for cause in crediting juror's statement that

that are “[v]ery heinous in nature, and I think each case . . . or each situation is different . . . I think you have to listen to . . . the facts and then bear judgment on it, but to put a blanket statement over, you know, would you do it here and not there? I think that has to be handled very carefully”

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he would have no trouble telling coworker who had lost 401 (k) funds in Enron collapse of not guilty verdict, despite fact that juror personally believed Enron's collapse was product of " 'greed' " and that "corporate executives, driven by avarice, 'walk a line that stretches sometimes the legality of something' "; *id.*, 397 (District Court did not commit manifest error in seating juror who "said she was angry about Enron's collapse and that she, too, had been forced to forfeit [her] own 401 (k) funds to survive layoffs" because she "made clear during voir dire that she did not personally blame Skilling for the loss of her retirement account," thought she could be fair and impartial, and had "not [paid] much attention to [Enron related] news . . . [so] she quite honestly did not have enough information to know whether Skilling was probably guilty" (internal quotation marks omitted)); *id.* (District Court properly credited multiple assurances of impartiality from juror who "wrote on her questionnaire that [Skilling] probably knew [he] [was] breaking the law," after she stated that "she did not know what [she] was thinking when she completed the questionnaire" (internal quotation marks omitted)). As the United States Supreme Court observed, "[j]urors . . . need not enter the box with empty heads in order to determine the facts impartially. It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." (Internal quotation marks omitted.) *Id.*, 398–99.

Consistent with the deference that we afford to the trial court's assessment of juror impartiality, pre-*Skilling* decisions from this court also support the conclusion that there was no actual prejudice in this case. For example, *State v. Pelletier*, *supra*, 209 Conn. 564, arose from the highly publicized Purolator Armored Car robbery in Waterbury, during which three guards were shot to death. See *id.*, 567–68. In *Pelletier*, this court

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concluded that the trial court did not deprive the defendant of a fair trial by declining to transfer his felony murder case out of Waterbury for a new trial after a successful appeal from the judgment of conviction rendered at his first trial. *Id.*, 568–69. The court rejected the defendant’s claim that “the best evidence of actual prejudice is found in the results of the voir dire examination of 381 venirepersons. Of those examined, the defendant claim[ed] that 199 were excused for cause because of prior knowledge of the case. [The court concluded, however, that this] fact alone . . . [did] not establish actual jury prejudice.” *Id.*, 570. The court emphasized that “[e]ach prospective juror was thoroughly and extensively examined. The parties fully explored the level and effects of each prospective juror’s exposure to the publicity concerning the defendant. . . . While slightly more than 50 percent of the prospective jurors had prior knowledge of the case that would affect their ability to be impartial, *of the twelve jurors and two alternates actually selected*, none had substantial knowledge of the case or preconceived notions of the defendant’s guilt. It is clear that [q]ualified jurors need not . . . be totally ignorant of the facts and issues involved. . . . Notably, none of the jurors or alternates selected knew of the defendant’s prior conviction. . . . [T]here was no connection between the pretrial publicity and actual jury prejudice and, therefore . . . the trial court did not abuse its discretion in denying the defendant’s motion to transfer the prosecution.” (Citations omitted; emphasis added; internal quotation marks omitted.) *Id.*, 570–71. In particular, the court deferred to the trial court’s decision to credit the statements of “eight venirepersons . . . that their knowledge of the defendant’s conviction [at his first trial] would not affect their ability to be impartial,” particularly when “[t]hroughout the voir dire the trial court excused for cause those venirepersons it believed could not be impartial.” *Id.*, 572.

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Similarly, in the infamous “ ‘woodchipper murder case’ ”; *State v. Crafts*, supra, 226 Conn. 258; this court held that there was no actual prejudice requiring a new trial because “the voir dire . . . reveal[ed] that, although many prospective jurors were familiar with the fact of the defendant’s arrest and of his first trial, most had only a vague recollection of any particular accounts of the crime.” *Id.*, 259. This court also observed that the defendant in *Crafts* had failed to exhaust his peremptory challenges after unsuccessful challenges for cause and had had the opportunity to explore fully each juror’s exposure to pretrial publicity; *id.*, 259–60; and that “the trial court took unusually thorough measures to ensure the jury’s continued impartiality through the use of extensive daily admonishments counseling the avoidance of any publicity.” *Id.*, 261.

Sister state case law similarly makes clear the deference appellate courts afford to trial courts’ assessments of juror impartiality during voir dire during notorious trials. See, e.g., *People v. Avila*, supra, 59 Cal. 4th 508, 513 (local radio show broadcast during jury selection urging death verdict and recruitment of “ ‘stealth juror’ ” did not require change of venue because trial court properly used voir dire to determine whether prospective jurors had listened to program, and review of voir dire “fully support[ed] the trial [court’s] estimation of the jury’s impartiality”); *State v. Carr*, supra, 300 Kan. 76 (The court held that there was no actual prejudice in a death penalty trial, which arose from a crime spree culminating in a home invasion with a quadruple homicide and sexual offenses, because, “despite widespread pretrial publicity, an unbiased jury had been selected in Wichita [Kansas]. Eight of the [twelve] jurors eventually seated in the defendants’ trial held no prior opinions on guilt. The four who admitted to forming such opinions ultimately said that they could

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set their opinions aside.”); *State v. Gribble*, supra, 165 N.H. 26–28 (no actual prejudice from pretrial publicity in home invasion, double homicide case given that trial court credited jurors’ assurances that they could decide case based solely on evidence, despite fact that “almost all of the prospective jurors were aware of the crimes before jury selection,” and all “sixteen seated jurors reported knowing about the crimes prior to jury selection, and most acknowledged that they had seen or heard media accounts of the case,” even when trial court had denied five challenges for cause to seated jurors with some having previously discussed case with others); *People v. Cahill*, 2 N.Y.3d 14, 36–37, 40–41, 809 N.E.2d 561, 777 N.Y.S.2d 332 (2003) (upholding denial of venue change in case of husband accused of poisoning his wife after she was comatose from beating he inflicted on her, despite facts that 86 percent of prospective jurors, including eight of twelve who sat, had heard of case and that 52 percent “came to court with an opinion as to [the] defendant’s guilt or innocence . . . [because] the voir dire successfully culled out jurors who may have been biased by pretrial publicity”).

As the defendant points out, the appropriately lengthy jury selection process in this case was not always the smoothest of sailing. A number of prospective jurors lost their composure at times, with some crying in open court or making menacing comments about or toward the defendant, with one, for example, calling him a “[k]iller, asshole,” after she was excused from jury service. These comments were a serious breach of the decorum expected in our state’s courthouses. Nevertheless, these outbursts, although inappropriate and unfortunate, did not deprive the defendant of a fair trial because the trial court queried any prospective jurors who had witnessed them about any effect that the outbursts might have had on their impartiality. See *State v. Ziel*, 197 Conn. 60, 65–67, 495 A.2d 1050 (1985) (com-

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mentary in jury room by venire members that defendant was guilty did not require excusal of entire panel, and trial court properly credited testimony of two jurors that they could remain impartial and decide case based solely on evidence in court, despite having heard those comments). Given the extensive voir dire conducted in this case, we defer to the trial court's assessment of the credibility of these jurors in light of their answers that they could remain fair and impartial, particularly insofar as only one of the prospective jurors who witnessed an outburst, R.F.—who saw two women leave crying—actually sat as a juror in this case, and the defendant did not challenge him—or any other regular juror—for cause. See part I C 1 h of this opinion. Accordingly, we conclude that the pretrial publicity did not result in actual jury prejudice that deprived the defendant of a fair trial.

E

Whether the Trial Court Improperly Denied the Defendant's Challenges for Cause

The defendant next claims that the trial court abused its discretion by denying his challenges for cause to twelve potential jurors,⁵⁵ thus depriving him of a fair trial. He argues that they could not judge his case fairly and impartially, and the trial court improperly placed “undue reliance on [those jurors'] own assessments—expressed with varying degrees of certainty—that they could be fair and impartial.” In response, the state cites, among other cases, *State v. Campbell*, 328 Conn. 444, 180 A.3d 882 (2018), and *State v. Esposito*, 223 Conn. 299, 613 A.2d 242 (1992), and contends, inter alia, that the defendant cannot prevail on these claims because

⁵⁵ Specifically, the defendant claims that the trial court improperly denied his challenges for cause to prospective jurors E.M., C.G., V.J., P.L., S.W., W.V., B.F.-S., M.C., S (no first name indicated), J.W., J.P., and C.P., thus requiring him to expend peremptory challenges on them.

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he did not exhaust his forty peremptory challenges until *after* the twelve main and six alternate jurors had been seated, and, most important, no juror who decided his guilt was one whom he had challenged for cause. We agree with the state and conclude that any error with respect to challenges for cause was harmless because none of the challenged jurors actually decided his guilt.

“The Connecticut constitution guarantees a criminal defendant the right to exercise peremptory challenges in the selection of his jury. Conn. Const., [amend. IV]; see also General Statutes §§ 54-82g and 54-82h. . . . [W]e agree with numerous other courts throughout the nation that it is reversible error for a trial court to force an accused to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.”⁵⁶ (Internal quotation marks omitted.) *State v. Esposito*, supra, 223 Conn. 313; see *State v. Campbell*, supra, 328 Conn. 476; *State v. Kelly*, 256 Conn. 23, 31, 770 A.2d 908 (2001).

“[I]t is implicit in *Esposito* that, in determining whether the denial of a for cause challenge was poten-

⁵⁶ We note “the sources in our law of the defendant’s right to an impartial jury and his correlative right to have a biased venireperson removed for cause. Both the federal and state constitutions guarantee to an accused the right to a public trial by an impartial jury. U.S. Const., amends. VI and XIV; Conn. Const., art. I, § 8. Furthermore, General Statutes § 54-82f provides in relevant part: ‘If the judge before whom the [voir dire] examination is held is of the opinion from the examination that any juror would be unable to render a fair and impartial verdict, the juror shall be excused by the judge from any further service upon the panel, or in the action, as the judge determines.’” *State v. Esposito*, supra, 223 Conn. 308–309; see also Practice Book § 42-12 (providing language substantially identical to § 54-82f). “[T]he trial court is vested with wide discretion in determining the competency of jurors to serve, and that judgment will not be disturbed absent a showing of an abuse of discretion. . . . In exercising this discretion the trial court must zealously protect the rights of the accused.” (Citation omitted; internal quotation marks omitted.) *State v. Esposito*, supra, 310.

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tially harmful, this court considers whether an identifiable, objectionable juror actually served on the jury that decided the case, not whether the composition of the jury would have been different in the absence of the claimed error.” *State v. Ross*, 269 Conn. 213, 232, 849 A.2d 648 (2004); see *id.*, 233 (failure to seek and exercise additional peremptory challenge against specific juror after exhaustion of peremptory challenges rendered harmless any previous improper denial of for cause challenge because “the defendant was not forced to accept an incompetent or objectionable juror after his peremptory challenges had been exhausted”). Put differently, “the general rule is that an improper grant or denial of a for cause challenge is not prejudicial unless the defendant shows that the ruling resulted in an identifiable, objectionable juror actually serv[ing] on the jury that decided the case” (Internal quotation marks omitted.) *State v. Gould*, *supra*, 322 Conn. 530. “Prejudice is assessed with reference to the jurors who convicted the defendant because [t]he constitutional standard of fairness requires [only] that a defendant have a panel of impartial, indifferent jurors. . . . The right to challenge is the right to reject, not to select a juror of the defendant’s preference.” (Citations omitted; internal quotation marks omitted.) *Id.*, 531. But cf *id.*, 531–32 (violation under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is “a limited exception” to prejudice rule).

We conclude that the defendant cannot prevail on his for cause challenge claims because no challenged juror actually sat to deliberate in this case. It is undisputed that the defendant did not challenge for cause any of the twelve main jurors who actually deliberated on this case; see part I C of this opinion; and none of the alternates or backup alternates, some of whom had been challenged for cause, was required to participate. Accordingly, we need not reach the merits of these

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claims because any error in the trial court's rulings on these identified challenges for cause was harmless due to the fact that none of those jurors deliberated with the jury that decided his guilt.⁵⁷

II

CLAIMS ARISING FROM HAYES' LETTERS

The defendant next raises several claims arising from the state's disclosure, after the close of evidence, of approximately 130 pages of letters written by Hayes while he was incarcerated, which the Department of Correction (department) had intercepted before they reached their intended recipient, an unidentified woman in North Carolina. In addition to claiming that the state's disclosure of the letters after the close of evidence violated *Brady v. Maryland*, supra, 373 U.S. 83, the defendant also contends that the trial court improperly denied his motions (1) for a continuance to assess the information therein, and (2) to reopen the evidence because the trial court had found that the letters were not sufficiently trustworthy to render them admissible as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence.⁵⁸ The

⁵⁷ To the extent that the defendant claims that he was prejudiced because he was required to exhaust his allotted peremptory challenges on these jurors prior to the conclusion of jury selection, thus depriving him of the opportunity to use those challenges on other jurors whom he also deemed objectionable, thereby affecting the composition of the panel as a whole, this claim is foreclosed by our decision in *State v. Ross*, supra, 269 Conn. 233–34. See also *State v. Pelletier*, supra, 209 Conn. 572–73 (“[T]he defendant did not accept any juror or alternate whom he requested to be removed for cause. Therefore, even if those prospective jurors were biased, the defendant was not harmed because those individuals never became members of the jury.”).

⁵⁸ Section 8-6 of the Connecticut Code of Evidence provides: “The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (4) Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal

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defendant argues that Hayes' letters would have supported his theory of the case, namely, that he did not intend for anyone to be killed, insofar as Hayes essentially admitted in the letters that he was the "mastermind" of the invasion of the P family home, and also confessed to raping, torturing, and murdering seventeen other women and girls. In response, the state contends that the trial court properly exercised its discretion to deny the various motions given its predicate determination that the letters were not admissible as statements against penal interest, which also rendered them immaterial for *Brady* purposes. The state further argues that any error was harmless because admitting the letters in their entirety into evidence would have been extremely prejudicial to the defendant because they contained graphic depictions of sexual assaults—including the assault of M that the defendant denied committing—and descriptions of joint efforts between the defendant and Hayes to plan and execute the crimes. We agree with the state and conclude that the trial court did not abuse its discretion in denying the defendant's motions for a continuance, mistrial, or to reopen the evidence on the basis of the disclosure of the letters after the close of evidence.

The record reveals the following additional relevant facts and procedural history. After the close of evidence, on October 7, 2011, the state provided the defendant with 132 pages of handwritten letters from Hayes to an unidentified woman who lived in North Carolina, which the department had intercepted and given to the prosecutor. On October 11, 2011, which was the day of closing arguments, the defendant moved for a continuance, claiming that he needed time to assess the letters

interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . ."

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because they contained information that was exculpatory to him, as, in addition to vividly describing the details of what had transpired in the P residence, Hayes confirmed his leadership role when he stated: “The [P] home invasion was a dry run in the partnership between [the defendant] and myself. I do now realize had we gotten away, I would have killed [the defendant]. He was not even close to being worthy of my partnership. His sloppiness and lack of control would have been my downfall” The defendant also argued that the letters provided evidence of other crimes that established Hayes’ modus operandi, given his claim therein that he had committed seventeen other murders by strangulation across the northeastern United States, each of which was preceded by a sexual assault. The trial court denied the motion for a continuance, stating that, although it would have granted one during a court trial, “we have the jury that’s ready to go, and [its] time has to be considered, too, and it’s a balancing act.” The trial court further observed that the letters did not appear exculpatory to the defendant. The trial court did, however, agree to delay submitting the case to the jury for deliberations until the following day, in order to give the defendant and the court an additional opportunity to review the letters in more detail later that day.⁵⁹

The next day, the defendant moved for permission to reopen the defense, initially proposing to offer Hayes’ testimony to establish his lack of availability to testify as a predicate to the admissibility of the letters.⁶⁰ The

⁵⁹ After closing arguments, the trial court readdressed the parties with respect to the letters. The court stated that it would review the letters and then hear arguments the next day from the parties as to their admissibility, as well as any desired relief. Consistent with its directive from earlier in the day, the trial court then charged the jury, but it did not submit the case to the jury for deliberation at that time.

⁶⁰ When asked by the trial court, defense counsel indicated that he had not yet spoken with Hayes’ attorneys, but he agreed with the trial court’s observation that “[i]t’s hard to imagine [Hayes] not taking the fifth amendment”

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defendant also suggested that the postevidence disclosure of the letters, which appeared to have been written between August and September of 2011, could form the basis for a motion for a mistrial, although he agreed that the prosecutor had not been dilatory about providing the letters. Defense counsel reiterated his desire for a continuance because he “had very little time to actually go through [the letters] and figure out [their] evidentiary potential,” observing that Hayes’ “depraved letter . . . outlines details perceived by him and written by him as to the events that occurred in the [P] home; perhaps, more importantly, as he details other crimes he’s committed, he develops [a modus operandi] that is similar to this crime.” Defense counsel again argued that the language describing the P home invasion as a “dry run” and indicating that Hayes would have killed the defendant had they escaped “clearly demonstrates that Hayes was the mastermind and the leader,” which was “exculpatory in rebutting the state’s theory that [the defendant] was the leader.” Defense counsel also argued that Hayes’ claimed history of having raped and strangled seventeen women “would indicate that, unbeknownst to [the defendant] . . . when they entered that house . . . Hayes had an agenda that he [had not] exposed to [the defendant], which was to further his [modus operandi] and to further his depraved actions that he had done in the past.”⁶¹ Counsel argued that it was “fundamentally unfair” that, given the “clear . . . exculpatory information” in the letters, he did not have time to investigate “information of this

⁶¹ The defendant emphasized that the police had found numerous pairs of female sneakers when they searched Hayes’ home and had found H’s sneakers in Hayes’ vehicle, which was consistent with his “constantly” talking in the letters about his sneaker fetish and the fact that he claimed to have taken sneakers as trophies in connection with his past murders. The defendant also contended that Hayes’ descriptions of himself as a “great hunter” and Hayes’ statements of sadistic pleasure supported the defendant’s theory that he personally lacked intent to kill during the home invasion.

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type,” including the identity of the woman and any questions that might have been posed to Hayes in responsive letters, which might provide context for his statements. The state objected to the defendant’s motion to reopen, arguing that the letters were hearsay that were “unequivocally, undeniably . . . not reliable”

The trial court treated the defendant’s motions as ones for both a continuance and to reopen, and denied both, relying on this court’s decision in *Wood v. Bridgeport*, 216 Conn. 604, 583 A.2d 124 (1990). The court determined that there was nothing in the letters that would lead to a “miscarriage of justice” should the evidence not be reopened. Assuming that Hayes would assert the fifth amendment privilege and thus be unavailable as a witness, the trial court nevertheless determined that the letters were not admissible as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence because the statements therein were unreliable, as Hayes’ descriptions of the seventeen homicides were “couched in terms that would be very difficult to allow corroboration because no dates are given, no times [are given], no locations are given, what he did with the bodies is not given.” Most important, the trial court emphasized that the defendant “cherry-picks” certain portions of the letters, while ignoring others that were “quite damning” to him, with the letters in their entirety being “the seal of [the defendant’s] doom” were they to be admitted into evidence.⁶² Specifically, the trial court observed that the

⁶² In its colloquy with defense counsel, the trial court described the letters as, “at a minimum, a bare minimum, a mixed blessing for you because, if you view . . . Hayes as truthful, he is one of the great serial killers [in] modern American history. He claims to have killed seventeen people prior to this incident in pretty horrific ways, but he also says extremely, and I mean extremely, inculpatory things about [the defendant such] that it would be hard to imagine you wanting to put on. He says that [the defendant] had the proper evil intent, he says that [the defendant] poured gas on [the victims] and set the fire.” The court further observed that Hayes had written

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letters would not benefit the defendant, even if Hayes were to be deemed “the leader in this horrendous enterprise,” given statements therein that the defendant himself had admitted prior killings, Hayes stated that they had planned to kill all of the occupants of the P house, Hayes vividly described watching the defendant sexually assault M anally, and Hayes said that it was the defendant who had poured the gasoline. The trial court further concluded that the probative value of the letters was outweighed by their prejudicial effect because leadership was not relevant to the elements of the crimes, with the content of the letters ultimately being harmful with respect to supporting the defendant’s claim of lack of intent.⁶³ The trial court then denied the defendant’s motion for a mistrial based on prejudice caused by the late production of the letters, concluding that the state had turned them over immediately upon receipt.

The defendant’s various claims arising from the disclosure of the Hayes letters after the close of evidence

that the defendant “said, suppose we’re going to kill everybody anyway, this is at an early stage, he says that [the defendant] announces that he is going to sexually assault the eleven year old girl which later on . . . Hayes purports to have personally witnessed. He says that . . . [the defendant] was the one who actually killed the girls. And he says that they went into this enterprise with the . . . joint plan of killing everybody. So, under these circumstances, I just don’t see how, if it’s true, that it helps you at all, and, of course, if it’s not true, then I don’t see how it could be relevant.” Although defense counsel demurred, stating that “I don’t believe it’s appropriate for me to address trial tactics with the court in a public forum,” the trial court emphasized that the information was “necessary for [it] to address this question because the evidence has closed” and could only “reopen . . . to avoid a miscarriage of justice.” The trial court questioned how these “damning things” in the letters would mean that reopening “would avoid a miscarriage of justice . . .” The trial court acknowledged that, if “hypothetically . . . Hayes had committed seventeen murders prior to this event, how you could argue from that that Hayes was the leader”; however, the letters also stated that *the defendant* himself had told Hayes that “he had killed before,” making it “very hard for [the court] to term this as exculpatory.”

⁶³ The trial court did, however, leave open the possibility that the letters could be admissible “in the penalty phase of the trial should we, hypothetically, get there,” given the relaxed rules of evidence in that stage of the proceedings.

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are evaluated under similar, well established legal standards, and we consider them together. With respect to the defendant's request to reopen the evidence, we note that, "[i]n any ordinary situation if a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is a serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided. . . . Whether . . . a trial court will permit further evidence to be offered after the close of testimony in a case is a matter resting in the sound discretion of the court. . . . Such a reopening should not be permitted if it would result in substantial prejudice to a party." (Citations omitted; internal quotation marks omitted.) *Wood v. Bridgeport*, supra, 216 Conn. 606; see, e.g., *State v. Carter*, 228 Conn. 412, 420–21, 636 A.2d 821 (1994); *State v. Dunbar*, 51 Conn. App. 313, 320, 721 A.2d 1229 (1998), cert. denied, 247 Conn. 962, 724 A.2d 1126 (1999), and cert. denied, 247 Conn. 962, 724 A.2d 1126 (1999). In considering "whether the trial court acted within its broad discretion in rejecting the defendant's request for permission to introduce [evidence] after the defendant had rested his case," we consider the admissibility of the proffered evidence, as well as "the specific circumstances of the defendant's request, including the state's interest in an orderly trial process, the potential for jurors to have placed undue emphasis on the evidence had it been admitted, and the nature of the evidence." *State v. Carter*, supra, 425; see id., 422.

It is likewise well established that the "determination of whether to grant a request for a continuance is similarly within the discretion of the trial court. . . . The court, in exercising its discretion, may weigh various factors in considering a request for a continuance, including the likely length of the delay . . . the impact

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of delay on the litigants, witnesses, opposing counsel and the court . . . the perceived legitimacy of the reasons proffered in support of the request . . . [and] the likelihood that the denial would substantially impair the defendant’s ability to defend himself In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis.” (Citations omitted; internal quotation marks omitted.) *State v. Jackson*, 334 Conn. 793, 811–12, 224 A.3d 886 (2020); see, e.g., *State v. Brown*, 242 Conn. 445, 459–61, 700 A.2d 1089 (1997) (The trial court did not abuse its discretion or deny the defendant due process in denying his midtrial motion for a continuance to perform DNA testing on the sexual assault victim’s jeans given the lack of evidence of semen at the scene, the likely length of the delay for the testing, the lack of evidence that testing was possible given the age of the exhibit, and the fact that the defendant was not prejudiced because he could “argue to the jury that the state, which bore the burden of proof, had presented no scientific evidence connecting him to the crime, and he specifically highlighted the lack of testing on the jeans. The defendant made that argument with the knowledge that, even if he was convicted, he probably would be granted a new trial if the test results proved exculpatory.”).

Finally, “[a]lthough the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances [that] may arise during the

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trial in which his function is to [ensure] a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice. . . . The decision whether to grant a mistrial is within the sound discretion of the trial court.” (Internal quotation marks omitted.) *State v. Guilbert*, 306 Conn. 218, 270–71, 49 A.3d 705 (2012).

“The law governing the state’s obligation to disclose exculpatory evidence to defendants in criminal cases is well established. The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. . . . In order to prove a . . . violation [of *Brady v. Maryland*, supra, 373 U.S. 83], the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. . . .

“[E]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*. . . . Even if evidence is not deemed suppressed under *Brady* because it is disclosed during trial, however, the defendant nevertheless may be prejudiced if he is unable to use the evidence because of the late disclosure. . . . Under these circumstances, the defendant bears the burden of proving that he was prejudiced by the state’s failure to make the information available to him at an earlier time.” (Citations omitted; internal quotation marks omitted.) *State v. Guilbert*, supra, 306 Conn. 271–72; see *id.*, 272–74 (belated disclosure of surveillance video recording did not deprive defendant of fair trial because, “even without the video recording, the defense was able to show inconsistencies between the eyewitness’ descriptions of the defendant and the

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shooter,” defense was able to ask “generally whether the police officers had provided [the] witnesses with information about the defendant’s appearance,” and “a reasonable juror might have concluded that the video recording corroborated some of the eyewitness testimony”).

Having reviewed the letters in their entirety, we conclude that the defendant’s various claims arising from Hayes’ letters lack merit. Even if we assume, without deciding, that the letters would have been admissible as dual inculpatory statements against Hayes’ penal interest; see Conn. Code Evid. § 8-6 (4),⁶⁴ there is nothing therein that is in any way exculpatory or directly supports the defendant’s theory that Hayes was the ringleader and that the defendant’s role was subservient to Hayes—even if that were relevant to the elements of the crimes charged. At most, the letters—including Hayes’ statement that he would have killed the defendant had they gotten away—indicate that the invasion of the P home was a joint venture. Indeed, substantial portions of the letters directly undercut in graphic detail certain theories of defense proffered at trial, namely,

⁶⁴ We agree with the trial court’s observation that, assuming that Hayes was unavailable to testify, the admissibility of his letters as declarations against penal interest was nevertheless highly doubtful, given that (1) they were written four years after the crimes to a woman whom Hayes understood to be simpatico in his passions for evil, and (2) there was no apparent corroboration of times, dates or places of his claimed prior seventeen homicides. See *State v. Bryant*, 202 Conn. 676, 699, 523 A.2d 451 (1987) (“the focus on time appears to arise from the belief that declarations made soon after the crime suggest more reliability than those made after a lapse of time [during which] a declarant has a more ample opportunity for reflection and contrivance”). Compare *State v. Snelgrove*, 288 Conn. 742, 769–70, 954 A.2d 165 (2008) (third party’s statement to fellow inmate that he had killed victim was inadmissible when third party “was suffering from psychiatric problems at the time that he made the statement,” which lacked corroboration and was made two to three years after murder and defendant’s arrest), with *State v. Rivera*, 268 Conn. 351, 369–71, 844 A.2d 191 (2004) (dual inculpatory statement was admissible when made to close family member in confidence, on his own initiative, and within five months of homicide).

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that the defendant did *not* engage in anal intercourse with M and that it was Hayes who had poured the gasoline before setting the house on fire.⁶⁵ Thus, we agree with the trial court's observation that the Hayes letters likely would have been "the seal of [the defendant's] doom" by both reinforcing the basis for a guilty verdict and laying the groundwork for the existence of several aggravating factors that the state needed to prove to obtain a death verdict during the penalty phase. Accordingly, we conclude that there was no miscarriage of justice or prejudice as a result of the late disclosure of the letters, and the trial court did not abuse its discretion in denying the defendant's motions for a mistrial, to reopen the evidence, or for a continuance.

III

BRADY CLAIMS ARISING FROM VARIOUS CHESHIRE POLICE COMMUNICATIONS

The defendant next claims that the state violated his due process rights under *Brady v. Maryland*, supra, 373 U.S. 83, by failing to disclose to trial counsel recordings of numerous Cheshire Police Department communications. The claims arising from these communications fall into three categories: (1) six communications concerning the police response to the home invasion, (2) a police communications log contained in

⁶⁵ Although the defendant suggests that the prejudicial portions of the Hayes letters could have been redacted, the state accurately notes that the defendant did not raise the possibility of redaction before the trial court. This precludes us from considering the possibility of redaction in determining whether the trial court abused its discretion in denying the defendant's motions. In any event, as the state also points out, redaction of the portions that were prejudicial to the defendant might well have affected the context of the remaining statements in a manner inconsistent with our case law governing the admission of declarations against penal interest. See, e.g., *State v. Bryant*, 202 Conn. 676, 696–97, 523 A.2d 451 (1987) ("where the disserving parts of a statement are intertwined with self-serving parts, it is more prudential to admit the entire statement and let the trier of fact assess its evidentiary quality in the complete context").

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an e-mail received in January, 2008, by C.H.-R., who is J's sister, and (3) two communications relevant to the state of mind and demeanor of both Hayes and the defendant at the time of their arrests. The defendant argues that the state's failure to disclose these communications deprived him of his right to a fair trial because they would have (1) "strongly supported the defendant's theory that, because of their woefully inadequate response to the 911 call from the Bank of America, the Cheshire police were motivated by guilt, anger, and embarrassment to undermine the credibility of the exculpatory parts of his police statements," (2) "strongly supported the defense theory that . . . Hayes was the mastermind of the murders and that the defendant, stunned by Hayes' statements and actions during the crime, was slow to process and react appropriately to them," and (3) "constituted powerful exculpatory evidence of the defendant's exhaustion and disorientation when arrested and when he waived his *Miranda* rights and gave his police statements." We address each *Brady* claim in turn.

A

Additional Relevant Facts and Procedural History

The record reveals the following additional facts and procedural history relevant to the defendant's *Brady* claims. Robert Sage, an inspector with the prosecutor's office, coordinated the discovery in this case, including collecting evidence from the police and bringing it to the prosecutors. That material was later distributed by the prosecutor to defense counsel as a discovery file, the contents of which were memorialized in a letter from the prosecutor. Shortly after the home invasion, Sage contacted Vignola, Cheshire's detective captain, and asked him to preserve any records relating to the investigation, including audio recordings. Vignola accommodated that request by directing Michael Win-

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ters, the Cheshire Police Department's information technology coordinator, to capture all communications contained in the department's recording systems from the incident, starting with the initial call until the end of the incident.⁶⁶

In August, 2011, shortly before trial, the defendant moved for disclosure and examination of the state's evidence, including exculpatory and impeachment evidence, pursuant to *Brady* and the rules of practice. The defendant filed an additional disclosure motion on August 18, 2011. After a hearing on August 22, 2011, the trial court granted both motions, with defense counsel acknowledging that the state had conducted this case as an open file case and given the defendant all requested material to that point. Subsequently, on August 25, 2011, defense counsel sent a letter to the prosecutor, which, inter alia, (1) observed that a compact disc (CD) that had been provided to the defendant of recorded Cheshire police communications "contains only select calls" and asked the state to provide all Cheshire and state

⁶⁶ Winters testified that he used software that allowed him to "mark" or "tag" recordings of various individual transmissions on the telephone and radio systems, and then to move them into another software application that would "recreate the incident." After reviewing the various telephone lines and radio channels, Winters moved the calls that he had tagged as relevant to the software application; he then created a compact disc (CD) for Vignola that contained those communications. Winters also created, at Vignola's request, a written log that summarized, but did not transcribe verbatim, the time and nature of the communications. This process depended on Winters' judgment to determine the relevance of each communication.

Winters testified that the system did not automatically back up the recordings, and he manually copied the sound files to CDs on a weekly basis as a backup. Several years later, the town replaced the Cheshire emergency communications system after it was severely damaged by a lightning strike in December, 2010. When he subsequently received a request for a review of additional communications in connection with the motions for augmentation in this case, Winters stated that the originals had been destroyed by the lighting strike, but he was able to review the backup drives that he had created, which were stored off-site at Cheshire's town hall. See footnote 67 of this opinion. He did not, however, remember the existence of those drives at the time that defense counsel had made the initial request for additional communications in 2011.

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police communications recorded on July 23, 2007, from 9 a.m. through 1 p.m., and (2) sought “all documentation related” to any review of the police response on July 23, 2007, in light of the “questions and widespread criticism surrounding” it. The state subsequently advised the defendant that it had provided him with all preserved communications. In a letter dated September 19, 2011, defense counsel responded that his review of the CD that had been provided identified at least one call missing from the written log of communications; he also specifically requested “the action review” that department policy required following a response of the special response team. The record does not include the state’s response to that letter. The case then proceeded to trial.

While this appeal was pending, the defendant’s appellate counsel learned from reading a Hartford Courant article that certain Cheshire Police Department communications had not been turned over to trial counsel, or heard or publicly disclosed prior to trial.⁶⁷ On August 29, 2014, the defendant filed in this court a motion for augmentation and rectification of the record relating to those recordings. The defendant sought a hearing pursuant to *State v. Floyd*, 253 Conn. 700, 732, 756 A.2d 799 (2000) (*Floyd* hearing),⁶⁸ to establish that the state

⁶⁷ Appellate counsel observed that the calls described in the Hartford Courant article were not identified in the call log and discovery memorandum that the state had produced prior to trial. She could not find any evidence of those communications after she searched the files of all three attorneys who had represented the defendant at trial and listened to the CDs that she found therein. She then contacted Neil Dryfe, the chief of the Cheshire police, who produced a flash drive of those calls, which had been found in a backup storage location in town hall. See footnote 66 of this opinion. Appellate counsel testified, however, that she subsequently learned that the recordings of the missing communications had in fact been produced to attorneys for Hayes, who was tried first.

⁶⁸ “Pursuant to *State v. Floyd*, supra, 253 Conn. 700, a trial court may conduct a posttrial evidentiary hearing to explore claims of potential *Brady* violations . . . when a defendant was precluded from perfecting the record due to new information obtained after judgment. . . . In order to warrant such a hearing, a defendant must produce prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial. . . . The trial court’s decision with respect to whether to hold a *Floyd* hearing is reviewable

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had failed to disclose to the defendant's trial counsel recordings of these communications. The defendant argued that this failure to disclose violated *Brady* because those communications were evidence that supported a defense theory that the police response in this case was inadequate. Evidence of an inadequate police response would have supported his attempts to attack the credibility of various police witnesses who had challenged the veracity of the defendant's statement to the police, and also would have "front-loaded" a strategy for mitigation in the anticipated penalty phase of the trial.⁶⁹ We referred this motion to the trial court for action.

On September 24, 2014, the state notified the defendant's appellate counsel of the existence of additional recordings that had not been produced to counsel, which were discovered by Cheshire town employees after the defendant filed his first motion for augmentation and rectification of the record. On November 13, 2015, the defendant filed a second motion for augmentation and rectification of the record related to those additional calls.

The trial court held a three day *Floyd* hearing on the defendant's motions.⁷⁰ In advance of the hearing, the

by motion for review pursuant to Practice Book § 66-7" (Citations omitted; internal quotation marks omitted.) *State v. Ouellette*, 295 Conn. 173, 182 n.7, 989 A.2d 1048 (2010).

⁶⁹ In particular, the defendant claimed that the inadequacy of the police response was a relevant circumstance in this case for consideration by the jury in its capital sentencing determination. At the *Floyd* hearing, Todd Bussert, who was one of the attorneys who represented the defendant at trial, testified that he had reviewed the CD of dispatch calls found in his trial file in advance of cross-examining Vignola, the Cheshire police detective captain. The defense strategy, in connection with "front-load[ing]" mitigation for the anticipated penalty phase, was to raise the question of whether the tragedy might not have occurred if the Cheshire police had responded differently. Bussert's objective in cross-examining Vignola was to establish the sequence of the police response and to demonstrate that the Cheshire police "didn't actually engage anyone; they just kind of set up a perimeter."

⁷⁰ At the *Floyd* hearing, the trial court also considered a separate augmentation and rectification motion filed on November 13, 2015, that encom-

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state and the defendant stipulated to the existence of the recordings of numerous communications from July or August of 2007 that had not been disclosed to the defendant's trial counsel prior to trial in 2011 and had been provided to appellate counsel for the first time in November, 2014. The parties stipulated that those recordings were true and accurate copies and should be marked as exhibits at the *Floyd* hearing.⁷¹ After hearing testimony from Sage, counsel, and Winters; see footnote 66 of this opinion; the trial court found that the CDs were not turned over as a result of an "error in transmission," which was likely attributable to the sheer volume of evidence in this case. The trial court found that it

passed certain testimony and exhibits from Hayes' trial with respect to the photographs that the defendant had taken of M. We address the defendant's claims relating to those items in part IV of this opinion.

⁷¹ As described in the stipulation, the relevant recordings are (1) "[a] recording numbered 173251 (CH10 09001C58) [in] the call log provided by the [s]tate to defense trial counsel and admitted at trial as [d]efendant's [e]xhibit #A. Call from Cheshire Police Sergeant Chris Cote to Officer Robert Regan, acting as dispatcher, in response to request of Officer Donald Miller for a call," (2) "[a] recording numbered 173309 (CH1 000A724) [in] the call log provided by the [s]tate to defense trial counsel and admitted at trial as [d]efendant's [e]xhibit #A in which Cheshire Police Captain Robert Vignola states he will do a drive-by of 300 Sorghum Mill Drive, Cheshire, and the house is described by Officer Philip Giampietro," (3) "[a] recording designated CH10 09001CCB 669; in which Shawn Patterson, a Cheshire [p]olice [o]fficer, speaks with Officer Brian Schechter," (4) "[a] recording designated CH10 09001D4C 669; the relevant speakers are a Cheshire Detective Kerry Nastro and . . . Connecticut State Trooper David Devito," (5) "[a] recording designated CH11 0A00327B; the relevant speaker is Cheshire Police Captain . . . Vignola; internal call from Captain Ren Marchand, shift commander. The time of the call was 9:27:52 a.m. on July 23, 2007," (6) "[a] recording designated CH17 10002AA5; the relevant speaker is Cheshire Police Officer Jeff Sutherland. The time of the call was 9:33:26 a.m. on July 23, 2007. This call was included on a dis[c] produced in discovery on or around September 13, 2007 (Item #87). It is included among other calls in Call #173292 [in] the call log, [d]efense [e]xhibit A," (7) "[a] recording designated CH17 10002AA7. The time of the call was 9:35:23 a.m. on July 23, 2007. This call was included on a dis[c] produced in discovery on or about September 13, 2007 (Item #87). It is included among other calls in Call #173292 [in] the call log, [d]efense [e]xhibit A," and (8) "[a] recording designated CH10 09001C57 (Time: 9:23:12); the relevant speakers are [Officer Regan] and Cheshire Police Lieutenant Joe Mazzini. The time of the call was 9:23:12 a.m. on July 23, 2007."

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was uncontested that “the three police calls described in paragraph four on page nine of the August 19, 2014 motion . . . were not disclosed to the defense.”⁷² We address the content of these communications in detail in part III C of this opinion. See also footnotes 82 through 84 of this opinion.

The parties disputed, however, the existence of a communication that was described in paragraph one on page eight of the August 19, 2014 motion for augmentation, namely, the call log that C.H.-R. claimed to have received in an e-mail. After considering testimony from C.H.-R. and her husband, W.R., about this e-mail, the trial court found that its existence had not been proven by a fair preponderance of the evidence. Consistent with our previous denial of relief in a subsequent motion for review, we now turn to the merits of the defendant’s *Brady* claims.

B

Claims Arising from the E-mail Described by C.H.-R.

We begin with the defendant’s claim that the trial court improperly found that he had failed to prove the existence of a call log that established the presence of a police officer at the P residence when Hayes and J returned from the bank in the Pacifica, which had been relayed to C.H.-R., who is J’s sister, in an e-mail that she received in January, 2008. The defendant first argues that the existence of the call log was established by the highly credible testimony of C.H.-R. and her husband, W.R., and corroborated by both the “consistent and highly suspicious pattern by the police of withholding or mischaracterizing critical police calls” and

⁷² The defendant withdrew claims arising from the 9:33:26 a.m. broadcast by Cote indicating that he was approaching Sorghum Mill Drive and the 9:35:23 a.m. broadcast by an officer who sounded like Cote, indicating that he was on the rear side of the P family residence at that time.

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“the improbability” that numerous Cheshire police officers had not “arrived at the P residence in time to observe the Pacifica returning there.” The defendant also argues that the trial court improperly required him to prove the existence of the call log by a preponderance of the evidence, contending that, under § 9-1 (a) of the Connecticut Code of Evidence,⁷³ a party need only make a prima facie showing of the authenticity of an exhibit to the court for purposes of admissibility. Finally, the defendant argues that the trial court abused its discretion by sustaining the prosecution’s objection under § 7-1 of the Connecticut Code of Evidence,⁷⁴ which governs the admission of lay opinion testimony, to defense counsel’s question at the *Floyd* hearing to W.R. about whether the e-mail “appear[ed]” to him “to be a document that could have been created by a nonpolice or like a layperson who was not involved in the response”

In response, the state assumes the credibility of C.H.-R. and W.R. but contends that their testimony nevertheless does not establish the existence of the call log or the e-mail in which it was contained. The state also cites, among other cases, *State v. Thompson*, 305 Conn. 412, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013), and argues that the trial court properly applied the preponderance of the evidence standard in determining whether the call log or e-mail existed as a predicate factual matter. Finally, the state contends that the trial court did not abuse its discretion in sustaining its objection to W.R.’s testimony

⁷³ Section 9-1 (a) of the Connecticut Code of Evidence provides: “The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be.”

⁷⁴ Section 7-1 of the Connecticut Code of Evidence provides: “If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.”

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about the appearance of the e-mail because it was not a proper subject for lay witness opinion testimony. We agree with the state and conclude that the trial court properly applied the preponderance of the evidence standard and concluded that the defendant had not established the existence of the communication at issue.

The record reveals the following additional relevant facts and procedural history. In his August 29, 2014 motion for augmentation and rectification of the record, the defendant claimed that the state had failed to produce a police communication that C.H.-R. had received by e-mail in January, 2008, and that she subsequently discussed during an appearance on Katie Couric’s television show that aired on August 19, 2013. The defendant averred that that communication, as described by C.H.-R., “establishes that ‘there actually was a police officer at [J’s] home watching her come back to the house and pull into the driveway,’” describing “‘her car [as] a silver Chrysler Pacifica [that] is now entering the driveway and the garage door is going up and the car is pulling in’”

At the *Floyd* hearing, C.H.-R. testified that she and her parents had remained in contact with the Cheshire police because they had concerns about the police response to the home invasion and were angry when the Cheshire town manager publicly commended the police on television. C.H.-R. testified that, in early January, 2008, she received an e-mail that contained what appeared to be a log of communications between the officers before that information was ultimately released to the public. C.H.-R. stated that the call log contained the times and written descriptions of various communications between the responding officers. One particular item that distressed C.H.-R. was a notation in the log that Cheshire police officers were present and had witnessed the Pacifica returning to the P family residence,

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leading her to conclude that officers were present at the house for approximately forty-five minutes before Hayes and the defendant fled the scene and that the officers could have prevented the deaths of J, H, and M. C.H.-R. testified that the log document in the e-mail did not have any logos or markings indicating that it had originated from either the Cheshire Police Department or the prosecutor's office. C.H.-R. did not know who sent the e-mail, but she assumed that "someone from the Cheshire police sent it to me."⁷⁵

C.H.-R. testified that she did not presently have a copy of the e-mail printed out or saved electronically. C.H.-R. "was afraid to keep the e-mail" because it was labeled "for your eyes only or FYI only," and she was afraid to show it to anyone or tell anyone about it. She testified, however, that she had printed a copy of the e-mail and deleted the electronic file sometime in February or March of 2008. C.H.-R. showed a copy of the printout to her husband, W.R., and to a North Carolina news reporter who had come to their home. She did not give the news reporter a copy of the e-mail and asked her not to report about it given its confidential nature. She also showed the printed copy to her parents, who were upset by it and wrote letters to the Cheshire police; the police claimed they had never received those letters. She testified that W.R. had shown the printed copy to an attorney friend, and that they subsequently lost—and perhaps accidentally discarded—that printed copy. No evidence of the e-mail appeared after a search of her computer hard drive. C.H.-R. acknowledged that the communication described in the e-mail did not appear in the communications logs admitted into evidence at trial and that recordings provided to her for

⁷⁵ C.H.-R. testified that she originally thought that the e-mail had been created by the Cheshire police and forwarded to her by her brother-in-law, W. C.H.-R. later asked W about the e-mail around the time of trial, and W denied sending the e-mail to her or having any awareness of the information therein.

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review by defense counsel did not include that communication.⁷⁶

W.R. also testified at the hearing. He testified that C.H.-R. had shown him the e-mail when he came home one afternoon in January, 2008. He could not tell from the e-mail or the printout the origin of the message; he did not think that it had been forwarded by W but, perhaps, had come from the spouse of a Cheshire police officer. He did not think that it had come from the town of Cheshire itself and did not know where the sender of the e-mail had obtained the information therein. W.R. testified that, at that time, his family was frequently receiving e-mails from people whom they had not met—nearly twenty to thirty times per day—offering support and prayers. He recalled that it was about the case, and “that the Pacifica was returning, and the garage door . . . was going up.” W.R. also observed that it had a list of numerous communications between police officers during the response. He showed a printout of the e-mail to an attorney friend and asked about “normal police protocol” in the home invasion/hostage situation. When he got home, he placed the printout on top of his computer to “save” or “keep it” The attorney did not keep a copy of the e-mail and did not ask for one. W.R. had never seen the police call log that was admitted into evidence at Hayes’ and the defendant’s trials. During W.R.’s testimony, the trial court sustained the state’s objection to the question whether the log in the e-mail “appear[ed] to you to be a document that could have been created by a nonpolice or like a layperson who

⁷⁶ C.H.-R. testified that she had discussed the police response with Vitello, who stated that he could not speak to her about the evidence until after the trial; she had informed him of her concern that the police were present when the Pacifica returned. She also discussed her concerns about the police response with the prosecutor before the trial, although none of the reports that he had showed them included the initial police response time. Sage, an inspector with the prosecutor’s office, counseled C.H.-R. not to discuss the information publicly until after the trial.

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was not involved in the response” With no argument by the defendant in response, the trial court ruled that the question “call[ed] for an opinion [and] that [there was] no foundation that he has some expertise in this.”

As we noted previously, Winters, the information technology manager for the Cheshire Police Department, worked at the direction of Vignola to capture, log, and summarize the police department’s radio and telephonic communications during the home invasion incident, from the initial 911 call until the defendant and Hayes were taken into custody. See footnote 66 of this opinion. In reviewing those communications in July, 2007, Winters denied hearing “in words or in substance a communication by or among Cheshire police officers to the effect that someone [had] observed the Chrysler Pacifica entering the driveway at that residence and the garage door being elevated” Had he heard such a communication, he would have moved it into the application and documented its existence in the log. Even if Winters had missed that communication during his manual review in 2007, it would have remained archived on the Cheshire police servers, as well as, presumably, the backup drives maintained at town hall. See footnote 66 of this opinion.

After hearing argument, the trial court first determined that it was the defendant’s burden to prove the existence of the call log by a preponderance of the evidence, rejecting his reliance on *State v. Colon*, 272 Conn. 106, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005), for the proposition that his burden was merely to establish a prima facie showing of the call log’s existence; the court deemed *Colon* to be limited to a showing of authenticity of an already existing document, whereas the inquiry in this case is whether the document existed at all. Observing that it was undisputed that the call log and

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communication had never been turned over to the defense, the trial court stated that “the only question is whether the call [log] existed in the first place,” and it concluded that it “cannot find on the basis of the evidence presented . . . that, by a preponderance of the evidence, such a call existed.” Although the trial court agreed that C.H.-R. had “no incentive to fabricate testimony to help” the defendant, it nevertheless deemed evidence of the call log’s existence unreliable given the lack of evidence as to the e-mail’s origin and the fact that C.H.-R. and W.R. were “getting all sorts of information from people they didn’t know.” The trial court acknowledged that § 10-3 (1) of the Connecticut Code of Evidence⁷⁷ allows other evidence of the contents of a writing, if the original is lost or destroyed, to be established by secondary evidence, but ultimately determined that there simply was not a preponderance of “credible evidence” beyond “guesswork or speculation” to establish the existence of the call log or the e-mail in which it had been contained.

Having reviewed the defendant’s various claims on this point, we first conclude that the trial court properly required the defendant to prove the existence of the e-mail and call log containing the communication described by C.H.-R. by a preponderance of the evidence. The existence of undisclosed evidence under

⁷⁷ Section 10-3 of the Connecticut Code of Evidence provides: “The original of a writing, recording or photograph is not required, and other evidence of the contents of such writing, recording or photograph is admissible if:

“(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original; or

“(2) Original not obtainable. No original can be obtained by any reasonably available judicial process or procedure; or

“(3) Original in possession of opponent. At a time when an original was under the control of the party against whom it is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the proceeding, and that party does not produce the original at the proceeding; or

“(4) Collateral matters. The contents relate to a collateral matter.”

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Brady “is an issue of fact for the determination of the trial court. . . . Furthermore, the burden is on the defendant to prove the existence of undisclosed exculpatory evidence. . . . A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant’s constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court’s factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court’s factual findings are supported by substantial evidence.” (Citation omitted; internal quotation marks omitted.) *Greene v. Commissioner of Correction*, 330 Conn. 1, 29, 190 A.3d 851 (2018), cert. denied sub nom. *Greene v. Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019); see, e.g., *State v. Ouellette*, 295 Conn. 173, 187–89, 989 A.2d 1048 (2010); *State v. Floyd*, supra, 253 Conn. 737–38.

Although the quantum of proof necessary to establish the existence of undisclosed evidence is a question of first impression in Connecticut, our research reveals federal and sister state authority that requires the defendant to prove by a preponderance of the evidence the existence of evidence that is claimed to be *Brady* material, which is an inquiry that most often arises in the context of undisclosed cooperation agreements between prosecutors and witnesses. See, e.g., *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir.), cert. denied, 574 U.S. 894, 135 S. Ct. 235, 190 L. Ed. 2d 177 (2014); *Walker v. Kelly*, 589 F.3d 127, 141–42 (4th Cir. 2009), cert. denied, 560 U.S. 920, 130 S. Ct. 3318, 176 L. Ed. 2d 1215 (2010); *United States v. Thompson*, Docket No. 07-35-GFVT, 2011 WL 1327339, *13 (E.D. Ky. April 4, 2011), aff’d, 501 Fed. Appx. 347 (6th Cir. 2012); *People v. Giuca*, 33 N.Y.3d 462, 474, 128 N.E.3d

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655, 104 N.Y.S.3d 577 (2019); *Commonwealth v. Spatz*, 616 Pa. 164, 201, 47 A.3d 63 (2012). The preponderance of the evidence standard is consistent with existing Connecticut case law governing factual proof of constitutional violations as a preliminary matter. See, e.g., *State v. Thompson*, supra, 305 Conn. 428 (applying preponderance standard in determining whether defendant procured absence of potential witness for purpose of hearsay exception under § 8-6 (8) of the Connecticut Code of Evidence because that “standard . . . is consistent with the standard used by courts in making other preliminary determinations of fact involving a defendant’s constitutional rights, such as whether a confession was voluntary”).

Application of the preponderance of the evidence standard is particularly apt in this case, in which the defendant sought to establish the existence of a lost or destroyed document or recording, the admissibility of which is governed by § 10-3 of the Connecticut Code of Evidence; authority applying similar rules of evidence generally requires such proof to be by at least a preponderance of the evidence.⁷⁸ See, e.g., *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.*, 354 F. Supp. 3d 375, 382 (S.D.N.Y. 2018) (applying Federal Rules of Evidence to claimed loss of assignment of patents); *Kleenit, Inc. v. Sentry Ins. Co.*, 486 F. Supp. 2d 121, 125–26 (D. Mass.

⁷⁸ Accordingly, we agree with the trial court that the issue presented in this case, which concerned the existence of both the missing e-mail and the call log contained therein, is—contrary to the defendant’s argument—distinct from the authentication inquiry governed by § 9-1 of the Connecticut Code of Evidence, under which the trial court exercises its discretion in determining whether there is a prima facie case showing that a specific item of evidence is what its proponent claims it to be. See, e.g., *State v. Carpenter*, 275 Conn. 785, 856–57, 882 A.2d 604 (2005) (authentication of identity of speaker on recording), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State v. Colon*, supra, 272 Conn. 188–89 (authentication of written confession to police). This authentication inquiry would have arisen in the present case had, for example, the e-mail itself been presented to the trial court, thus requiring the trial court to consider the authenticity of both the e-mail and the call log contained therein.

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2007) (applying Massachusetts law to lost insurance policy); *Coxwell v. Coxwell*, 296 Ga. 311, 312–13, 765 S.E.2d 320 (2014) (lost antenuptial agreement). But see *Estate of Bossio v. Bossio*, 237 W. Va. 130, 134–35, 785 S.E.2d 836 (2016) (requiring clear and convincing evidence to prove existence and contents of lost document). Accordingly, we conclude that the trial court properly required the defendant to prove the existence of the call log and C.H.-R.’s lost or deleted e-mail by a preponderance of the evidence.

We further conclude that the trial court did not commit clear error in finding that the defendant had not proven the existence of the call log described in C.H.-R.’s lost or deleted e-mail, or the e-mail itself, by a preponderance of the evidence. Although the trial court found C.H.-R. and W.R. to be credible, the fact that the e-mail had been deleted and the printout lost rendered it impossible to determine the provenance of the message or the call log contained therein. Neither C.H.-R. or W.R. knew who had sent the e-mail, and a search of Cheshire’s communications server and records did not reveal a corresponding communication. Accordingly, we conclude that the trial court correctly concluded that the defendant had not established the existence of the call log claimed to have been contained in C.H.-R.’s e-mail.

Finally, we address the defendant’s claim that the trial court abused its discretion in sustaining the state’s objection under § 7-1 of the Connecticut Code of Evidence, governing lay opinion testimony, to a question posed to W.R., namely, whether the e-mail “appear[ed] to you to be a document that could have been created by a nonpolice or like a layperson who was not involved in the response” See, e.g., *State v. Holley*, 327 Conn. 576, 604–606, 175 A.3d 514 (2018) (setting forth background principles and abuse of discretion standard of review applicable to lay opinion evidence). The trial

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court sustained the state's objection to this question, concluding that it "call[ed] for an opinion that [there was] no foundation that he has some expertise in this." We conclude that any error on this point is harmless, given that this issue turned on the lack of proof that the e-mail and the call log contained therein existed, as opposed to the authenticity of those documents.

C

Whether Certain Communications Not Disclosed
by the State Were Material for Purposes
of a *Brady* Violation

It is undisputed that the state failed to disclose six Cheshire police communications that form the basis of the defendant's *Brady* claim with respect to the police response, and two communications that concern the demeanor of the defendant and Hayes following their arrests. Before turning to those communications, we review the well established principles governing the defendant's claim under *Brady v. Maryland*, supra, 373 U.S. 83. "Due process principles [under the fourteenth amendment to the United States constitution] require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . [Thus] [i]n order to obtain a new trial for improper suppression of evidence, the [defendant] must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure." (Citations omitted.) *Marquez v. Commissioner of Correction*, 330 Conn. 575, 592, 198 A.3d 562 (2019).

"In *Brady*, the court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is

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material either to guilt or to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . The United States Supreme Court also has recognized that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . .

“Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Adams v. Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013); see *id.*, 370 (noting that “a classic *Brady* case . . . involv[es] the state's inadvertent failure to disclose favorable evidence”).

In the present case, it is undisputed that the communications were not disclosed and constituted impeachment evidence. The sole issue concerns whether they were material under *Brady*, which “presents a question of law subject to plenary review.” *Marquez v. Commissioner of Correction*, *supra*, 330 Conn. 593. “Evidence

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is material when there would be a reasonable probability of a different result if it were disclosed. . . . A reasonable probability exists if the evidence could reasonably . . . put the whole case in such a different light as to undermine confidence in the verdict. . . . Materiality does not require, however, a demonstration . . . that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . Instead, the operative inquiry is whether, in the absence of the evidence, the defendant received a fair trial . . . resulting in a verdict worthy of confidence." (Citations omitted; internal quotation marks omitted.) Id., 593–94.

"This calls for a careful review of that [evidence] and its probable effect on the jury, weighed against the strength of the state's case and the extent to which [the defendant was] otherwise able to [discredit the evidence]. . . . [E]vidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can . . . be determined [only] by comparison to the rest." (Citation omitted; internal quotation marks omitted.) Id., 594; see *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); see also *Henning v. Commissioner of Correction*, 334 Conn. 1, 24–26, 219 A.3d 334 (2019) (discussing more "stringent" and "strict" standard of materiality applicable when "a prosecutor obtains a conviction with evidence that he or she knows or should know to be false" (internal quotation marks omitted)). We now turn to the undisclosed communications.

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Police Response Communications

The first communication at issue is a call from Cheshire police Sergeant Chris Cote to Officer Robert Regan, at 9:25:15 a.m. on July 23, 2007, discussing whether and where to attempt to intercept the Pacifica en route to the P family residence in response to a 911 call from the Bank of America.⁷⁹ The defendant argues that this first call supports the proposition that Cote was in a position to locate and to stop the Pacifica, yet failed to do so. The defendant argues that the other five calls suggest a failure by the Cheshire police to marshal necessary resources in a timely manner. Specifically, the second call is an internal communication at 9:27:52 a.m. between Vignola and Cheshire Police Captain Ren Marchand, who was the shift commander, indicating

⁷⁹ The recording of the first communication provides in relevant part: “[A Male Voice]: Hey, what’s up?”

“[A Male Voice]: We’re taking 911s from the bank. Apparently some family is tied up and being held hostage, and they’re forcing the woman to go to the bank and withdraw a large amount of cash to pay the captors. Mazzini is here now. Don is getting basic information on it, but it sounds like we might be in this for a little bit.

“[A Male Voice]: All right. Where is it?”

“[A Male Voice]: The lady is at Bank of America, Don? The lady just left, possibly with the captors in a Chrysler Pacifica heading out Vespucci’s side of Maplecroft.

“[A Male Voice]: Do you want to put that on the air? Joe, what do you want to do? Do you want to try to find that car or what do you want to do? We’re going to put that out on [indiscernible]. Just left Bank of America, the captors might be in the car with her, Chrysler Pacifica. . . . The bank manager is the one that called us. The lady doesn’t even—didn’t want to notify the police because they have her family tied up. [Indiscernible.]

* * *

“[A Male Voice]: . . . Chrysler Pacifica, color gray, coming out of Maplecroft Plaza [indiscernible] West Main Street toward Sorghum Mill Road.

“[A Male Voice]: All right. What color is the Pacifica? . . .

“[A Male Voice]: . . . [Indiscernible] But—why don’t you just head down toward that area and see if we can intercept this car.

“[A Male Voice]: I’m on Maple now. . . . [Indiscernible.] Turned onto West Main Street, the Pacifica [indiscernible] gray Pacifica. . . .”

that Vignola was “heading out” to the scene.⁸⁰ The third communication is one between 9:36:18 and 9:36:45 a.m., in which Vignola advises that he will “drive by” the P family house and receives a description of it from Officer Phillip Giampietro.⁸¹ The fourth communication is one in which the caller, who is a hostage negotiator, is directed not to report to the station.⁸² The fifth communication is one in which Cheshire special response team members are directed not to report to the station.⁸³ The sixth call is one in which an unidentified Cheshire police officer appears to have briefly questioned the account of the incident that J provided at Bank of America, which had been relayed to the police.⁸⁴

The defendant argues that these undisclosed communications would have provided further impeachment evidence with respect to the veracity of the Cheshire police witnesses by providing support for the theory that their testimony was colored by their remorse for

⁸⁰ The recording of the second communication provides: “[A Male Voice]: 300 Sorghum Mills? . . . Is the lady still at the bank? . . . Chrysler Pacifica? . . . All right. We’re heading out.”

⁸¹ The recording of the third communication provides in relevant part: “[A Male Voice]: [Indiscernible.] Going to do a drive-by [indiscernible] . . . “[A Male Voice]: Okay, as soon as you get past Hotchkiss Ridge, just look on your left, you’ll see the house. Again, the front faces Hotchkiss Ridge, the driveway comes out onto Sorghum. The vehicle is in the driveway.”

⁸² The recording of the fourth communication provides in relevant part: “[A Male Voice]: I need to know whether you want me in or not. I’m the hostage negotiator, and I got paged. . . .”

“[A Male Voice]: Not at this time. . . .”

⁸³ The recording of the fifth communication provides in relevant part: “[A Male Voice]: We want to know, Brian and I are out on West Johnson . . . [indiscernible] if you want us to come in and start suiting up?”

“[A Male Voice]: We’ll call you if we need anything—if we need you.”

⁸⁴ The recording of the sixth communication provides in relevant part: “[A Male Voice]: All right. Did you get that so far? . . . Apparently she came into the bank, she tried to get some money out. . . . One of the accounts was in the husband’s name, and then she says, well, my kids are at home tied up, so we don’t know if they really are or if she was just trying to get money out of the bank at this point. . . . The car is at the house from what I understand.

“The car is at the house. She got \$15,000 in cash in three envelopes with \$5000 a piece. They’re all strapped. So \$15,000 dollars in \$50 bills.”

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an inadequate police response. As the defendant acknowledges in his brief, however, the principal issues of fact at the guilt phase of the trial were whether he had (1) committed an anal sexual assault of M, and (2) intended to kill J, H, and M. A review of the record, including the parties' closing arguments and the supporting evidence, confirms that none of the undisclosed material impeaches the veracity of the Cheshire police witnesses in a manner that undermines our confidence in the verdict as to the disputed fact issues. With respect to the sexual assault of M, the recovery of the defendant's DNA from her anus provides ample and overwhelming support for the jury's verdict on that count, with any inadequacy in the *police* response to the emergency bearing no relation to his theory, proffered during closing argument, that the rectal swab taken from M must have been cross-contaminated with the defendant's DNA by a technician in the Connecticut Forensic Science Laboratory (state lab), insofar as there was no other evidence of sexual assault such as physical injury to M's anal area or the presence of M's DNA on the defendant's penis.⁸⁵

⁸⁵ We note that the defendant argued that the officers had watched him when he went into the bathroom at the police station to make sure that he did not wash himself, and that the swab had in fact detected the defendant's sperm on his penis, which was consistent with his account in his statement that he ejaculated after committing an oral sexual assault on M. Although the defense acknowledged Carver's testimony that the lack of physical injury was not inconsistent with sexual assault, the defense contended that it was unlikely given the size differences between M and the defendant, along with the lack of consent.

In rebuttal, the state emphasized that there was no support for the defense theory because it was Carver himself who had taken the swab from M and not a technician. The state also reemphasized Carver's testimony about the elasticity of the anus rendering the lack of injury to the area "not unusual" Finally, the state emphasized that there was no evidence that the police had supervised the defendant while he was in the bathroom at the police station, which would support the state's argument that he had the opportunity to wash his penis while in there, along with the fact that the swabs were not taken from the defendant until at least fifteen hours after his arrest. On this point, Vitello testified on cross-examination that the police had provided the defendant with a bathroom break during the interview; no one went in the bathroom with him, but they left the door partially ajar.

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The state sought to prove the defendant's intent to kill by circumstantial evidence given the defendant's denials of such intent in his statement. The state relied on the defendant's motive of hiding the evidence of his sexual assault of M and his failure to walk out of the house and abort the crimes during the opportunities presented when Hayes was out of the house buying gasoline and taking J to the bank, along with his act of retying H and M to their beds after they had been permitted to use the bathroom and M had showered. The state also argued that the defendant had poured bleach on M's shorts in an attempt to eliminate DNA evidence. The state further relied on evidence that gasoline had been poured only in areas of the P home where people were present. The state also emphasized that gasoline was found on the defendant's clothes and debunked his explanation that the gasoline was the result of his work activities by using Stop and Shop surveillance video showing him wearing different clothes when he stalked J and M at the store after work than when he was arrested after perpetrating these crimes. None of the undisclosed evidence pertaining to the police response affected this evidence of intent in any way, as it did not depend on the observations or veracity of the Cheshire police witnesses. Accordingly, we conclude that the additional evidence that would raise the question of an inadequate police response was not material to the guilt issues at this trial, and the state's failure to disclose it did not, therefore, violate *Brady*.

2

Communications About the Defendant's
Appearance and Demeanor

The defendant next claims that two communications describing his demeanor and Hayes' appearance were

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material for *Brady* purposes. The first communication is one in which Shawn Patterson, a Cheshire police officer, described the defendant to another officer as “nobody home” and “simple as they come.”⁸⁶ The defendant argues that this communication was material to the voluntariness of his statements, which was an issue that he addressed in closing argument, and the waiver of his *Miranda* rights, and that the trial court would have granted his pretrial motion to suppress his statement on the ground that it was not voluntary because of sleep deprivation and injury from the collision between the Pacifica and the Cheshire police cruisers. In response, the state contends that Patterson’s statement was not material because any information that could be drawn from it was amply duplicated firsthand at trial, including by Vitello’s description of the defendant during the interview and the audio recording of the defendant’s statement. We agree with the state and conclude that Patterson’s description of the defendant was not material.

A review of the record satisfies us that Patterson’s description of the defendant was not material for *Brady* purposes because its omission does not undermine our confidence in the fairness of the trial or the suppression hearing in this case. It is not reasonably likely that Patterson’s testimony would have changed the fact finder’s determination on this point, given the uncontro-

⁸⁶ In the first communication, the following exchange occurred between Patterson and Officer Brian Schechter: “[Patterson]: I was talking to the—I was with the detective when he was talking. That kid is like, there is nobody home, dude.

“[Schechter]: Which one? The older one or the younger one?

“[Patterson]: The younger one. The darker haired dude.

“[Schechter]: Really?

“[Patterson]: There is nobody . . . that dude is fucking simple as they come.”

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verted evidence at the *Floyd* hearing that Patterson's contact with the defendant was at most a fleeting observation in the hallway of the police station; he took no part in the response to the P home or the ensuing investigation and was not present for the interview.⁸⁷ Indeed, Patterson's testimony was at best cumulative of more probative evidence as to the defendant's demeanor, namely, Vitello's testimony that the defendant was emotionless during the period of time following his arrest, and the lengthy recording of the defendant's statement, which the trial court and the jury had the opportunity to hear for themselves. See, e.g., *State v. Wilcox*, 254 Conn. 441, 458, 758 A.2d 824 (2000); *Morant v. Commissioner of Correction*, 117 Conn. App. 279, 298–99, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009).

We now turn to the second communication, which is a discussion between Cheshire Police Detective Kerry Nastri and Connecticut State Trooper David Devito, in which one of the two officers⁸⁸ describes Hayes as

⁸⁷ Specifically, Patterson testified at the *Floyd* hearing that he had been called to the station around noon on July 23, 2007, to help cover "routine calls" in Cheshire in the aftermath of the incident; he had no role in responding to the P home that morning. While standing in a hallway near a bulletin board, Patterson observed the defendant for several seconds being escorted by several detectives into the booking area. Patterson did not participate in any interviews of or have any conversations with the defendant at any time. He recalled making the comment to a fellow officer about the defendant that was captured on the recording, describing his observation that "no one was home" "and "simple as they come" as reflecting what he felt was a lack of emotion that was unusual for a person who had just been arrested.

⁸⁸ Neither Nastri nor Devito testified at the *Floyd* hearing, and the trial court did not make any finding as to which speaker made the "looked evil" comment. Although the defendant argues that Nastri made the "looked evil" comment, the state disagrees, observing that the flow of the conversation demonstrates that it was Devito who had made the observation, given that there was no evidence that Devito had responded to the scene, and Cheshire Police Lieutenant Jay Markella testified at trial that Nastri had responded to the scene and entered the house with him as part of the department's special response team.

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“look[ing] evil.”⁸⁹ The defendant argues that this statement would have supported his argument that Hayes was the mastermind in charge of the events at the house and that the defendant wanted no part of killing the P family, especially when considered in light of evidence of the defendant’s apparent slow reaction to the unfolding events, such as Patterson’s statement. The state argues that this statement was not material because it was “gossip” that did not necessarily reflect what Hayes or the defendant looked like at the time of the home invasion. We agree with the state and conclude that this casual observation of Hayes’ appearance as “evil” was not material. In the absence of any evidence that the officers heard Hayes make any statements that would support the defendant’s theory, an offhand impression of Hayes as “look[ing] evil”—with

⁸⁹ The second communication consisted of the following conversation:
“[A Male Voice]: Did the officers get hurt in the cars at all?”

“[A Male Voice]: No, they were not in the cars.

“[A Male Voice]: The cars looked wrecked.

“[A Male Voice]: Oh they—they are.

“[A Male Voice]: They are totaled, right?”

“[A Male Voice]: They are totaled. . . . They had placed the cars so that no one would drive into the area, and there was a little gap between them, and the guy tried to—

“[A Male Voice]: Oh, I see what he did . . . he tried to park [indiscernible]. . . . He hit them hard, huh?”

“[A Male Voice]: Oh yeah. . . . And they—I’m sure their car, you know the victim’s car was—

“[A Male Voice]: I saw the troop. I saw the troop. . . . I saw the two dirtbag cars. . . . There was a red pickup and there was like a minivan.

“[A Male Voice]: Yeah.

“[A Male Voice]: I think that those are the two scumbags.

“[A Male Voice]: Yup.

“[A Male Voice]: Wow, I mean that—the older guy just looked evil.

“[A Male Voice]: Yeah?”

“[A Male Voice]: He just looked evil. I mean you got—you know what? Your heart just breaks as an officer watching that stuff. You know—I mean it’s heartbreaking for all of us to investigate it. You know? Cuz we have families and all that crap too you know.

“[A Male Voice]: Well we have—Out of all the guys that went in . . . I think I was probably the only one who didn’t have children . . . and we have [employee assistance programming] coming in tomorrow. . . .”

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no further elaboration—does nothing to inform the jury’s assessment of what actually happened in the P residence, whether considered in isolation or cumulatively. Accordingly, we conclude that this undisclosed evidence was not material for purposes of *Brady*.

IV

NAPUE AND GIGLIO CLAIMS ARISING FROM
PHOTOGRAPH ON DEFENDANT’S
CELL PHONE

The defendant next claims that the state deprived him of his right to a fair trial under *Giglio v. United States*, supra, 405 U.S. 150, and *Napue v. Illinois*, supra, 360 U.S. 264, among other cases, by presenting evidence that it knew or should have known was false or highly misleading, namely, an inflammatory photograph taken from the defendant’s cell phone that the state’s expert witness, John Brunetti, testified was of M in a sexually explicit pose. In contrast to Brunetti’s testimony at the defendant’s trial, John Farnham, an analyst at the state lab, who also testified at the defendant’s trial, testified as an expert witness at Hayes’ trial that the same photograph was of a different female, and not M, who was prepubescent. The defendant contends that Brunetti’s testimony was, therefore, misleading evidence that violated his right to a fair trial because the state capitalized on it during closing argument, insofar as it was “exponentially more inflammatory by the state’s claim that it depicted an eleven year old child,” and it undermined portions of his statement stating that he did not anally rape M, believed that she was between fourteen and sixteen years old, and did not intend anyone to be killed or pour gasoline at the scene. In response, the state contends, inter alia, that “there is no reasonable possibility that any falsity affected the outcome of the trial.” We agree with the state and conclude that there is no reasonable likelihood that any falsity or substantially

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misleading testimony by Brunetti on this point affected the outcome of the defendant's trial.

The record reveals the following additional relevant facts and procedural history. At the defendant's trial, H. Wayne Carver II, then the state's chief medical examiner, testified about his autopsy of M. He described her as "a young adolescent female," stating that she was eleven years old "*and the body looked like it*, and, at the time of the autopsy, she weighed 124 pounds." (Emphasis added.) In describing the various samples that he took from M's body, Carver stated that he had taken "a sample of hairs, and *I don't think she had much more than head hair, but, if she had other hairs*, we would have taken them and labeled them." (Emphasis added.) Carver further stated that he performed various "swabs and smears" to retrieve material from M's oral, vaginal, and anal areas.

Farnham, a retired state police detective who worked in the computer crime unit at the state lab, had examined, pursuant to a search warrant, cell phones belonging to the defendant and Hayes; he retrieved text messages from both phones and photographs from the defendant's phone. Farnham retrieved eight photographs within the date and time period specified by the search warrant; he testified that two depicted the defendant and six "showed a young white female on a bed" The six images were admitted into evidence as state's exhibit 209.⁹⁰

Brunetti, who worked in the multimedia and image enhancement section of the state lab, had reviewed the six images in state's exhibit 209, which were taken between 7:27 and 9:14 a.m. on July 23, 2007. The first five images depict a partially clothed young female,

⁹⁰ Defense counsel objected to state's exhibit 209 on the ground that its prejudicial effect outweighed its probative value. The trial court overruled that objection. The defendant does not challenge that ruling in this appeal.

whose head is covered; two of those images are a close-up photograph of the female's genital area, which is covered by underwear. The sixth image in state's exhibit 209 depicts an unclothed female lying on her back, with her legs raised at close to a ninety degree angle; the female's genitalia and anus are covered by a black bar that Brunetti had added to the original photograph for "[d]iscretion." Brunetti opined that all six of the images were of the same person, namely, M.⁹¹ The defendant cross-examined Brunetti briefly but did not question him about his conclusion that the six images all depicted M.

In contrast to Brunetti's testimony at the defendant's trial, the record, as augmented on appeal after the *Floyd* hearing,⁹² reveals that Farnham testified at Hayes' trial that the sixth image was of "a different female, apparently older than the first female picture that was taken,"

⁹¹ Brunetti determined that all six of the photographs depicted the same person, despite the fact that "the last image is more of an image that's a close-up photograph," which did not contain "a lot of the surrounding area that you see in the previous five images" Brunetti based his opinion on "some telltale signs that . . . led [him] to the conclusion that it was the same person. And the last photograph, what's consistent about that photograph, as compared to two or three of the other images, is that the person in the last photograph has some type of a cloth over the upper face chest area that proceeds under the left arm, and the arm's bent back, apparently past the head, and you could see the cloth going out, and it's consistent [in] both of those photographs. In addition, the female that's in that photograph has pretty much a pronounced chest cavity when she's lying on her back, you could see the bones of her chest cavity and they are consistent in both those images also."

⁹² During the pendency of this appeal, on November 13, 2015, the defendant filed a motion to augment the record pursuant to, inter alia, *State v. Floyd*, supra, 253 Conn. 700, to add to the record in this case a transcript of Farnham's testimony at Hayes' trial, along with the unredacted counterpart to state's exhibit 209 at Hayes' trial under seal. The defendant argued that this augmentation was necessary to establish a violation of *Napue v. Illinois*, supra, 360 U.S. 264, and its progeny. After a hearing, the trial court granted the defendant's motion over the state's objection and added the transcript and a copy of the exhibit—the authenticity of which was stipulated by all counsel—to the record for purposes of this appeal. This court subsequently upheld that decision when it granted a motion for review filed by the state but denied the relief requested.

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and that, “[b]ased on the size of the person, *it doesn’t appear to be the same person; this person has reached puberty.*” (Emphasis added.) As the defendant observes in his brief, the sixth image that was admitted into evidence at Hayes’ trial is unredacted and “shows that the female has reached puberty and has more than head hair,” which is inconsistent with Carver’s description of M.

“Whether a prosecutor knowingly presented false or misleading testimony [in violation of a defendant’s due process rights] presents a mixed question of law and fact, with the [trial] court’s factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review. . . .

“[D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading. . . .

“To establish a *Napue/Giglio* violation, then, the [defendant] must demonstrate that the state’s witnesses provided material, false or substantially misleading testimony that the prosecutor failed to correct.” (Citations omitted; internal quotation marks omitted.) *Gomez v. Commissioner of Correction*, 336 Conn. 168, 175–76, 243 A.3d 1163 (2020); see also *id.*, 182–83 (explaining relationship between prosecutor’s obligations under *Napue/Giglio* and prosecutor’s disclosure obligations under *Brady v. Maryland*, *supra*, 373 U.S. 83); *Greene v. Commissioner of Correction*, *supra*, 330 Conn. 24–25 (*Napue* and *Giglio* “do not apply to merely ‘misleading’ testimony in the first instance. Rather, those cases require the prosecutor to correct *only* testimony that

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is substantially misleading or false.” (Emphasis in original.)).

Whether the prosecutor’s presentation of false or substantially misleading testimony constitutes a due process violation depends on whether the evidence at issue is material. In contrast to conventional *Brady* claims, “[w]hen . . . a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial [impropriety], but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . . In light of this corrupting effect, and because the state’s use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state’s case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury. . . .

“In accordance with these principles, our determination of whether [the witness’] false testimony was material under *Brady* and its progeny requires a careful review of that testimony and its probable effect on the jury, weighed against the strength of the state’s case

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and the extent to which [the defendant was] otherwise able to impeach [the witness].” (Emphasis in original; internal quotation marks omitted.) *State v. Jordan*, 314 Conn. 354, 370–71, 102 A.3d 1 (2014); see also *Marquez v. Commissioner of Correction*, supra, 330 Conn. 593–94. “[D]etermining materiality presents a question of law subject to plenary review.” *Marquez v. Commissioner of Correction*, supra, 593.

Assuming without deciding that Brunetti’s testimony at the defendant’s trial that the sixth image in state’s exhibit 209 depicted M was false or substantially misleading, we conclude that it was not material and did not violate the defendant’s due process rights under *Napue* and *Giglio*.⁹³ Specifically, our review of the record demonstrates that there is no reasonable likelihood that Brunetti’s testimony identifying the sixth photograph as M would have affected the jury’s verdict, despite its inconsistency with Farnham’s testimony on this point at Hayes’ trial. First, there is no dispute that the other five images in state’s exhibit 209 were of M, which corroborates the defendant’s statement to the police that he took photographs of M for his “personal

⁹³ Accordingly, we need not consider the state’s arguments that (1) the testimony at issue constituted a mere inconsistency in opinion that did not rise to the level of false or misleading testimony, and (2) there was no due process violation because the defendant was aware of the claimed falsity through his review of the Hayes’ trial record during trial preparation, and was not precluded from responding to it. But see *Gomez v. Commissioner of Correction*, supra, 336 Conn. 189–90 (stating that, “although the burden is one shared by defense counsel and the trial court, the onus ultimately is on the prosecutor to not knowingly seek a conviction on the basis of false testimony and, should a state’s witness testify falsely, to take such remedial measures before the jury retires as are necessary to ensure that it is not deceived,” and adopting case-by-case multifactor approach to whether case is “[an] exceptional [one] in which disclosure to defense counsel, standing alone, is sufficient to satisfy a prosecutor’s obligations and to vindicate a defendant’s rights under *Napue*”). We also need not consider the state’s request that we reconsider our decision on the motion for review upholding the trial court’s decision to grant the defendant’s request to make Farnham’s testimony at Hayes’ trial and the unredacted photograph part of the trial record in this case. See footnote 92 of this opinion.

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use.” Second, the content of the image does not bear on any of the contested issues in the guilt phase, and particularly whether the sexual assault that the defendant had committed was by anal intercourse rather than the claimed cunnilingus, or whether he had the requisite intent to kill.⁹⁴ Third, if the person in the image at issue was not M, based on the timing of the photograph, it had to have been H, which would have added the differently inflammatory specter of an additional sexual assault victim to the case. Indeed, the entirely tangential nature of this issue is borne out by the defendant’s failure to cross-examine Brunetti on this point, despite having had access to Farnham’s testimony at Hayes’ trial and indications in the photographs—namely, different bedding as a backdrop—that suggest that the images were of different people. Accordingly, we conclude that any misleading testimony on this point was not material under *Napue* and *Giglio*, and did not deprive the defendant of a fair trial.

V

CONDITIONS OF CONFINEMENT

Finally, the defendant claims that the trial court unconstitutionally applied the stringent conditions of confinement set forth in § 18-10b after his death sentence was vacated and he was resentenced to life imprisonment without the possibility of release and subsequently transferred to a prison in Pennsylvania. Specifically, the defendant contends that the restrictive conditions of confinement set forth in § 18-10b, as

⁹⁴ We acknowledge, as the defendant argues, that his claim regarding his estimation of M’s age was discussed at closing argument in the context of the state’s attack on the credibility of his statements that he did not pour the gasoline, intend anyone to be killed, or sexually assault M anally. Although the state argued that these assertions, which included an attack on the defendant’s claimed belief that M was fourteen to sixteen years old, lacked credibility, its argument was not based on the photographs but, instead, focused on the likely content of the conversation about summer plans and school that the defendant claimed to have had with M.

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implemented by an administrative directive of the department, constitute an ex post facto law, violate equal protection, and are excessive and disproportionate, in violation of the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. In response, the state relies on *State v. Campbell*, supra, 328 Conn. 444, and argues that this claim is not ripe for review because the record lacks evidence or factual findings regarding the defendant's conditions of confinement or the procedures utilized by the department in determining those conditions. We agree with the state and conclude that this conditions claim, although ripe, is not reviewable in this direct appeal.

In *Campbell*, the defendant, Jessie Campbell III, argued that his penalty phase claims were not moot, despite the abolition of the death penalty, because he would suffer collateral consequences as a result of the previously imposed death sentence, namely, the imposition of restrictive conditions of confinement pursuant to § 18-10b. See *State v. Campbell*, supra, 328 Conn. 461. We agreed with the state's argument that Campbell's conditions of confinement claim was not yet ripe for review⁹⁵ because those conditions "have not yet been settled, as [Campbell] ha[d] not yet been resentenced.

⁹⁵ "The doctrines of mootness and ripeness both implicate justiciability. . . . Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review. . . . An issue is moot when the court can no longer grant any practical relief. . . . [T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements Accordingly, in determining whether a case is ripe, a . . . court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Citations omitted; internal quotation marks omitted.) *State v. Campbell*, supra, 328 Conn. 463.

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Additionally, there ha[d] been no factual findings as to how, if at all, [Campbell's] confinement, after resentencing, would differ from those of any inmate who is similarly situated." *Id.*, 462–63. We further concluded that, "because [Campbell's] argument centers on a potential challenge to conditions of confinement, the proper vehicle for those claims is a petition for a writ of habeas corpus." *Id.*, 463. Accordingly, we dismissed the appeal in *Campbell* "with respect to his claims challenging the penalty phase and the sentence of death." *Id.*, 466; see *id.*, 463 n.5 (deeming penalty phase claims challenging death sentence moot).

Although the defendant in this case has been resentenced, in contrast to Campbell, whose resentencing was still hypothetical, rendering a challenge thereto not ripe; see *id.*, 464; that is a distinction without a difference with respect to the reviewability of the merits of the defendant's claim in this appeal. With respect to the equal protection challenge in particular, which focuses on the claimed disparate treatment of defendants who had received life sentences after the abolition of the death penalty as compared to capital defendants who had previously received life sentences, there is no evidence in the record beyond an averment of information and belief in the defendant's brief as to the treatment of similarly situated inmates. Additionally, there is no evidence as to the conditions of confinement actually imposed on the defendant, who is presently incarcerated in Pennsylvania. Any merit with respect to the defendant's § 18-10b claims aside, they implicate his conditions of confinement. "It is well established that the proper vehicle by which a defendant may challenge his conditions of confinement is a petition for a writ of habeas corpus. . . . The present case illustrates perfectly why a habeas petition is the proper vehicle. In the habeas court, the defendant will have the opportunity to present any and all evidence that is relevant to his

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claim. That court is empowered to make factual findings on that evidence. This court is not.” (Citation omitted.) *Id.*, 465–66. Accordingly, we leave the merits of the defendant’s conditions of confinement claim under § 18-10b to a subsequent habeas corpus proceeding.⁹⁶

The judgment is affirmed.

In this opinion the other justices concurred.

A BETTER WAY WHOLESALE AUTOS, INC. v.
JAMES SAINT PAUL ET AL.
(SC 20386)

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

Syllabus

The plaintiff, an automobile dealership, sought to vacate an arbitration award that was issued in favor of the defendants in connection with their purchase of a vehicle from the plaintiff. The parties had entered into a

⁹⁶ We note that, while this appeal was pending before this court, the United States Court of Appeals for the Second Circuit issued its decision in *Reynolds v. Quiros*, 990 F.3d 286 (2d Cir. 2021), which considered a variety of constitutional challenges to § 18-10b brought by Richard Reynolds, a former death row inmate who had been resentenced under that statute following this court’s decision in *State v. Santiago*, supra, 318 Conn. 1. In *Reynolds*, the Second Circuit held that (1) § 18-10b is an unlawful bill of attainder in violation of article I, § 10, of the United States constitution, and (2) the risk classification imposed on Reynolds by the defendants, who are numerous officials of the department, violated his rights under the equal protection clause of the fourteenth amendment to the United States constitution because the defendants failed to establish a rational basis for why he was classified more strictly than similarly situated former death row inmates. See *Reynolds v. Quiros*, supra, 300, 301. The Second Circuit also held, however, that the United States District Court for the District of Connecticut had improperly granted Reynolds’ motion for summary judgment with respect to his eighth amendment and due process claims by deciding genuine issues of material fact about whether his conditions of confinement, pursuant to § 18-10b, in the Special Circumstances Unit at Northern Correctional Institution were in fact “properly characterized as ‘solitary confinement.’” *Id.*, 294. We emphasize that our dismissal of the defendant’s appeal with respect to his conditions of confinement claim is without prejudice to any facial or as applied challenges to § 18-10b that he may bring in a subsequent proceeding.

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financing agreement that contained an arbitration clause providing, *inter alia*, that any arbitration between the parties would be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration. After the arbitrator ruled in favor of the defendants, the plaintiff filed an application to vacate the arbitration award in the trial court. The defendants opposed the plaintiff's application to vacate, claiming that the court lacked subject matter jurisdiction because the plaintiff's application was untimely under the state statute (§ 52-420 (b)) that imposed a thirty day limitation period for applications to vacate an arbitration award. The court agreed and rendered judgment dismissing the plaintiff's application to vacate as untimely. The plaintiff appealed to the Appellate Court from the trial court's judgment, contending that its application to vacate was not untimely because the arbitration agreement specified that the Federal Arbitration Act would govern any arbitration between the parties and the limitation period for a motion to vacate an arbitration award under the applicable provision of that act (9 U.S.C. § 12) was three months. The Appellate Court affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held:*

1. The trial court properly dismissed the plaintiff's application to vacate an arbitration award as untimely under § 52-420 (b), and, accordingly, the Appellate Court properly affirmed the trial court's judgment: this court had repeatedly held that § 52-420 (b) unambiguously implicates a trial court's subject matter jurisdiction, and, therefore, the expiration of the limitation period in § 52-420 (b) deprives a trial court of subject matter jurisdiction over an application to vacate an arbitration award filed pursuant to that statute; moreover, the plaintiff's reliance on federal cases for the proposition that § 52-420 (b) is not necessarily jurisdictional was misplaced because those cases concerned the subject matter jurisdiction of federal courts with respect to certain federal statutes, not Connecticut courts with respect to § 52-420 (b); furthermore, because § 52-420 (b) implicates a trial court's subject matter jurisdiction, the private agreement between the parties could neither confer subject matter jurisdiction on the trial court nor cure the jurisdictional defect arising from the plaintiff's late filing.
2. The plaintiff could not prevail on its claims that § 52-420 (b) was preempted by the Federal Arbitration Act and that the trial court's dismissal of its application to vacate an arbitration award conflicted with the obligation imposed on state courts by a provision of that act (9 U.S.C. § 2) to enforce arbitration agreements: § 52-420 (b) did not stand as an obstacle to the accomplishment of the federal policy to enforce arbitration agreements, as both parties had postarbitration rights to seek judicial enforcement of the agreement to arbitrate under the Connecticut statutory scheme, and the plaintiff did not argue that the thirty day limitation period in § 52-420 (b) was prohibitively short such that a challenging party lacks a meaningful opportunity to seek to vacate an arbitration

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award; moreover, the application of § 52-420 (b) to the plaintiff's application to vacate did not treat an arbitration agreement differently from any other contract, which was consistent with the purpose of the Federal Arbitration Act; furthermore, this court found persuasive a federal case that examined the relationship between § 52-420 (b) and the Federal Arbitration Act and found no conflict preemption, and the plaintiff's reliance on *Haywood v. Drown* (556 U.S. 729), a case in which the United States Supreme Court struck down a New York law that divested state courts of jurisdiction over actions brought against correction officers pursuant to federal statute (42 U.S.C. § 1983), was unavailing, as the relevant policy concern underlying the Federal Arbitration Act was significantly different from the policy concerns underlying 42 U.S.C. § 1983, and the challenged state law in *Haywood* also was distinguishable from § 52-420 (b).

Argued October 15, 2020—officially released April 15, 2021*

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the defendants filed motions to confirm the award and for attorney's fees, and to dismiss the application to vacate the award; thereafter, the case was tried to the court, *M. Taylor, J.*; judgment dismissing the application to vacate and granting the motions to confirm and for attorney's fees, from which the plaintiff appealed to the Appellate Court, *DiPentima, C. J.*, and *Lavine, Keller, Elgo, Bright and Moll, Js.*, with *Sheldon and Lavery, Js.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellees (defendants).

Opinion

McDONALD, J. This certified appeal requires us to determine the statutory time limitation applicable to a

* April 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

motion to vacate an arbitration award brought in state court when review of the underlying arbitration is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., pursuant to a private arbitration agreement. This determination presents two issues. First, we consider whether the Connecticut thirty day time limitation applicable to a motion to vacate an arbitration award, General Statutes § 52-420 (b),¹ implicates the subject matter jurisdiction of our courts. Second, we consider whether this state's law is preempted by the FAA as a result of an actual conflict between the different time limitations contained in the two statutes.

The plaintiff, A Better Way Wholesale Autos, Inc., appeals from the judgment of the Appellate Court, which affirmed the trial court's judgment and concluded, among other things, that the plaintiff's application to vacate an arbitration award rendered in favor of the defendants, James Saint Paul and Julie J. Saint Paul, was untimely under § 52-420 (b). See *A Better Way Wholesale Autos, Inc. v. Saint Paul*, 192 Conn. App. 245, 247, 257, 217 A.3d 996 (2019) (en banc). On appeal, the plaintiff claims that the Appellate Court incorrectly concluded that its application to vacate the arbitration award was governed by the thirty day time limit set forth in § 52-420 (b) in contravention of a private agreement between the parties.

The Appellate Court's decision sets forth the facts and procedural history; *id.*, 247–50; which we summarize in relevant part. In 2015, the defendants bought a motor

¹ Throughout the opinion, we refer to both a “motion” to vacate an arbitration award and an “application” to vacate an arbitration award. The relevant statutes employ both terms in different provisions. Section 52-420 (b) sets a thirty day time limit for both an application to vacate filed by the party that lost in the underlying arbitration, as well as a motion or opposition filed by such party in response to the prevailing party's application to confirm the arbitration award. See *Wu v. Chang*, 264 Conn. 307, 309–11, 823 A.2d 1197 (2003). We employ both terms as appropriate for technical precision; however, there is no substantive distinction between them.

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vehicle from the plaintiff, and the parties entered into an agreement to finance the purchase. The financing agreement contained an arbitration clause that provided, among other things, that any dispute arising from the defendants' purchase of the vehicle would be resolved by binding arbitration. The arbitration clause contained a choice of law provision, which provided in relevant part: "Any arbitration under this [a]rbitration [p]rovision shall be governed by the [FAA] . . . and not by any state law concerning arbitration. . . ." (Citation omitted.) The clause further provided in relevant part: "Any court having jurisdiction may enter judgment on the arbitrator's award. . . ."

Later that year, the defendants initiated an arbitration proceeding, claiming, among other things, that the plaintiff failed to disclose certain charges in violation of the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On July 21, 2016, the arbitrator ruled in favor of the defendants with respect to the Truth in Lending Act claim and awarded damages, attorney's fees, and costs.

On August 26, 2016, the plaintiff filed an application to vacate the arbitration award in the Superior Court pursuant to the FAA, claiming that the arbitrator exceeded his powers. The defendants opposed the plaintiff's application to vacate on the ground that the trial court lacked subject matter jurisdiction. Specifically, the defendants argued that the plaintiff's application was untimely under § 52-420 (b), which imposes a thirty day limitation period to seek to vacate an arbitration award. The trial court agreed with the defendants and dismissed the plaintiff's application to vacate as untimely under § 52-420 (b). The plaintiff appealed from the trial court's judgment of dismissal to the Appellate Court. Specifically, the plaintiff argued that its application to vacate was not untimely because the arbitration

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agreement specified that the FAA—and not any state law provision—would apply, and the limitation period for a motion to vacate an arbitration award under the FAA is three months. See 9 U.S.C. § 12 (2012).

A three judge panel of the Appellate Court heard oral argument. *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 192 Conn. App. 250 n.3. Thereafter, pursuant to Practice Book § 70-7 (b), the court, sua sponte, ordered reargument en banc. *Id.* The Appellate Court also ordered the parties to file supplemental briefs addressing, among other things, the applicability of that court’s decision in *Doctor’s Associates, Inc. v. Searl*, 179 Conn. App. 577, 180 A.3d 996 (2018), overruled in part by *A Better Way Wholesale Autos, Inc. v. Saint Paul*, 192 Conn. App. 245, 217 A.3d 996 (2019) (en banc). See *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 250 n.3. The Appellate Court subsequently affirmed the judgment of the trial court. *Id.*, 265. Relevant to this appeal, it concluded that parties cannot, “as a matter of law, agree to have the FAA’s three month limitation period set forth in 9 U.S.C. § 12 apply to a vacatur proceeding filed in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b).” (Emphasis in original.) *Id.*, 252. It reasoned that this court has repeatedly held that the thirty day limitation period in § 52-420 (b) is subject matter jurisdictional. *Id.*, 255. It also noted that “parties cannot agree to confer subject matter jurisdiction on a court . . . [or] waive the lack of subject matter jurisdiction.” *Id.*, 257. Finally, the Appellate Court overruled *Doctor’s Associates, Inc.*, “insofar as [that decision stood] for the proposition that, as a matter of contract interpretation, parties can agree to have” the FAA’s three month limitation period supplant the thirty day limitation period prescribed by § 52-420 (b). *Id.*, 260.

Two members of the en banc court dissented. The dissent conceded that the FAA did not preempt § 52-

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420 (b); *id.*, 269 (*Lavery, J.*, dissenting); but explained that it would nevertheless apply the three month limitation period to give effect to the FAA’s bedrock principle of contractual freedom. See *id.*, 268–69, 275 (*Lavery, J.*, dissenting). The dissent noted that “the parties agreed to be bound by the FAA in its entirety,” including the time limitation period contained in 9 U.S.C. § 12. *Id.*, 267 (*Lavery, J.*, dissenting). Finally, the dissent reasoned that the thirty day limitation period in § 52-420 (b) was not properly characterized as subject matter jurisdictional because it “could be considered an element necessary to establish a right, and, therefore, substantive in nature.” *Id.*, 272–73 (*Lavery, J.*, dissenting).

Thereafter, the plaintiff filed a petition for certification to appeal, which we granted, limited to the following issue: “Did the Appellate Court correctly conclude that parties to an arbitration agreement did not avoid Connecticut’s thirty day statutory deadline for filing an application to vacate an arbitration award set forth in . . . § 52-420 (b) by including in their agreement a choice of law provision stating that any arbitration shall be governed by the [FAA] . . . which contains a three month deadline for filing a motion to vacate?” (Citation omitted.) *A Better Way Wholesale Autos, Inc. v. Saint Paul*, 333 Conn. 935, 218 A.3d 593 (2019).

On appeal, the plaintiff contends that the arbitration clause contained in the parties’ financing agreement requires the application of the FAA in all respects, including its three month limitation period for filing a motion to vacate. See 9 U.S.C. § 12 (2012). Specifically, the plaintiff contends that we should reverse the judgment of the Appellate Court because § 52-420 (b) is not subject matter jurisdictional. The plaintiff also argues that, even if we were to conclude that § 52-420 (b) is subject matter jurisdictional, reversal is required because that statute is preempted by the FAA. The defendants disagree and contend that the Appellate

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Court correctly determined that state law governs the timeliness question because § 52-420 (b) is subject matter jurisdictional. The defendants also argue that the FAA does not preempt § 52-420 (b).

As the Appellate Court noted, whether the plaintiff's application to vacate was untimely "depends on whether state or federal law controls the limitation period in which the plaintiff was required to file such application." *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 192 Conn. App. 252. This question is a legal one, as are the incorporated issues concerning the trial court's subject matter jurisdiction and federal preemption of a state statute. Therefore, our review is plenary. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover . . . [s]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction" (Footnote omitted; internal quotation marks omitted.) *Bloomfield v. United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286, 939 A.2d 561 (2008). Furthermore, "[j]urisdiction of the [subject matter] is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Internal quotation marks omitted.) *Rayhall v. Akim Co.*, 263 Conn. 328, 339, 819 A.2d 803 (2003). In addition, the question of preemption "is a question of law and, therefore, our review is plenary." *Hackett v. J.L.G. Properties, LLC*, 285 Conn. 498, 503, 940 A.2d 769 (2008).

We begin with the plaintiff's contention that § 52-420 (b) is not subject matter jurisdictional. This question

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requires an examination of the state law procedures governing a motion to vacate an arbitration award in state court. Section 52-420 (b) provides: “No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion.” We have explained that “[a] proceeding to vacate an arbitration award is not a civil action, but is rather a special statutory proceeding. . . . Section 52-420 (b) requires that a motion to vacate an arbitration award be filed within thirty days of the notice of the award to the moving party.” (Citations omitted.) *Middlesex Ins. Co. v. Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993).

We have repeatedly held that § 52-420 (b) unambiguously implicates a court’s subject matter jurisdiction. For example, in *Middlesex Ins. Co.*, we stated: “If the [application to vacate the arbitration award] is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the [application].” *Id.*, citing *Vail v. American Way Homes, Inc.*, 181 Conn. 449, 452–53, 435 A.2d 993 (1980). In addition, we have reasoned that the expiration of the limitation period deprives the trial court of subject matter jurisdiction over any ground to vacate the arbitration award, even if the ground to vacate is raised by way of an opposition to the prevailing party’s timely filed application to confirm the arbitration award. See *Wu v. Chang*, 264 Conn. 307, 309–10, 313–14, 823 A.2d 1197 (2003). Most recently, we have held that a trial court lacked subject matter jurisdiction over an untimely motion to vacate when the substantive claim was based in common law rather than the statutory scheme governing arbitration; see *Bloomfield v. United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, *supra*, 285 Conn. 279–80; because the “broad language [of § 52-420 (b)] plainly states that the [limitation] period applies regardless of the grounds for

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the motion to vacate.” *Id.*, 287. Accordingly, there is an abundance of authority stating that a trial court lacks subject matter jurisdiction over a motion to vacate an arbitration award that is filed outside the thirty day time limit. See, e.g., *id.*, 280, 284; *Wu v. Chang*, *supra*, 312; *Middlesex Ins. Co. v. Castellano*, *supra*, 225 Conn. 344; see also, e.g., *Vail v. American Way Homes, Inc.*, *supra*, 452–53; cf. *Middletown v. Police Local, No. 1361*, 187 Conn. 228, 231, 445 A.2d 322 (1982) (plaintiff invoked statutory jurisdiction of trial court when it filed application to vacate arbitration award). In this case, the plaintiff filed its application to vacate the arbitration award on August 26, 2016, more than thirty days after it received notice of the award on July 21, 2016. Therefore, the trial court lacked subject matter jurisdiction over the plaintiff’s motion.

The plaintiff does not contend that we should overrule this line of cases stating that § 52-420 (b) is subject matter jurisdictional. Rather, the plaintiff asserts that § 52-420 (b) is not necessarily jurisdictional merely because it contains a time limitation. In support of this argument, the plaintiff relies on two cases from federal courts that interpreted federal statutes. In the first case, the United States Supreme Court evaluated the thirty day time period in the Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (1) (B), that limits an application for attorney’s fees when the applicant prevailed in an action against the government. *Scarborough v. Principi*, 541 U.S. 401, 405, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004). The court held that this limitation period did not implicate the subject matter jurisdiction of the federal courts. *Id.*, 414. In the second case, the United States District Court for the District of Columbia held that the three month limitation period on a motion to vacate an arbitration award contained in § 12 of the FAA was nonjurisdictional. *Equitas Disability Advocates, LLC v. Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d

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197, 218 (D.D.C.), aff'd sub nom. *Equitas Disability Advocates, LLC v. Feigenbaum*, 672 Fed. Appx. 13 (D.C. Cir. 2016).

The plaintiff's reliance on these cases is unpersuasive. Both cases concerned the subject matter jurisdiction of federal courts with respect to certain federal statutes, not Connecticut state courts with respect to the particular statute at issue in this case, § 52-420 (b). Consequently, the nonjurisdictional nature of the limitation periods in those two federal statutes does not persuade us that the thirty day limitation period contained in § 52-420 (b) is likewise nonjurisdictional. Moreover, the plaintiff does not explain how either case counsels overruling this court's holdings in *Middlesex Ins. Co., Wu*, and *Bloomfield* that § 52-420 (b) is subject matter jurisdictional.²

Necessarily following our conclusion that § 52-420 (b) implicates a trial court's subject matter jurisdiction, we likewise conclude that the choice of law provision contained in the parties' private agreement could neither enlarge the trial court's jurisdiction over the plaintiff's application nor waive the jurisdictional defect. "It is hornbook law that the parties cannot confer subject matter jurisdiction on a court by consent, waiver, silence or agreement." *Hayes v. Beresford*, 184 Conn. 558, 562, 440 A.2d 224 (1981). "A conclusion that a time

² Additionally, the plaintiff repeats the suggestion raised by the dissent in the Appellate Court that the time limitation in § 52-420 (b) "could be considered an element necessary to establish a right, and, therefore, substantive in nature." (Emphasis added.) *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 192 Conn. App. 272-73 (*Lavery, J.*, dissenting). In support of this proposition, the plaintiff cites to *Baxter v. Sturm, Ruger & Co.*, 230 Conn. 335, 644 A.2d 1297 (1994), in which we considered whether an Oregon statute of repose was properly classified as substantive, and therefore subject matter jurisdictional, or procedural under Connecticut choice of law principles. See *id.*, 338-39. However, the plaintiff does not articulate the consequence of this suggestion, the relevance of our choice of law holding in *Baxter*, or why the Appellate Court dissent's sparse language on this point counsels overruling our unequivocal holdings in *Middlesex Ins. Co., Wu*, and *Bloomfield* that § 52-420 (b) is subject matter jurisdictional.

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limit is subject matter jurisdictional has very serious and final consequences. It means that . . . a subject matter jurisdictional defect may not be waived . . . and that subject matter jurisdiction, if lacking, may not be conferred by the parties, explicitly or implicitly.” (Citations omitted.) *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 A.2d 645 (2001). Because the parties’ private agreement could neither confer subject matter jurisdiction on the trial court nor cure the jurisdictional defect arising from the plaintiff’s late filing, the trial court properly dismissed the plaintiff’s application to vacate as untimely. In addition, the Appellate Court properly overruled *Doctor’s Associates, Inc.*, “insofar as [that decision stood] for the proposition that, as a matter of contract interpretation, parties can agree to have ‘the procedure for moving to vacate an arbitration award [in Connecticut state court] governed by federal law.’” *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 192 Conn. App. 260, quoting *Doctor’s Associates, Inc. v. Searl*, supra, 179 Conn. App. 586.

Notwithstanding our conclusion that the trial court lacked subject matter jurisdiction over the plaintiff’s application to vacate because it was untimely under § 52-420 (b), the plaintiff claims that this statutory provision is preempted by the FAA. Specifically, the plaintiff points to § 2 of the FAA, which provides in relevant part that a written agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012). The plaintiff argues that the trial court’s dismissal of its application to vacate conflicted with the obligation imposed on state courts by § 2 of the FAA to enforce arbitration agreements.

“The question of preemption is one of federal law, arising under the supremacy clause of the United States constitution.” (Internal quotation marks omitted.)

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Hackett v. J.L.G. Properties, LLC, supra, 285 Conn. 504. The supremacy clause of the United States constitution provides in relevant part that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2. The United States Supreme Court has recognized three forms of preemption that derive from the supremacy clause: express preemption, whereby a federal statute expressly states Congress’ intent to preempt state law; field preemption, whereby a federal statute “so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the [s]tates to supplement it”; and conflict preemption, whereby state law actually conflicts with federal law. (Internal quotation marks omitted.) *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

The United States Supreme Court has stated that “[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). The plaintiff’s argument therefore rests on conflict preemption. Under this form of preemption, “state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” (Internal quotation marks omitted.) *Id.*; see also *Edgar v. MITE Corp.*, 457 U.S. 624, 631, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) (“[o]f course, a state statute is void to the extent that it actually conflicts with a valid federal statute . . . and [a] conflict will be found [when] compliance with both federal and state regulations is a physical impossibility

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. . . or [when] the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (citation omitted; internal quotation marks omitted).

A review of the purposes of the FAA informs our analysis of whether it preempts our state law as a result of an actual conflict between the statutes. Congress’ primary purpose in enacting the FAA was “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate . . . and place such agreements [on] the same footing as other contracts” (Citations omitted; internal quotation marks omitted.) *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, supra, 489 U.S. 474. Section 2 of the FAA “establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). The FAA thus preempts any state rule discriminating on its face against arbitration” *Kindred Nursing Centers Ltd. Partnership v. Clark*, U.S. , 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017). “There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, supra, 476.

Moreover, “[a]s for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being something of an anomaly in the field of [federal court] jurisdiction in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.”

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(Internal quotation marks omitted.) *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581–82, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). Therefore, “[g]iven the substantive supremacy of the FAA, but [its] nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate.” *Vaden v. Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009).

We conclude that § 52-420 (b) does not stand as an obstacle to the accomplishment of the federal policy to enforce arbitration agreements.³ Under the Connecticut statutory scheme, both parties have postarbitration rights to seek judicial enforcement of the agreement to arbitrate. General Statutes § 52-417 provides the prevailing party one year to seek confirmation of the award; § 52-420 (b) provides the challenging party thirty days to seek to vacate or modify the award. The plaintiff does not argue that thirty days is prohibitively short such that a challenging party lacks a meaningful opportunity to seek to vacate an arbitration award. Therefore, the thirty day time limitation contained in § 52-420 (b) does not interfere with the plaintiff’s right to challenge the arbitration award and, in doing so, to enforce the arbitration agreement. Indeed, far from standing as an obstacle, the time limitation actually furthers the FAA’s “national policy favoring arbitration with just the limited [judicial] review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Hall Street Associates, LLC v. Mattel, Inc.*, supra, 552 U.S. 588.

Moreover, consistent with the purpose of the FAA, application of § 52-420 (b) to the plaintiff’s application

³ The dissenting Appellate Court judges agreed with this conclusion: “I do not mean to say that the FAA preempts the General Statutes regarding arbitration. That would be contrary to clear United States Supreme Court precedent.” *A Better Way Wholesale Autos, Inc. v. Saint Paul*, supra, 192 Conn. App. 269 (*Lavery, J.*, dissenting).

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to vacate does not treat an arbitration agreement differently from any other contract. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, supra, 489 U.S. 474 (purpose of FAA is to “place such agreements [on] the same footing as other contracts” (internal quotation marks omitted)). The well established rule that a jurisdictional defect may not be waived applies equally to a purported waiver arising during litigation and to a purported waiver contained in a private agreement. See *Hayes v. Beresford*, supra, 184 Conn. 562 (“[i]t is hornbook law that the parties cannot confer subject matter jurisdiction on a court by . . . agreement”). Therefore, the parties’ contractual provision specifying that the FAA would govern the arbitration agreement could not serve to waive a subject matter jurisdictional defect in state court resulting from noncompliance with § 52-420 (b). In this way, § 52-420 (b) does not discriminate against arbitration agreements; rather, it equates them with certain contract actions brought in state court that are subject to jurisdictional limitation periods under state law.

In addition, we are persuaded by the United States Court of Appeals for the District of Columbia Circuit, which examined the relationship between § 52-420 (b) and the FAA and found no conflict preemption. See *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1393, 1396 (D.C. Cir. 1995). In that case, the parties’ arbitration agreement specified that Connecticut law would govern any disputes, but the plaintiffs’ petition to vacate was filed in the United States District Court for the District of Columbia outside the thirty day time limitation contained in § 52-420 (b).⁴ *Id.*, 1393. The District of Colum-

⁴ The federal District Court in the District of Columbia had diversity jurisdiction over the action. See *Ekstrom v. Value Health, Inc.*, supra, 68 F.3d 1392-94. The District of Columbia Circuit concluded that the thirty day time limitation in § 52-420 (b), properly characterized as jurisdictional under Connecticut law, applied to the plaintiffs’ petition to vacate pursuant to the arbitration agreement provision for Connecticut law. *Id.*, 1395. This

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bia Circuit rejected the plaintiffs' argument that the FAA preempted § 52-420 (b), reasoning that "Connecticut law surely does not conflict with the FAA's 'primary purpose.'" *Id.*, 1396. Although the choice of law provision in *Ekstrom* provided that Connecticut law, and not federal law, governed the agreement, the court's preemption analysis applies with equal force here.

Our conclusion is also consistent with those of two other state supreme courts. The Supreme Court of Pennsylvania held that the FAA did not preempt a state statute that provided for a thirty day limitation period on a petition to vacate an arbitration award filed in state court. *Moscatiello v. J.J.B. Hilliard, W.L. Lyons, Inc.*, 595 Pa. 596, 603, 939 A.2d 325 (2007). The court reasoned that the state law time limitation "provide[s] for the enforcement of arbitration of contract and other disputes, [and, therefore] [it] foster[s] the federal policy favoring arbitration enforcement." *Id.* The court further reasoned that "[t]he FAA does not preempt the procedural rules governing arbitration in state courts, as that is beyond its reach." *Id.*

Similarly, the Supreme Court of Kentucky held that the FAA did not preempt state procedural law applicable to a motion to vacate an arbitration award filed in state court. *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984). The court reasoned that "[t]he [FAA] covers both substantive law *and* a procedure for federal courts to follow

conclusion is not inconsistent with our holding here: although the parties' arbitration agreement in the present case specified that federal law and not state law would govern, the plaintiff filed its application to vacate in state court, which is bound by § 52-420 (b) regardless of the governing substantive law. Together, *Ekstrom* and our holding here stand for the proposition that § 52-420 (b) applies to (1) an application to vacate an arbitration award brought under Connecticut state law in any court, and (2) an application to vacate an arbitration award brought under any law in a Connecticut state court. In addition, *Ekstrom* and our holding in the present case establish that in neither circumstance is § 52-420 (b) preempted by the FAA.

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[when] a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.” (Emphasis in original.) *Id.* These cases support our conclusion that a state law time limitation applicable to a motion to vacate an arbitration award brought in state court, such as that set forth in § 52-420 (b), does not stand as an obstacle to the accomplishment of any policy underlying the FAA.

The plaintiff argues that the United States Supreme Court’s decision in *Haywood v. Drown*, 556 U.S. 729, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009), supports its contention that the FAA preempts § 52-420 (b).⁵ In that case, the court struck down a New York law that divested jurisdiction from state courts over actions brought against correction officers under 42 U.S.C. § 1983. *Id.*, 731, 741–42. The court reasoned that a state court “cannot employ a jurisdictional rule to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” (Internal quotation marks omitted.) *Id.*, 736. In other words, “[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter

⁵ The plaintiff also argues that a case from the United States District Court for the District of Massachusetts supports its contention that the FAA preempts § 52-420 (b). In *Kiewit/Atkinson/Kenny v. International Brotherhood of Electrical Workers, Local 103, AFL-CIO*, 43 F. Supp. 2d 132, 133 (D. Mass. 1999) (*Kiewit*), the plaintiff brought an action to vacate an arbitration award in federal court under the FAA. The District Court, exercising diversity jurisdiction, rejected the defendant’s argument that the timeliness of the action was governed by a thirty day limitation period contained in a substantively related state law. *Id.* The plaintiff in the present case argues that the FAA’s three month time limitation should govern because, like in *Kiewit*, the plaintiff brought the application to vacate under the FAA. The plaintiff, however, disregards a crucial difference between *Kiewit* and the present case, namely, that the action to vacate in *Kiewit* was brought under federal law in *federal court*. The plaintiff here brought its application under federal law in *state court*. As a result, the plaintiff is required to comply with the jurisdictional requirements that bind the state court.

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how evenhanded it may appear.” *Id.*, 739. The plaintiff argues that this principle applies with equal force here: Connecticut courts cannot employ § 52-420 (b), despite its subject matter jurisdictional nature, to decline to enforce the FAA and undermine attendant federal policy.

The plaintiff’s reliance on *Haywood* is unpersuasive. The federal statute at issue in *Haywood*, 42 U.S.C. § 1983, “create[d] a remedy for violations of federal rights committed by persons acting under color of state law.” *Id.*, 731. The relevant policy concern underlying the FAA—equal enforcement of private agreements to arbitrate legal disputes—is so different in kind from the policy concerns underlying § 1983 as to render *Haywood* inapposite. Indeed, as we previously noted, the FAA carries “no federal policy favoring arbitration under a certain set of procedural rules” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, *supra*, 489 U.S. 476.

In addition, the challenged state law in *Haywood* is also distinguishable from § 52-420 (b) because the New York law was “effectively an immunity statute cloaked in jurisdictional garb,” entirely divesting state courts of jurisdiction over certain actions. *Haywood v. Drown*, *supra*, 556 U.S. 742. In contrast, § 52-420 (b) contains a conventional jurisdictional time limitation, which effectively furthers both state and federal policy favoring finality of arbitration judgments. It does not prevent a party from challenging an arbitration award in state court; it merely limits a party’s ability to challenge an arbitration award to thirty days, a period of time that is not prohibitively short. Section 52-420 (b) bears no resemblance to the state statute at issue in *Haywood*, and, therefore, it does not implicate analogous concerns. Indeed, the majority in that case expressly limited its holding to “the unique scheme adopted by the [s]tate of New York” in response to

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the dissent's concern that the case would be broadly applied to strike down all state jurisdictional rules. *Id.*, 741.

In sum, we conclude that the thirty day limitation period set forth in § 52-420 (b) applies to the plaintiff's application to vacate.⁶ It is undisputed that the plaintiff's application was filed more than thirty days after the plaintiff received notice of the arbitration award. Accordingly, the trial court properly dismissed the plaintiff's application to vacate as untimely under § 52-420 (b).

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

⁶The parties disagree as to whether the plaintiff could have brought the application to vacate in federal court rather than in state court. As we discussed, it is undisputed that the FAA does not create subject matter jurisdiction in federal courts. Therefore, a federal court must have an independent basis of subject matter jurisdiction over an FAA claim. See, e.g., *Vaden v. Discover Bank*, *supra*, 556 U.S. 59; *Hall Street Associates, LLC v. Mattel, Inc.*, *supra*, 552 U.S. 581–82. An independent basis of jurisdiction may be established, among other ways, through (1) diversity of citizenship; see, e.g., *Equitas Disability Advocates, LLC v. Daley, Debofsky & Bryant, P.C.*, *supra*, 177 F. Supp. 3d 204; *Kiewit/Atkinson/Kenny v. International Brotherhood of Electrical Workers, Local 103, AFL-CIO*, 43 F. Supp. 2d 132, 135 (D. Mass. 1999); or (2) federal question jurisdiction over the underlying dispute pursuant to 28 U.S.C. § 1331. See, e.g., *Vaden v. Discover Bank*, *supra*, 59–60; see also, e.g., *id.*, 62 (approving “look through” approach to determine whether federal court has federal question jurisdiction under FAA). The plaintiff argues that state court was its only avenue to vacate the arbitration award because a federal court would not have had diversity jurisdiction. The defendants argue that the underlying dispute, which concerned the plaintiff's obligations under the federal Truth in Lending Act, would have supported federal question jurisdiction over the plaintiff's application to vacate had it been filed in federal court. We express no opinion on the question of whether a federal court could have exercised jurisdiction over the plaintiff's application.

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STATE OF CONNECTICUT v. ERNEST FRANCIS
(SC 20353)Robinson, C. J., and McDonald, D'Auria,
Mullins, Kahn and Ecker, Js.*Syllabus*

The defendant, who had been convicted of murder, appealed to the Appellate Court from the trial court's denial of his motion to correct an illegal sentence. Prior to sentencing, the sentencing court was provided with a criminal history report and a presentence investigation report, which included a summary of the defendant's prior convictions of assault and drug offenses. In his motion to correct, the defendant claimed that the sentencing court relied on materially inaccurate information concerning his criminal history and the circumstances of the underlying offense. Specifically, the defendant claimed that the presentence investigation report incorrectly indicated that he had been convicted of conspiracy to sell cocaine, rather than conspiracy to possess cocaine, and that he was convicted of assault in the second degree of an elderly person, rather than assault in the third degree. The defendant also claimed that the sentencing court mistakenly believed that he "grazed" the victim before stabbing him. The trial court denied the defendant's motion, concluding that there was no evidence that the sentencing court relied on inaccurate information, that the court's statement that the defendant "grazed" the victim was supported by the record, and that, even if that statement was inaccurate, the court did not rely on the inaccuracy. The Appellate Court upheld the trial court's denial of the motion to correct, and the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the trial court had not abused its discretion in denying the defendant's motion to correct an illegal sentence:

1. The defendant could not prevail on his claim that the sentencing court had substantially relied on inaccurate information when imposing his sentence: the defendant's claim was belied by the record because, prior to sentencing, the prosecutor informed the sentencing court of the error in the presentence investigation report, the court correctly noted that the defendant's assault conviction was for assault in the third degree, and nothing in the record suggested that the court gave explicit attention to the inaccurate characterization of the defendant's assault conviction or that it considered the notation in the criminal history report incorrectly identifying the assault victim as elderly; moreover, although the sentencing court incorrectly referred to the defendant's conspiracy conviction as a conviction for conspiracy to sell cocaine, the court did not substantially rely on the precise nature of the conspiracy charge when imposing the defendant's sentence, as the court's recitation of the defen-

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dant's criminal history was used only to support the observation that the defendant had been convicted of three felony offenses before he had reached the age of nineteen.

2. There was no merit to the defendant's claim that the sentencing court substantially relied on a false recollection of how the victim died when imposing the defendant's sentence: the court's statement that the defendant had "grazed" the victim was not materially inaccurate because, although a medical examiner testified that he observed a single stab wound on the victim's chest, eyewitnesses testified that the defendant had made several stabbing motions toward the victim before inflicting the fatal blow; moreover, the court's primary focus was on the severity and location of the fatal wound rather than the exact number of times the defendant stabbed the victim.

Argued October 15, 2020—officially released April 16, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Miano, J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the trial court's judgment; thereafter, the court, *Dewey, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Alvord and Conway, Js.*, which affirmed the trial court's decision; subsequently, the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

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

* April 16, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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Opinion

KAHN, J. The defendant, Ernest Francis, appeals from the judgment of the Appellate Court, which affirmed the trial court's denial of his motion to correct an illegal sentence. See *State v. Francis*, 191 Conn. App. 101, 110, 213 A.3d 536 (2019). In the present appeal, the defendant claims that the trial court improperly denied that motion because the sentencing court substantially relied on materially inaccurate information.¹ Specifically, the defendant claims that his sentence was based on inaccurate information concerning both (1) his criminal history, and (2) the particular manner in which he committed the underlying criminal offense. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to this appeal. Following a jury trial, the defendant was convicted of murder in violation of General Statutes § 53a-54a (a). *Id.*, 103. Prior to the defendant's sentencing, the sentencing court was provided with a criminal history report² and a presentence investigation report (PSI report). The PSI report indicated that the defendant had convictions arising out of three separate cases: (1) possession of narcotics with an offense date of June 29, 1989, (2) conspiracy to sell cocaine with an offense date of August 9, 1989,³ and (3) assault in the second degree with an offense date of September 25, 1989.⁴

¹ The sentence at issue in the present appeal was imposed by the court, *Miano, J.*, whereas the subsequent motion to correct an illegal sentence was decided by the court, *Dewey, J.* Unless otherwise noted, all references hereinafter to the sentencing court are to Judge Miano, and all references to the trial court are to Judge Dewey.

² This single page document contains a list of the defendant's prior convictions. According to a notation at the top of the document, the list was generated on February 18, 1992. We note that the defendant's brief refers to this document as the "1992 criminal history"

³ The PSI report indicated that the defendant's conviction for conspiracy to sell cocaine resulted in a \$380 fine.

⁴ Although the defendant's convictions for possession of narcotics and assault arose from two separate incidents, the defendant was convicted and sentenced for both charges on the same day. There is some ambiguity in

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The PSI report included a brief summary of the underlying facts related to the defendant's prior convictions of possession of narcotics and assault. A notation in the criminal history report indicated that the victim of the assault was over the age of sixty.

At sentencing, the prosecutor noted that there were some discrepancies between the defendant's prior criminal history and the information contained in the PSI report. Regarding the defendant's apparent conviction for conspiracy to sell cocaine, the prosecutor stated that the case involved "an undercover buy in which the defendant was the driver of a vehicle out of which the seller exited" The prosecutor stated that, although the defendant was charged with "conspiracy to commit sale of narcotics," there was "some question about what [crimes the defendant] was actually convicted of . . . [because] [t]he docket numbers and the statute numbers differ from the name of the charge."⁵ The prosecutor went on to state that the "gravamen of the [underlying] offense was that [the defendant] was involved in a sale situation."

The prosecutor also informed the sentencing court that the defendant had been convicted of assault in the third degree, not assault in the second degree, as the PSI report indicated. The sentencing court asked the prosecutor if the assault conviction "concern[ed] hitting another person with a lead pipe," as the PSI report

the record as to the specific sentences imposed in connection with these charges; however, the record is clear that the defendant ultimately received a total effective sentence of four years of incarceration, execution suspended, and four years of probation.

⁵ During the course of the underlying trial, the prosecutor summarized this same discrepancy to the court as follows: "[T]he [s]tatute number that the defendant apparently pleaded to is possession with intent to sell. And what they did on the docket, is when he entered his plea, they changed the word[s] 'conspiracy to sell' to 'conspiracy to possess cocaine,' but they did not change the [s]tatutory reference, so I don't know if it's conspiracy to simply possess cocaine, or if it's a conspiracy to possess cocaine with the intent to sell."

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suggested. The prosecutor responded in the affirmative. Explaining the discrepancy between the PSI report and the defendant's actual record, the prosecutor stated that "it wasn't a serious injury, and I think that's part of the reason that the case was later reduced to [an] assault in the third degree."

After hearing from, among others, the defendant's fiancée and brother, the sentencing court discussed the reasoning for its sentence. The sentencing court began by noting that "[t]here are several areas of inquiry the court must scrutinize in order to impose what it perceives to be a just sentence; the first is the nature of the offense; the second is the record, if any, of the defendant; the third is the background of the defendant; and the fourth is the impact on the victim's family." As for the nature of the offense, the sentencing court recounted the events leading up to the defendant's murder of the victim. While summarizing the relevant facts, the sentencing court remarked that, prior to inflicting the fatal knife wound, "the defendant raised his right hand with the knife and with a downward thrust apparently grazed the victim." The sentencing court also noted that the victim's death was a tragedy for his family, and remarked that "the value of human life is immeasurable"

Regarding the defendant's criminal record, the sentencing court stated: "Here is a young man that at age sixteen was convicted of possession of narcotics; at age seventeen was convicted of conspiracy to sell cocaine; at age seventeen, assault in the third degree; and now murder, and he's only nineteen years old. Three felony convictions at age nineteen." After discussing positive aspects of the defendant's background, including the defendant's family and employment history, the sentencing court made the following statement: "The purposes of sentencing are punishment, deterrence, rehabilitation. Deterrence may be illusory. I don't know

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if this case will be reported or be in the print media or not. I don't know. I think that the media should have more of a civic responsibility. This is an aside. Oftentimes, we're quick to print articles critical of the courts, quick to print articles concerning tragedies that occur on the streets, but yet not so quick to report dispositions in the courts. And I think that's important, not for Mr. Francis or the Mr. Francises to come, but the young people that are on the street that see the young men like Mr. Francis that appear macho, that are involved in drugs, that have cars, attractive new cars, that have jewelry, that have money, that have attractive ladies. And that's impressionable on young people. And when these people are involved in the criminal milieu, it's unfortunate that these young, impressionable people don't see where they end up. Because only if these cases I think every week or every month, the more serious narcotic cases and violent crimes cases of convictions, the pictures and articles should be put in the paper in a special section for all to see. Otherwise, to say there's deterrence is, as I said, illusory." Shortly after making these remarks, the sentencing court sentenced the defendant to fifty years of incarceration.⁶

On December 30, 2016, the defendant filed the present motion to correct an illegal sentence, alleging that the sentencing court substantially relied on materially inaccurate information concerning his prior criminal history and the circumstances of the underlying offense when imposing the sentence.⁷ See *State v. Francis*, supra, 191

⁶ This court upheld the defendant's murder conviction in *State v. Francis*, 228 Conn. 118, 120, 136, 635 A.2d 762 (1993).

⁷ This motion is the defendant's fourth motion to correct and is based on the same claims that the defendant, previously self-represented, raised in a prior motion filed in 2010. In *State v. Francis*, 322 Conn. 247, 140 A.3d 927 (2016), we concluded that the trial court, *Gold, J.*, "improperly failed to appoint counsel to assist the defendant in determining whether there was a sound basis for him to file such a motion;" *id.*, 251; and remanded the case for further proceedings. *Id.*, 270.

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Conn. App. 104–105. Specifically, the defendant claimed that the sentencing court substantially relied on the inaccurate information contained in the PSI report, which incorrectly indicated that he had been convicted of conspiracy to *sell* cocaine, and erroneously listed his prior assault conviction as a conviction for assault in the second degree. Additionally, the defendant claimed that the sentencing court relied on an inaccurate interpretation of the evidence presented at trial and mistakenly believed that he “grazed” the victim before fatally stabbing the victim in the chest. (Internal quotation marks omitted.) The defendant claimed that the record of the sentencing hearing established that the sentencing court substantially relied on these material inaccuracies when imposing the sentence.

The trial court denied the defendant’s motion, concluding that there was no evidence that the sentencing court substantially relied on materially inaccurate information. In reaching that conclusion, the trial court reasoned that, although the PSI report contained errors regarding the defendant’s prior criminal history, the record of the sentencing hearing did not demonstrate that the sentencing court substantially relied on those errors when arriving at its sentence. As for the defendant’s claims concerning the facts of the underlying offense, the trial court concluded that the sentencing court’s statement that the defendant “grazed” the victim was supported by the trial record and, even if the statement was materially inaccurate, the sentencing court did not substantially rely on the alleged inaccuracy. (Internal quotation marks omitted.)

The defendant thereafter appealed to the Appellate Court, claiming that the trial court improperly denied his motion. See *State v. Francis*, supra, 191 Conn. App. 103. The Appellate Court affirmed the decision of the trial court, holding that the trial court did not abuse its discretion in concluding that the sentencing court did

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not substantially rely on materially inaccurate information concerning the defendant's prior criminal history and the circumstances of the underlying offense. See *id.*, 108–10. This certified appeal followed.⁸

We begin our analysis by noting both the applicable standard of review and the legal principles relevant to our consideration of the present appeal. Practice Book § 43-22 provides: “The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.” As this court has previously stated, “[a] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is [typically] reviewed pursuant to the abuse of discretion standard.”⁹ (Internal quotation marks omitted.) *State v. Adams*, 308 Conn. 263, 269, 63 A.3d 934 (2013); accord *State v. Tabone*, 279

⁸ This court granted the defendant's petition for certification to appeal, limited to the following issue: “Did the Appellate Court correctly conclude that the sentencing [court] did not substantially rely on materially inaccurate information about the defendant?” *State v. Francis*, 333 Conn. 912, 215 A.3d 733 (2019).

We note that the precise question now under review is whether the Appellate Court properly reviewed the reasonableness of the actions of the trial court. As both parties acknowledge in their briefs, the certified question could be understood to suggest that the focus of our inquiry is the conduct of the sentencing court. We, therefore, reformulate the certified question as follows: “Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in concluding that the sentencing court did not substantially rely on materially inaccurate information about the defendant?” See, e.g., *State v. Skipwith*, 326 Conn. 512, 516 n.4, 165 A.3d 1211 (2017) (court may reformulate certified question to conform to issue actually presented and to be decided on appeal). We note that both the state and the defendant have addressed this question in their respective briefs.

⁹ In his brief, the defendant argues that the sentencing court's factual findings call for the application of a clearly erroneous standard of review. We reiterate that the proper focus of the inquiry presently before us is whether the trial court abused its discretion by denying the defendant's motion to correct an illegal sentence. See footnote 8 of this opinion; see also, e.g., *State v. Charles F.*, 133 Conn. App. 698, 704–706, 36 A.3d 731, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012).

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Conn. 527, 534, 902 A.2d 1058 (2006). “When reviewing claims under an abuse of discretion standard . . . great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness 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.) *State v. Smith*, 313 Conn. 325, 336, 96 A.3d 1238 (2014); see also *State v. Bozelko*, 175 Conn. App. 599, 609, 167 A.3d 1128, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

A sentence is imposed in an illegal manner when it is “imposed in a way [that] violates [a] defendant’s right . . . to be sentenced by a judge relying on accurate information or considerations solely in the record”¹⁰ (Internal quotation marks omitted.) *State v. Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010). This principle emanates from the defendant’s constitutional right to due process. See *id.*, 843. “To prevail on such a claim as it relates to a [PSI] report, [a] defendant [cannot] . . . merely alleg[e] that his . . . report contained factual inaccuracies or inappropriate information.” (Internal quotation marks omitted.) *Id.* Specifically, a defendant must show “(1) that the information was *materially* false or unreliable; and (2) that the trial court *substantially* relied on the information in determining the sentence.” (Emphasis added.) *State v. Collette*, 199 Conn. 308, 321, 507 A.2d 99 (1986). “A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it,

¹⁰ As this court has previously recognized, reliance on inaccurate information is only one example of how a sentencing court can impose a defendant’s sentence in an illegal manner. See, e.g., *State v. Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010) (noting that sentence is imposed in illegal manner when it is “imposed in a way [that] violates [a] defendant’s right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right that the government keep its plea agreement promises” (internal quotation marks omitted)).

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[bases] its sentence at least in part on it, or gives specific consideration to the information before imposing [the] sentence.” (Internal quotation marks omitted.) *State v. Parker*, supra, 843 n.12.

In the present appeal, the defendant claims that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in denying his motion to correct an illegal sentence. Specifically, the defendant claims that his fifty year sentence was imposed in an illegal manner because the sentencing court improperly relied on (1) inaccurate information in both the criminal history report and PSI report, and (2) an incorrect belief that he “grazed” the victim before fatally stabbing him in the chest. (Internal quotation marks omitted.) We address these claims in turn.

I

The defendant first claims that the sentencing court substantially relied on inaccurate information in the criminal history report and the PSI report when imposing the sentence. Specifically, the defendant alleges that the information in those reports incorrectly indicated that he had been convicted of assault in the second degree of an elderly person, when in fact he had been convicted of assault in the third degree, and that he had been convicted of conspiracy to sell cocaine, when he had instead been convicted of conspiracy to possess cocaine. The defendant argues that the sentencing court’s remarks demonstrate that it substantially relied on those inaccuracies when imposing his sentence. In response, the state argues that the trial court correctly concluded that the record of the sentencing hearing does not support the defendant’s claim. Having reviewed the record, we agree with the state and conclude that the trial court did not abuse its discretion in concluding that the sentencing court did not substan-

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tially rely on inaccurate information concerning the defendant's criminal history.

Regarding his prior assault conviction, the defendant contends that the PSI report incorrectly stated that the conviction was for assault in the second degree and that the criminal history report erroneously identified the victim of the assault as a person over the age of sixty. The defendant argues that the sentencing court's use of the word "macho" to describe "young men like [the defendant]" demonstrates that the sentencing court substantially relied on the inaccurate description of his prior assault conviction and, as a result, viewed him as a "violent predator attacking the weak and infirm." (Internal quotation marks omitted.) The defendant's claim is belied by the record.

Prior to the imposition of the defendant's sentence, the prosecutor informed the sentencing court of the error in the PSI report and explained that the defendant had been convicted of assault in the third degree.¹¹ When summarizing the defendant's prior criminal history, the sentencing court correctly noted that the defendant's prior assault conviction was for an assault in the third degree. Nothing in the record suggests that the sentencing court gave explicit attention to the PSI report's inaccurate characterization of the defendant's assault conviction or that it considered the notation in the defendant's criminal history report that incorrectly identified the victim as elderly. Because the defendant has failed to establish that the sentencing court substantially relied on the inaccurate information concerning his prior assault conviction, we conclude that the trial court correctly determined that, "as to the assault

¹¹ Although the prosecutor did not specifically draw the sentencing court's attention to the inaccurate description of the victim contained in the criminal history report, the prosecutor provided the sentencing court with a detailed description of the crime, which made clear that the victim was not over the age of sixty and that the incident did not involve serious injury.

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charge, the [sentencing] court clearly did not sentence the defendant on the basis of any misinformation.” (Internal quotation marks omitted.) The defendant’s claim relating to his prior assault conviction, therefore, fails.¹²

The defendant next argues that the sentencing court substantially relied on the inaccurate description of his prior conspiracy conviction in the PSI report and, as a result, erroneously believed that he was a convicted drug dealer. In support of his claim, the defendant points to the sentencing court’s specific reference to his prior conviction for “conspiracy to sell cocaine” and its general statement that “young men like [the defendant] . . . are involved in drugs,” and have “new cars,” “jewelry,” “money,” and “attractive ladies.” The defendant argues that these remarks demonstrate that the sentencing court relied on the false belief that he had been convicted of conspiracy to sell cocaine when imposing the sentence.

Although we agree with the defendant that the sentencing court incorrectly referred to his prior conspiracy conviction as a conviction for conspiracy to sell cocaine, the sentencing court did not substantially rely on the precise nature of the conspiracy charge when imposing the sentence. The sentencing court’s recitation of the defendant’s criminal history was used to

¹² The defendant also claims that the PSI report inaccurately indicated that his sentence for assault in the third degree was four years of incarceration, execution suspended, and four years of probation. The defendant argues that, because such a sentence would have exceeded the statutory limits for the misdemeanor of assault in the third degree, the sentencing court’s reliance on the fact that he was on probation at the time of the murder amounts to reliance on inaccurate information. We are unconvinced by the defendant’s claim and agree with the Appellate Court that, “[r]egardless of the merits of the defendant’s argument that his sentence for his conviction of assault in the third degree was illegal, the defendant does not dispute that he was on probation when he committed this murder; accordingly, this fact was not materially inaccurate when it was relied on by the sentencing court.” *State v. Francis*, supra, 191 Conn. App. 108 n.4.

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support only a single observation: that the defendant had been convicted of three felony offenses before the age of nineteen. As the trial court aptly noted, “[t]he disputed narcotics conviction, regardless of its precise nature, was a felony offense—one of the two [previous] felonies that were contained in the defendant’s criminal history.”¹³ (Internal quotation marks omitted.) We agree with the trial court that the context in which the sentencing court incorrectly referred to the defendant’s prior conspiracy conviction demonstrates that the sentencing court’s focus was on the fact that the prior conviction was a felony and not whether it was a conviction for conspiracy to sell or possess cocaine.¹⁴ The defendant’s claim relating to the sentencing court’s mischaracterization of his prior conspiracy conviction is, therefore, unavailing.

Likewise, the sentencing court’s more generalized statement that “young men like [the defendant] . . . are involved in drugs” does not demonstrate that the court substantially relied on the PSI report’s mischaracterization of his prior conspiracy conviction. The sentencing court had before it adequate evidence to support its general conclusion that the defendant was “involved in drugs” or the sale of drugs. As we previously noted, the prosecutor explained during the sentencing hearing that the defendant’s prior conviction for conspiracy to possess cocaine involved “an undercover

¹³ When reviewing the defendant’s criminal history, the sentencing court stated: “Here is a young man that at age sixteen was convicted of possession of narcotics; at age seventeen was convicted of conspiracy to sell cocaine . . . and now murder, and he’s only nineteen years old.”

¹⁴ We reiterate that, during both the trial and sentencing hearing, the prosecutor informed the sentencing court that there was uncertainty in the record as to the actual charge that the defendant plead guilty to in relation to this narcotics offense. See footnote 5 of this opinion. The sentencing court was also reminded by defense counsel that the defendant’s prior narcotics and assault convictions did not result in a sentence of incarceration.

buy in which the defendant was the driver of a vehicle out of which the seller exited” Additionally, the defendant’s PSI report indicated that, during the presentence investigation, the defendant himself admitted to having previously sold drugs.¹⁵ At sentencing, defense counsel, in fact, expressly argued that the defendant’s honesty concerning his prior involvement in the sale of drugs should weigh in favor of leniency. Notwithstanding the PSI report’s incorrect recitation of one of his prior drug convictions, the sentencing court could have reasonably concluded, based on the record before it, that the defendant had been “involved in drugs” or had sold drugs.

Although we conclude that the trial court correctly determined that the sentencing court’s statements do not evince a reliance on materially inaccurate information, we recognize that some of those statements were inappropriate.¹⁶ The trial court’s statements, if taken literally, were not directed at the defendant but, rather, expressed the court’s views concerning the perception that “young people” have of individuals involved in the “criminal milieu,” the failure of the media to adequately cover the disposition of criminal cases involving illegal drug activity, and the resulting impact on the efficacy of general deterrence. Comments such as those made by the sentencing court during its self-described “aside” can, however, undermine the public’s trust in the admin-

¹⁵ The PSI report also included the following description of the circumstances of the defendant’s prior conviction for possession of narcotics: “This offense involved police officers observing the [defendant] while he approached motor vehicles and made exchanges. Upon his arrest, the [defendant] was found to be in possession of cocaine, marijuana, and \$135 in cash.”

¹⁶ We refer, in particular, to the statement in which the sentencing court observed: “And I think that’s important, not for Mr. Francis or the Mr. Francis to come, but the young people that are on the street that see the young men like Mr. Francis that appear macho, that are involved in drugs, that have cars, attractive new cars, that have jewelry, that have money, that have attractive ladies. And that’s impressionable on young people.”

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istration of justice. Generalizations, especially those that are based in pernicious stereotypes, have no place in our judicial system. Judges must be cognizant of the fact that all persons, no matter their lived experience, harbor implicit biases. Judges, therefore, have a responsibility to identify biases, both explicit and implicit, and to proactively guard against even the appearance that those biases might play any role whatsoever in the sentencing process.

II

In his final claim, the defendant contends that the sentencing court substantially relied “on a demonstratively false recollection of how [the victim] died” when imposing the sentence. Specifically, the defendant argues that the evidence submitted at trial established that the victim was stabbed only once, and that the sentencing court’s statement that the defendant had “grazed” the victim demonstrates that it misunderstood that evidence, and, as a result, incorrectly viewed the incident as a “prolonged, vicious attack” demonstrating a “clear and consistent intent to kill.” In response, the state argues that the trial court correctly concluded that the sentencing court’s statement was not materially inaccurate and that the sentencing court, when imposing the sentence, did not substantially rely on the number of times that the defendant stabbed the victim.

We do not agree with the defendant that the trial court’s statement was materially inaccurate. During the trial, H. Wayne Carver II, the medical examiner who performed the autopsy of the victim, testified that he observed a single stab wound on the victim’s chest while conducting the autopsy. Multiple eyewitnesses, however, also testified that the defendant made several stabbing motions toward the victim before inflicting the fatal blow. One witness, Jennifer Green, testified that the defendant “brushed [the victim] with the knife

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on the shoulder” and “grazed” him before stabbing him in the chest. Another witness, Victor Lowe, testified that the defendant swung the knife toward the victim twice and that the first swing cut in half an ice pop that the victim was holding in his hand. Indeed, in our prior decision upholding the defendant’s conviction, we noted that the defendant made “stabbing *motions* at the victim” after pulling the knife from behind his back. (Emphasis added.) *State v. Francis*, 228 Conn. 118, 121, 635 A.2d 762 (1993). On the basis of the record before us, we conclude that the trial court did not abuse its discretion by concluding that the sentencing court’s statement that the defendant “grazed” the victim “was not materially false or inaccurate.” (Internal quotation marks omitted.)

The trial court also correctly determined that “[t]here [was] no indication in the record that the [sentencing] court [in sentencing the defendant] relied minimally, let alone substantially, on the number of times the defendant thrust the knife at the victim” (Internal quotation marks omitted.) The transcript of the sentencing hearing demonstrates that the sentencing court’s primary focus was the severity of the four inch knife wound that killed the victim. When describing the fatal wound, the sentencing court stated: “That blow, that large blade, as was testified to, apparently went four inches into the chest. . . . Carver testified that the aorta and the pulmonary arteries were severed or, if not severed completely, severed to a degree that medical intervention if on the scene immediately would have been futile.” Conversely, the sentencing court’s statement that the defendant “grazed” the victim was made in passing and was not repeated. In light of the sentencing court’s particular focus on the severity and location of the fatal wound, as opposed to the exact number of times that the defendant stabbed the victim, we agree with the trial court’s conclusion that the sentencing

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court, when imposing the sentence, did not substantially rely on the belief that the defendant apparently “grazed” the victim. Because the sentencing court did not substantially rely on that observation, and because that observation was reasonably based in the record, we conclude the trial court did not abuse its discretion in relation to this claim.

For the foregoing reasons, we conclude that the Appellate Court correctly concluded that the trial court did not abuse its discretion in denying the defendant’s motion to correct an illegal sentence. We conclude that, although the defendant’s criminal record and the PSI report contained inaccurate information concerning his prior criminal history, the trial court correctly determined that the defendant failed to meet his burden of demonstrating that the sentencing court substantially relied on inaccurate information when imposing the sentence. Additionally, we conclude that the trial court did not abuse its discretion in determining that the sentencing court’s statement that the defendant “grazed” the victim was not materially inaccurate and that, even if it were, the record does not support the defendant’s claim that the sentencing court substantially relied on that alleged inaccuracy when imposing the sentence.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

TOWN OF LEDYARD *v.* WMS GAMING, INC.
(SC 20418)

Robinson, C. J., and McDonald, Mullins, Kahn and Cradle, Js.

Syllabus

Pursuant to statute (§ 12-161a), “[i]n the institution of proceedings by any municipality to enforce collection of any delinquent tax on personal property from the owner of such property, through . . . any other proceeding in law in the name of the municipality for purposes of enforcing

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such collection, such person shall be required to pay any . . . reasonable attorney's fees incurred by such municipality as a result of and directly related to such . . . collection proceedings."

The plaintiff town sought to collect unpaid personal property taxes that it had imposed on slot machines that the defendant, W Co., owned and leased to an Indian tribe for use at the tribe's casino. After the plaintiff filed its collection action in state court, the tribe filed an action in federal court, challenging the plaintiff's authority to impose property taxes on the slot machines. A federal court of appeals ultimately held that the plaintiff's authority to impose property taxes on the slot machines was not preempted by federal law. The plaintiff and W Co. then executed a stipulation regarding the outstanding taxes, interest, penalties, and the attorney's fees incurred in the state collection action, but they disagreed as to whether the trial court could also find W Co. liable for attorney's fees incurred by the plaintiff in defense of the federal action commenced by the tribe, to which W Co. was not a party. The plaintiff and W Co. filed separate motions for summary judgment on that issue, and the trial court granted the plaintiff's motion and denied W Co.'s motion, concluding that the plaintiff was entitled to the attorney's fees that it had incurred in defending the federal action pursuant to § 12-161a. The trial court rendered judgment for the plaintiff only as to liability with respect to the attorney's fees incurred in the federal action, and W Co. appealed to the Appellate Court. The Appellate Court reversed the trial court's judgment, concluding that the phrase "as a result of and directly related to," as used in § 12-161a, required a closer proximal nexus between the collection proceeding and the requested attorney's fees than the expansive interpretation applied by the trial court and that the claims advanced in the federal action, although significant to the ultimate resolution of the tax collection issue in the state proceeding, did not directly result in a final determination of the rights and obligations of the parties relative to the claimed delinquent taxes. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court improperly reversed the trial court's decision to grant the plaintiff's motion for summary judgment because the Appellate Court incorrectly construed § 12-161a narrowly to limit the scope of the plaintiff's entitlement to attorney's fees to only those fees incurred in the state collection action: because § 12-161a was ambiguous with respect to the scope of the attorney's fees that are considered "as a result of and directly related to" a state collection proceeding, this court considered extratextual evidence, including legislative history, statutes containing similar language, and the treatment of the phrase "as a result of and directly related to" in Connecticut case law, and concluded that the ambit of § 12-161a includes a directly related federal action that is determinative of a municipality's authority to pursue the underlying state collection proceeding; in the present case, the attorney's fees attributable to the federal action were a result of and directly related to the state collection action

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within the meaning of § 12-161a, as the federal action was filed after the commencement of the state collection action for the purpose of staying the state collection action and was determinative of the state action; moreover, the restrictive construction of § 12-161a adopted by the Appellate Court and advanced by W Co. would lead to the absurd result of frustrating government administration insofar as the plaintiff, after successfully litigating its authority to pursue a specific collection action, could incur an actual loss of revenue as a result of its inability to recover attorney's fees in defending the federal action.

Argued November 19, 2020—officially released April 21, 2021*

Procedural History

Action to recover unpaid personal property taxes, and for other relief, brought to the Superior Court in the judicial district of New London, where the parties entered into a stipulated agreement; thereafter, the court, *Vacchelli, J.*, granted the plaintiff's motion for summary judgment as to liability and denied the defendant's motion for summary judgment as to liability, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Beach, Alvord, Sheldon and Prescott, Js.*, which granted the plaintiff's motion to dismiss the appeal; thereafter, the defendant, on the granting of certification, appealed to this court, which reversed the Appellate Court's judgment and remanded the case to that court with direction to deny the plaintiff's motion to dismiss and for further proceedings; subsequently, the Appellate Court, *DiPentima, C. J.*, and *Keller and Noble, Js.*, reversed the trial court's judgment and remanded the case to that court with direction to deny the plaintiff's motion for summary judgment as to liability and to grant the defendant's motion for summary judgment as to liability, and the plaintiff, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Proloy K. Das, with whom were *Lloyd L. Langhammer* and *Kevin W. Munn*, for the appellant (plaintiff).

* April 21, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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Aaron S. Bayer, with whom, on the brief, was *David R. Roth*, for the appellee (defendant).

Opinion

ROBINSON, C. J. The sole issue in this certified appeal is whether General Statutes § 12-161a,¹ which allows trial courts to award a municipality attorney's fees incurred "as a result of and directly related to" proceedings to collect delinquent personal property taxes, includes attorney's fees incurred in a related federal action regarding the municipality's authority to impose such personal property taxes. The plaintiff, the town of Ledyard, appeals, upon our grant of its petition for certification,² from the judgment of the Appellate Court reversing the judgment of the trial court and directing summary judgment for the defendant, WMS Gaming, Inc. *Ledyard v. WMS Gaming, Inc.*, 192 Conn. App. 836, 850, 218 A.3d 708 (2019). On appeal, the plaintiff claims that the Appellate Court improperly construed § 12-161a in concluding that the defendant's liability for attorney's fees under the statute is limited to the collection proceeding in state court and does not include the related federal court proceeding. See *id.*,

¹ General Statutes § 12-161a provides in relevant part: "In the institution of proceedings by any municipality to enforce collection of any delinquent tax on personal property from the owner of such property, through . . . any other proceeding in law in the name of the municipality for purposes of enforcing such collection, such person shall be required to pay any court costs, reasonable appraiser's fees or reasonable attorney's fees incurred by such municipality as a result of and directly related to such levy and sale, enforcement of lien or other collection proceedings."

² We granted the plaintiff's petition for certification, limited to the following issue: "Did the Appellate Court correctly conclude that . . . § 12-161a, which allows trial courts to award attorney's fees incurred by a municipality 'as a result of and directly related to' state court proceedings to collect unpaid personal property taxes, did not authorize the award of attorney's fees incurred by a municipality in defending a collateral action in federal court that challenged the municipality's authority to collect the personal property taxes at issue in the state court action?" *Ledyard v. WMS Gaming, Inc.*, 334 Conn. 904, 904–905, 220 A.3d 35 (2019).

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845. We conclude that the ambit of § 12-161a includes a directly related federal action that is determinative of a municipality's authority to pursue the underlying state collection proceeding. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history, as set forth in the various decisions issued by this court and the Appellate Court in this case. See *Ledyard v. WMS Gaming, Inc.*, 330 Conn. 75, 78–80, 191 A.3d 983 (2018); *Ledyard v. WMS Gaming, Inc.*, supra, 192 Conn. App. 839–42; *Ledyard v. WMS Gaming, Inc.*, 171 Conn. App. 624, 625–28, 157 A.3d 1215 (2017), rev'd, 330 Conn. 75, 191 A.3d 983 (2018). “On August 3, 2006 . . . the Mashantucket Pequot Tribal Nation (Tribal Nation) filed an action in the United States District Court for the District of Connecticut challenging the authority of the state of Connecticut [state] and the plaintiff to impose property taxes on slot machines owned by Atlantic City Coin & Slot Co. (AC Coin) and leased to the Tribal Nation, for use in its gaming operations. In that complaint, the Tribal Nation alleged that the plaintiff lacked the authority to impose the property tax because such taxation is preempted by federal regulation of Indian gaming pursuant to both the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 through 2721 . . . and the Final Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24,996 (May 31, 1991), and that the taxation was an illegal interference with the Tribal Nation's sovereignty. The present action was filed [in the trial court] on June 23, 2008, to collect unpaid personal property taxes for gaming equipment owned by the defendant and leased to the Tribal Nation for its gaming operations.”³ *Ledyard v. WMS Gaming, Inc.*, supra, 192 Conn. App. 839.

³ We note that, for purposes of this appeal, our focus is on the plaintiff's entitlement to attorney's fees incurred in the related federal action involving the defendant. The plaintiff's entitlement to attorney's fees incurred in defending its authority to tax AC Coin is not directly at issue.

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“[T]he plaintiff [in the present action] sought \$18,251.23 in unpaid personal property taxes, plus costs, interest, and penalties. In addition, the plaintiff sought attorney’s fees pursuant to . . . § 12-161a.

“Shortly after the plaintiff had commenced the underlying state action, the Tribal Nation filed [a second] action in the United States District Court for the District of Connecticut challenging the authority of the state . . . and the plaintiff to impose the taxes at issue in the present state action. Although it was not a party to the federal action commenced by the Tribal Nation, the defendant filed a motion to stay the present state action pending the outcome of the federal action, which the trial court, *Martin, J.*, granted.

“On March 27, 2012, the District Court ruled on [the parties’] motions for summary judgment filed in the . . . federal action. The District Court, determining that the authority of the state and the plaintiff to impose the taxes was preempted by federal law, granted the Tribal Nation’s motion for summary judgment and denied separate motions for summary judgment filed by the plaintiff and the state See *Mashantucket Pequot Tribe v. Ledyard*, Docket No. 3:06CV1212 (WWE), 2012 WL 1069342, *12 (D. Conn. March 27, 2012), rev’d, 722 F.3d 457 (2d Cir. 2013). On July 15, 2013, the United States Court of Appeals for the Second Circuit reversed the District Court’s judgment, concluding that the authority of the state and the plaintiff to impose the taxes was not preempted by federal law. See *Mashantucket Pequot Tribe v. Ledyard*, 722 F.3d 457, 477 (2d Cir. 2013).

“After the proceedings had resumed in the present state action, the parties executed a stipulation. Under the stipulation, the parties agreed that the defendant had tendered payment to the plaintiff for all outstanding taxes, accrued interest, and accrued penalties at issue.

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They further agreed that the plaintiff was entitled to reasonable attorney's fees and costs incurred in the underlying state action, the amount of which would be determined by the trial court and the payment of which would be accepted by the plaintiff as satisfaction of all of the taxes, interest, penalties, attorney's fees, and costs recoverable by the plaintiff with respect to the underlying state action. They disputed, however, whether the trial court could also find the defendant liable for attorney's fees incurred by the plaintiff in defense of the federal action commenced by the Tribal Nation to which the defendant was not a party The parties agreed to submit to the trial court the issue of whether the defendant was liable for the federal action attorney's fees.

"After executing the stipulation, the parties filed . . . motions for summary judgment as to liability only with respect to the federal action attorney's fees. On October 6, 2016, the trial court, *Vacchelli, J.*, issued its memorandum of decision granting the plaintiff's motion for summary judgment, denying the defendant's motion for summary judgment, and rendering . . . judgment as to liability only in favor of the plaintiff with respect to the federal action attorney's fees. The trial court concluded that the defendant was liable for the federal action attorney's fees pursuant to § 12-161a. The trial court further stated that the plaintiff could file a motion for attorney's fees within thirty days and that a hearing would be scheduled thereafter to determine the amount of the attorney's fees to which the plaintiff is entitled. Shortly thereafter, on October 11, 2016, the plaintiff filed a motion for attorney's fees.

"On October 25, 2016, [before] the trial court [scheduled] a hearing on the plaintiff's motion for attorney's fees, the defendant appealed [from] the trial court's decision with respect to the federal action attorney's fees [to the Appellate Court]." (Footnotes omitted;

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internal quotation marks omitted.) *Ledyard v. WMS Gaming, Inc.*, supra, 192 Conn. App. 839–41. “The plaintiff subsequently filed a motion to dismiss the appeal for lack of subject matter jurisdiction, which [the Appellate Court] granted on the ground that the trial court’s decision was not yet an appealable final judgment because it had yet to determine the amount of attorney’s fees owed to the plaintiff. . . . Thereafter, [this court] reversed the judgment of [the Appellate Court] and remanded the case . . . to [the Appellate Court] with direction to deny the plaintiff’s motion to dismiss.” (Citation omitted.) *Id.*, 841–42.

With respect to the merits of the defendant’s appeal, the Appellate Court concluded on remand that the plain language of § 12-161a, specifically, “as a result of and directly related to,” required a “more restrictive proximal nexus to the collection proceeding in which the attorney’s fees are requested” than a proximate cause standard. *Id.*, 845. The Appellate Court determined that the phrase “directly related,” when read in context with “as a result of,” imported a more restrictive meaning to the language of the statute. *Id.*, 844–45. The court noted that, although the resolution of the federal action was significant to the ultimate outcome of the tax collection proceeding in state court, it “did not result directly in a final determination of the rights and obligations of the parties relative to the claimed delinquent tax.” *Id.*, 845. Therefore, the Appellate Court held that “only litigation fees incurred in the prosecution of the collection action itself would qualify as attorney’s fees directly related to the collection proceeding as contemplated by § 12-161a.” *Id.*; see *id.*, 845–46 (noting that nature of “the claims that were at issue in the federal action,” including claim that Tribal Nation lacked standing, supported its conclusion because, “far from incurring attorney’s fees directly related to an action that would result in a final determination of the rights and

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obligations of the parties relative to the claimed delinquent tax, the attorney's fees in the federal action were incurred in a collateral deviation or diversion from such a final determination"); see also *id.*, 847–49 (comparing § 12-161a to other attorney's fee statutes, including General Statutes §§ 12-193 and 49-7). Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case to that court "with direction to deny the plaintiff's motion for summary judgment and to grant the defendant's motion for summary judgment." *Id.*, 850. This certified appeal followed. See footnote 2 of this opinion.

On appeal, the plaintiff claims that the Appellate Court improperly construed § 12-161a to limit a municipality's entitlement to attorney's fees only to those incurred in the specific state court collections action. The plaintiff contends that the plain meaning of "as a result of and directly related to," as that phrase is used in § 12-161a, is "quintessential proximate cause language" The plaintiff asserts that the Appellate Court's narrow interpretation of § 12-161a would lead to bizarre results, such as a municipality's seeking to recoup unpaid property taxes but ultimately incurring greater financial losses as a result of the municipality's efforts, in a directly related case in a different forum, to defend its authority to impose such taxes. In response, the defendant argues that the Appellate Court improperly construed the plain meaning of § 12-161a because "interpreting 'directly related to' to mean proximate cause would make it duplicative of 'as a result of,' violating a cardinal rule of statutory interpretation." The defendant also argues that the attorney's fees incurred by the plaintiff were not actually caused by the underlying state court collection action against it because the Tribal Nation had already filed a federal action against the state and the plaintiff in 2006 challenging similar personal property taxes, meaning that

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the plaintiff would have incurred the attorney's fees in federal court regardless of whether it brought a collections action against the defendant. Finally, the defendant argues that we should affirm the judgment of the Appellate Court because the federal action was not proximately caused by the specific state collection action involving the plaintiff and the defendant but, rather, concerned issues of federal Indian law and federal preemption, which are subjects that are beyond the scope of § 12-161a. We agree with the plaintiff and conclude that the Appellate Court's interpretation of § 12-161a was too constrained in limiting the scope of a municipality's entitlement to attorney's fees only to those fees incurred in the specific collection action.

Whether the Appellate Court correctly determined that the plaintiff was not entitled to its attorney's fees in the federal action under § 12-161a is a question of statutory construction that presents a question of law over which we exercise plenary review. See, e.g., *Boisvert v. Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena v. American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see *id.*, 45–46 (setting forth plain meaning rule).

Generally, Connecticut adheres to the American rule under which parties pay their own attorney's fees in the absence of a statutory exception. See, e.g., *Aaron Manor, Inc. v. Irving*, 307 Conn. 608, 617, 57 A.3d 342 (2013). Section 12-161a provides an exception in cases brought to collect delinquent personal property taxes, allowing trial courts to award to a municipality "reasonable attorney's fees incurred by such municipality *as a result of and directly related to* such levy and sale, enforcement of lien or other collection proceedings."

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(Emphasis added.) See footnote 1 of this opinion (setting forth relevant text of § 12-161a). This statutory language is the focus of our analysis in this appeal.⁴

In interpreting statutes, words and phrases are to be construed according to their “commonly approved usage” General Statutes § 1-1 (a); see, e.g., *State v. Panek*, 328 Conn. 219, 227–28, 177 A.3d 1113 (2018). Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage. See, e.g., *Redding Life Care, LLC v. Redding*, 331 Conn. 711, 718, 207 A.3d 493 (2019). Contemporary to the passage of § 12-161a in 1982, “result” was defined as “something that results as a consequence, issue, or conclusion” Webster’s New Collegiate Dictionary (1981) p. 980. “[D]irect” was defined as “characterized by close logical, causal, or consequential relationship,” and “in a direct way . . . without an intervening agency or step” *Id.*, p. 320. Finally, “related” was defined as “connected by reason of an established or discoverable relation” *Id.*, p. 968. The meaning of the phrase “as a result of” does not seem to be in dispute because, as the Appellate Court noted, this court previously held in *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300, 306, 692 A.2d 709 (1997), that “as a result of,” in the legal context, is synonymous with proximate cause.⁵ See *Ledyard v. WMS Gaming*,

⁴ We note that neither the plaintiff’s entitlement to attorney’s fees nor the amount to which it is entitled is at issue in this appeal. Rather, this opinion is limited to the scope of attorney’s fees that may be available to the plaintiff under § 12-161a.

⁵ Although the defendant now argues that the Appellate Court improperly construed § 12-161a to require a closer nexus than proximate cause, the plaintiff points out that the defendant, in its brief to the Appellate Court, stated: “[T]he phrase ‘incurred as a result of and directly related to’ requires the [plaintiff] to show that the fees it seeks were *proximately caused* by this collection action against [the defendant].” (Emphasis in original.) The plaintiff does not, however, argue that this position before the Appellate Court estops the defendant from advancing these arguments in this certified appeal.

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Inc., supra, 192 Conn. App. 844. Instead, the issue in this case is the meaning of the complete phrase “as a result of and directly related to,” rather than its individual words. General Statutes § 12-161a.

As required by § 1-2z, we first determine whether this statutory language is ambiguous. The plaintiff argues that, because the phrase “directly related to” is analogous to “direct cause,” which has also been interpreted to be synonymous with proximate cause, it does not alter the meaning of the phrase. See *Sanders v. Officers Club of Connecticut, Inc.*, 196 Conn. 341, 349, 493 A.2d 184 (1985) (“A proximate cause is a direct cause. It is an act or failure to act, followed in its natural sequence by a result without the intervention of any other superseding cause.”). The defendant, however, advances a similarly reasonable reading of the statutory text, arguing that the Appellate Court properly held that a closer proximal nexus is required because interpreting “directly related to” as meaning proximate cause would render the phrase superfluous, given the consensus that “as a result of” has been held to denote proximate cause. Because the text at issue allows for more than one plausible meaning, we are confronted with two reasonable readings of § 12-161a and deem it ambiguous for purposes of the § 1-2z analysis.⁶ See, e.g., *Commissioner of Public Safety v. Freedom of Information Commission*, 312 Conn. 513, 534, 93 A.3d 1142 (2014).

⁶ We note that, although there must be more than one reasonable interpretation of a statute in order for it to be considered ambiguous, those interpretations need not be necessarily strong or have a high probability of success. Put differently, a statute is plain and unambiguous when “the meaning . . . is so strongly indicated or suggested by the [statutory] language . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning. . . . [I]f the text of the statute at issue . . . would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous.” (Emphasis in original; internal quotation marks omitted.) *State v. Kalman*, 93 Conn. App. 129, 134, 887 A.2d 950, cert. denied, 277 Conn. 915, 895 A.2d 791 (2006); accord *State v. Miranda*, 274 Conn. 727, 738–39, 878 A.2d 1118 (2005) (*Borden, J.*, concurring).

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Accordingly, we now consider extratextual sources, including legislative history and similar statutes, to determine the scope of the attorney’s fees that are “as a result of and directly related to” a state collection proceeding. See *id.*

In considering the scope of § 12-161a, we recognize the “well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so.” (Citation omitted; internal quotation marks omitted.) *Stafford v. Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014). A review of similarly worded statutes reveals that, when the legislature intends to limit the scope of recovery of attorney’s fees to those incurred only in defense of state actions, it knows how to do so. For example, General Statutes § 12-140 provides in relevant part that “attorney’s fees, for all fees and costs *incurred by the municipality in defending any civil action brought as a result of a tax sale or an alias tax warrant or which seeks to enjoin or declare unlawful any tax sale or alias tax warrant . . . shall be paid by the delinquent taxpayer . . .*” (Emphasis added.) See *Cornelius v. Rosario*, 167 Conn. App. 120, 127, 143 A.3d 611 (2016) (holding that § 12-140 unambiguously allows recovery of reasonable attorney’s fees incurred in defending plaintiff’s action challenging tax sales). Similarly, General Statutes § 36a-237h (c) (2) provides in relevant part that “[a]ttorneys’ fees and any related expenses *incurred in defending a legal action* for which immunity or indemnity is available under this section shall be paid . . . as they are incurred, in advance of the final disposition of such action upon receipt . . .” (Emphasis added.) A comparison of the language in § 12-161a, namely, “any other proceeding in law in the name of the municipality for purposes of enforcing such collection, such person shall be required to pay *any court costs . . . or reasonable attorney’s*

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fees incurred by such municipality as a result of and directly related to such . . . enforcement of lien or other collection proceedings,” to the language in these other statutes strongly supports a conclusion that, had the legislature intended a municipality to be entitled to *only* those fees incurred in the state court action for the prosecution of delinquent personal property taxes, it would have included such language rather than using language that suggests a broader reach beyond the docketed action.

Turning now to the extratextual sources, we note that there is no relevant legislative history available for § 12-161a, which was enacted in 1982; Public Acts 1982, No. 82-56, § 1; that sheds light on the legislature’s intended scope of attorney’s fees for municipalities in tax collection disputes. However, “it is well settled that the legislature is always presumed to have created a harmonious and consistent body of law [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction.” (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008). Thus, we find instructive case law construing § 12-193,⁷

⁷ General Statutes § 12-193 provides: “Court costs, reasonable appraiser’s fees, and reasonable attorney’s fees incurred by a municipality *as a result of any foreclosure action brought pursuant to section 12-181 or 12-182 and directly related* thereto shall be taxed in any such proceeding against any person or persons having title to any property so foreclosed and may be collected by the municipality once a foreclosure action has been brought pursuant to section 12-181 or 12-182. A municipality shall reimburse a taxpayer for the costs of state marshal fees or any property seized if the court finds that such costs were incurred because of an error by the tax assessor or tax collector and not as the result of any action or failure on the part of the taxpayer.” (Emphasis added.)

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which contains similar language and provides for a municipality's entitlement to attorney's fees in foreclosure proceedings. See *Danbury v. Dana Investment Corp.*, 249 Conn. 1, 27, 730 A.2d 1128 (1999). As the plaintiff points out, § 12-193 was first enacted in 1949 and subsequently was amended in 1975. See *id.*, 27–28. The 1975 amendment, which was enacted prior to the passage of § 12-161a, altered the statute to allow municipalities to recover attorney's fees incurred in foreclosure proceedings. See *id.*; Public Acts 1975, No. 75-73, § 1. This court has previously observed that § 12-193 “was intended to put municipalities on a par with private foreclosing parties regarding costs and fees, and therefore to incorporate into such cases the long-standing principle that costs and fees in equitable actions are discretionary with the court . . . but ordinarily are imposed as in actions at law.” *Danbury v. Dana Investment Corp.*, *supra*, 27.

Thus, we consider a series of decisions from the Superior Court considering the scope of a municipality's entitlement to attorney's fees under the language of § 12-193 in the context of foreclosure actions. This line of cases highlights a key distinction drawn by the Superior Court when denying attorney's fees for collateral actions; actions commenced prior to the foreclosure proceedings have not been considered “as a result of and directly related to” the underlying foreclosure action. See *Milford Tax, LLC v. Paradigm Milford, LLC*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-14-6015774-S (May 28, 2015) (60 Conn. L. Rptr. 473, 476) (work done in prior bankruptcy proceeding was not directly related to foreclosure action); *Groton v. First Groton, LLC*, Superior Court, judicial district of New London, Docket No. CV-08-5008750 (March 25, 2011) (municipality was not entitled to attorney's fees for work related to collection of back taxes and intervening bankruptcy matters that commenced five

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years prior to commencement of foreclosure action); see also *White Sands Beach Assn., Inc. v. Bombaci*, Superior Court, judicial district of New London, Docket No. CV-04-0568713 (May 12, 2009) (awarding attorney's fees for work directly related to foreclosure action but not in defense of counterclaim). But see *Monroe v. Mandanici*, Superior Court, judicial district of Fairfield, Docket No. CV-92-0293234 (March 2, 1995) (awarding attorney's fees for defense of counterclaim to foreclosure action). Upon review of these decisions, we recognize that the timing of an action is an important factual consideration in determining whether an action is "a result of and directly related to" a state collection proceeding. This case is distinguishable from the aforementioned cases under § 12-193 because the federal action in this case, concerning the plaintiff's authority to impose personal property taxes on the defendant, was commenced by the Tribal Nation *after* the plaintiff had initiated the state collection proceeding. In addition to timing, it is significant that the federal action was commenced for the *purpose* of challenging the plaintiff's authority to pursue that same collection action on grounds of federal preemption.⁸

The defendant argues, however, that the federal action should not be considered "as a result of and directly related to" the state collection proceeding because it was commenced by a third party, namely, the Tribal Nation, and that litigation focused on issues of tribal sovereignty and federal preemption rather than

⁸ We note that the Tribal Nation had initiated a prior federal action against the plaintiff in 2006 challenging the plaintiff's authority to impose taxes on another vendor working with the Tribal Nation, AC Coin. See *Mashantucket Pequot Tribe v. Ledyard*, *supra*, 2012 WL 1069342, *1. However, the timing of that action is not germane to this appeal, as the only question before us is whether the scope of § 12-161a expands beyond the docketed action to include related actions, such as the one initiated by the Tribal Nation challenging the plaintiff's authority to tax the defendant. See footnote 3 of this opinion.

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the defendant's liability in connection with the state's tax collection. We disagree. Given the factual context of this case, in which it is undisputed that the Tribal Nation and the defendant coordinated and mutually agreed to bring the federal lawsuit, the fact that the defendant was not formally a party to the federal action is not an absolute bar to the plaintiff's entitlement to attorney's fees. As the trial court in the present case noted, "even a cursory examination of the complaint filed in the federal [District Court] demonstrates that it was an action to prevent the [plaintiff] from taxing the same . . . gaming machines [owned by the defendant] that were the subject of the [present] case. In describing the nature of the action, the operative federal complaint, filed after the [present] case was commenced, states: 'In clear disregard for well established principles of federal Indian law, the [plaintiff has] assessed property taxes on gaming equipment that the [Tribal Nation] leases from [the] Illinois based [defendant] The [Tribal Nation] seeks a declaration that the property taxes are void and illegal, and a permanent injunction preventing the [plaintiff and the state] from assessing illegal taxes on the leased gaming equipment in the future.' . . . Thus, there can be no doubt that the federal action was directly aimed at stopping the collection proceedings, and, therefore, the fees incurred by the [plaintiff] in defending against it were directly related to and a result of the [plaintiff's] collection proceedings." (Citation omitted.) We further note that the Tribal Nation and the defendant were, at one point, represented by the same attorney, and the defendant "had certain indemnification agreements with the [Tribal Nation] with respect to the tax liabilities at stake in the event that the federal litigation was unsuccessful." Finally, it can hardly be ignored that, when seeking a stay of this state court action pending the federal litigation, the defendant justified its request by describ-

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ing that federal action as “ ‘determinative’ ” of the state collection action.

Indeed, the Appellate Court’s conclusion that municipalities are entitled to attorney’s fees that are incurred only in the specific, docketed collection action contradicts a basic principle of statutory construction. This court has often stated that “it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results.” (Internal quotation marks omitted.) *Raftopol v. Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011). As the plaintiff argues, the Appellate Court’s limited construction of § 12-161a could well create the absurd result in which a municipality, required to defend its authority in federal court to pursue a specific collection action against a delinquent taxpayer, would incur “an actual loss of revenue . . . that adversely impacts its ability to provide municipal government services.” Because frustration of government administration is an absurd result, the legislature cannot be presumed to have intended such a consequence. See *id.*, 705; *First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc.*, 273 Conn. 287, 294, 869 A.2d 1193 (2005).

Given the plain language of the statutory text and the treatment of the phrase “as a result of and directly related to” in prior Connecticut cases, as well as the potential for an absurd outcome in the present case if we were to determine otherwise, we conclude that the Appellate Court’s interpretation of § 12-161a was too constrained. A municipality may be entitled to attorney’s fees that are incurred in a collateral federal action that is “a result of and directly related to” a state tax collection proceeding. We emphasize, however, that our decision in this certified appeal is limited to a determination of the breadth of § 12-161a as applied to the facts of this case. The defendant’s ultimate liability and the

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appropriate amount of reasonable attorney's fees to which the plaintiff is entitled from the federal action are dependent on factual determinations yet to be made by the trial court in connection with the plaintiff's pending motion for attorney's fees, namely, the extent to which the attorney's fees in the federal action were incurred in connection with proceedings relating to this defendant's slot machines. Accordingly, we conclude that, because the federal action in this case was commenced after the state collection action, concerned the plaintiff's authority to pursue that proceeding, and was determinative of that proceeding, and the record indicates the participation of the defendant in that collateral action, it was a result of and directly related to the state collection action, thus entitling the plaintiff to reasonable attorney's fees within the meaning of § 12-161a.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion the other justices concurred.

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JOHN M. ROBB *v.* CONNECTICUT BOARD OF
VETERINARY MEDICINE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 204 Conn. App. 595 (AC 41912), is denied.

Joseph P. Secola, in support of the petition.

Tanya Feliciano DeMattia, assistant attorney general, in opposition.

Decided September 28, 2021

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STONE KEY GROUP, LLC *v.* REID TARADASH

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 55 (AC 42524), is denied.

James Nealon, in support of the petition.

Daniel L. Schwartz and *Howard Fetner*, in opposition.

Decided September 28, 2021

STONE KEY GROUP, LLC *v.* REID TARADASH

The plaintiff's cross petition for certification to appeal from the Appellate Court, 204 Conn. App. 55 (AC 42524), is denied.

Daniel L. Schwartz and *Howard Fetner*, in support of the petition.

James Nealon, in opposition.

Decided September 28, 2021

STATE OF CONNECTICUT *v.* OSCAR H.

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 207 (AC 43622), is denied.

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

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided September 28, 2021

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GOSHEN MORTGAGE, LLC *v.* ANDREAS D.
ANDROULIDAKIS ET AL.

The petition of the defendant Jameela R. Androulidakis for certification to appeal from the Appellate Court, 205 Conn. App. 15 (AC 43002), is denied.

Jameela R. Androulidakis, self-represented, in support of the petition.

Christopher J. Picard, in opposition.

Decided September 28, 2021

STATE OF CONNECTICUT *v.*
AHMAAD JAMAL LANE

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 1 (AC 40185), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

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

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

Decided September 28, 2021

JAVIER VILLANUEVA *v.* RAFAEL VILLANUEVA

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 36 (AC 43619), is denied.

John R. Hall, in support of the petition.

Mark M. Kratter, in opposition.

Decided September 28, 2021

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and for mistrial, which were based on claim that state improperly failed to disclose certain letters written by defendant's accomplice; claim that state violated defendant's due process rights under Brady v. Maryland (373 U.S. 83) by failing to disclose recordings of certain communications made by police officers during and after response to home invasion; standard by which defendant must prove existence of purported Brady violation, discussed; whether trial court correctly concluded that defendant had failed to establish by preponderance of evidence existence of purported e-mail and police communications log; whether certain undisclosed communications regarding police department's response during and following home invasion and describing demeanor and appearance of defendant and his accomplice were material under Brady; claim that state violated defendant's due process right to fair trial by presenting evidence that it knew or should have known to be false or misleading; reviewability of claim that statute (§ 18-10b) imposing certain restrictive conditions of confinement on inmates, like defendant, convicted of capital felony or murder with special circumstances constituted ex post facto law, violated equal protection, and resulted in excessive and disproportionate punishment.

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**CONNECTICUT
APPELLATE REPORTS**

Vol. 208

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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Johnson v. Commissioner of Correction

ANTHONY JOHNSON v. COMMISSIONER
OF CORRECTION
(AC 42994)

Prescott, Elgo and DiPentima, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea, of the crime of manslaughter in the first degree with a firearm in connection with his involvement in an altercation in 2008, sought a writ of habeas corpus, claiming, inter alia, a violation of the ex post facto clause of the United States constitution. In 2011, the legislature enacted a statute (§ 18-98e) that permitted certain inmates, including the petitioner, to earn risk reduction credit toward the reduction of their sentences, at the discretion of the respondent, the Commissioner of Correction, and amended the statute (§ 54-125a) governing parole eligibility to permit risk reduction credit to be applied to advance the parole eligibility date of inmates convicted of certain violent offenses. In 2013, No. 13-3 of the 2013 Public Acts (P.A. 13-3) amended § 54-125a and removed the language that permitted the risk reduction credit earned under § 18-98e to advance the parole eligibility date of violent offenders. The petitioner claimed, inter alia, that the 2013 amendment, as applied retroactively to him, violated the ex post facto clause of the federal constitution. The habeas court rendered judgment declining to issue a writ of habeas

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corpus pursuant to the applicable rule of practice (§ 23-24 (a) (1)) on the ground that it lacked subject matter jurisdiction. The petitioner then filed a second petition for a writ of habeas corpus, in which he alleged that the Department of Correction (department) had unconstitutionally forfeited his risk reduction earned credit that had already been earned and applied. The court again declined to issue the writ, concluding that the second petition was identical to the first petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court abused its discretion in denying the petition for certification to appeal and in declining to issue a writ of habeas corpus on the petitioner's second petition because it was identical to the first petition, as no such ground is contained in Practice Book § 23-24: under § 23-24, the judicial authority shall issue a writ of habeas corpus unless it appears that it lacks jurisdiction, the petition is wholly frivolous on its face or the relief sought is not available; moreover, as the respondent conceded, the first and second petitions were not identical, as the first petition was construed by the habeas court as a constitutional challenge regarding the department's failure to allow the petitioner to continue to earn and apply new credits to his sentence, and the second petition specifically concerned risk reduction earned credits that allegedly had already been earned and applied pursuant to § 18-98e.
2. This court affirmed the decision of the habeas court to decline to issue a writ of habeas corpus on the alternative ground that the habeas court lacked subject matter jurisdiction over the second petition, as the petitioner's criminal offense predated the enactment of the risk reduction earned credit program; this court previously applied precedent from our Supreme Court in the context of a habeas court's decision to decline to issue a writ for lack of jurisdiction pursuant to Practice Book § 23-24 (a) (1) in *Whistnant v. Commissioner of Correction*, (199 Conn. App. 406), and the present case was indistinguishable from that case in all material respects, as both cases involved petitioners who committed criminal offenses in 2008, years before the enactment of the risk reduction earned credit program in 2011, and who claimed that the retroactive application of the 2013 amendment to § 54-125a (b) (2) to him violated the ex post facto clause, and, as in *Whistnant*, the enactment of P.A. 13-3 simply returned the petitioner to the same position in terms of parole eligibility that he was in at the time that he committed the offense.

Argued March 4—officially released October 12, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the court

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denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Anthony Johnson, appeals from the judgment of the habeas court declining to issue a writ of habeas corpus pursuant to Practice Book § 23-24. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal and declining to issue a writ of habeas corpus. The respondent, the Commissioner of Correction, concedes that the court abused its discretion in denying his petition for certification and declining to issue the writ for the reason stated by the court, but nonetheless argues that we should affirm the judgment because the court lacked jurisdiction over the petition. We agree with the respondent and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. The petitioner was involved in an altercation that occurred on December 7, 2008. He thereafter was arrested and charged with murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On December 2, 2009, the petitioner pleaded guilty to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a. On February 26, 2010, the court sentenced the petitioner to a term of thirty years of incarceration, execution suspended after eighteen years, with five years of probation.

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On February 25, 2019, the petitioner filed a petition as a self-represented party for a writ of habeas corpus (first petition), raising an ex post facto challenge to the application of the risk reduction earned credit program that was established in 2011, by No. 11-51 of the 2011 Public Acts (P.A. 11-51), as codified in General Statutes (Supp. 2012) §§ 18-98e and 54-125a, which was eliminated in 2013, following the enactment of No. 13-3, § 59, of the 2013 Public Acts (P.A. 13-3).¹ In that petition, the petitioner broadly alleged that application of P.A. 13-3 to his sentence violated the ex post facto clause of the United States constitution.²

On March 4, 2019, the habeas court, *Bhatt, J.*, declined to issue the writ pursuant to Practice Book § 23-24 (a) (1). In its written order, the court concluded that it lacked subject matter jurisdiction over the first petition because the date of the offense underlying the petitioner’s conviction was December 7, 2008, and thus predated the enactment of the risk reduction earned credit program established by P.A. 11-51. In so doing, the court relied on *Perez v. Commissioner of Correction*, 326 Conn. 357, 373–74, 163 A.3d 597 (2017), *Boria v. Commissioner of Correction*, 186 Conn. App. 332, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020), and *Holliday v. Commissioner of Correction*, 184 Conn. App. 228, 194 A.3d 867 (2018), cert. granted, 335 Conn. 901, 225 A.3d 960 (2020), noting that “[o]ur Supreme Court and Appellate Court have repeatedly held that this court lacks jurisdiction over claims involving an offense date that is prior to the enactment of the [risk reduction earned credit] statute,”

¹ Number 13-3, § 59, of the 2013 Public Acts amended subsections (b) (2), (c) and (e) of General Statutes (Rev. to 2013) § 54-125a to delete provisions permitting the reduction of time off a prisoner’s parole eligibility date for risk reduction credit earned under § 18-98e.

² The constitution of the United States, article one, § 10, provides in relevant part: “No State shall . . . pass any . . . ex post facto Law”

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including ex post facto challenges. The court then concluded its order with the following statement: “The holdings of those [appellate] cases make clear that this court has no jurisdiction to consider the claims raised in the [first petition]. If, however, the petitioner is claiming that credits that have already been earned and applied in the past have been unconstitutionally forfeited by the Department of Correction [department], as opposed to [the department’s] failure to allow the petitioner to continue to earn and apply new credits to his sentence, then the petitioner is invited to refile the petition.”³

Approximately two weeks later, the petitioner filed a second petition for a writ of habeas corpus (second petition), in which he amended his first petition as suggested by the habeas court. Specifically, the petitioner alleged in relevant part that the department had “unconstitutionally forfeited risk reduction earned credit . . . from the petitioner [that] have already been earned and applied” The petitioner further alleged that “the retroactive application of [P.A.] 13-3 violat[es] the ex post facto clause” by “[w]ithdrawing any credits that [were] earned toward the reduction of [his parole eligibility date].” By way of relief, the petitioner asked the court to “reinstate any lawfully earned [risk reduction earned credit] that was forfeited unconstitutionally with the retroactive application of P.A. 13-3.” On March 25, 2019, the habeas court, *Newson, J.*, declined to issue the writ “because [the second petition] is identical to [the first petition], which was declined . . . on March

³ Although perhaps well intentioned, it is not proper for a court that lacks subject matter jurisdiction over a given controversy to provide such guidance to litigants. See, e.g., *418 Meadow Street Associates, LLC v. Clean Air Partners, LLC*, 304 Conn. 820, 827 n.8, 43 A.3d 607 (2012) (“the [trial] court should have dismissed the action for lack of subject matter jurisdiction and proceeded no further” (internal quotation marks omitted)); *Nieves v. Cirimo*, 67 Conn. App. 576, 587 n.4, 787 A.2d 650 (“[t]he court is not an advocate and should not be placed in a position of making tactical decisions for the [parties] before it”), cert. denied, 259 Conn. 931, 793 A.2d 1085 (2002).

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4, 2019.”⁴ The petitioner then filed a petition for certification to appeal, which the court denied. From that judgment, the petitioner appealed to this court.

The petitioner subsequently filed a motion requesting that the habeas court file a memorandum of decision pursuant to Practice Book § 64-1. The court denied that motion on August 12, 2019, stating in relevant part: “The basis for the court’s [decision to] decline [to issue the writ] pursuant to Practice Book § 23-24 [was] on the ground that the [second] petition was identical to [the first petition] that had been declined approximately two weeks prior pursuant to Practice Book § 23-24 . . . where [the habeas court] did provide the petitioner with an order including legal reasoning, does not require further explanation.” (Citation omitted.)

In response, the petitioner filed a motion for articulation, in which he asked the habeas court to articulate the basis of its decision to deny his motion seeking a memorandum of decision, its decision to decline to issue the writ, and its denial of his petition for certification to appeal. The court summarily denied that motion the next day. On September 3, 2019, the petitioner filed an “amended motion for articulation,” again seeking articulation of the habeas court’s decision declining to issue a writ of habeas corpus. The court denied the amended motion on September 16, 2019, stating that “[t]he basis for the court’s decision was made clear in its order and is not in need of further articulation.” On September 26, 2019, the petitioner filed a motion for review of the habeas court’s denial of his amended

⁴ Although the court stated in its order that the second petition was “being returned,” the court in substance declined to issue a writ of habeas corpus. See Practice Book § 23-24. As our Supreme Court recently explained, “by ordering the return of the petition, the court did not issue the writ. Ordering the petition returned is consistent with the court’s not accepting the writ.” *Cookish v. Commissioner of Correction*, 337 Conn. 348, 357 n.7, 253 A.3d 467 (2020).

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motion. On December 4, 2019, this court denied review of that motion.

On appeal, the petitioner argues that the habeas court abused its discretion when it denied the petition for certification to appeal because it improperly declined to issue the writ on the ground that the second petition was “identical” to the first one. The respondent concedes that the court abused its discretion in both denying his petition for certification to appeal and declining to issue the writ on that ground.⁵ The respondent nevertheless argues, as an alternative ground of affirmance, that we should affirm the judgment of the habeas court because it lacked jurisdiction over the second petition. See Practice Book § 23-24 (a) (1). We agree with the respondent.⁶

I

We first consider the propriety of the stated basis of the habeas court’s decision to decline to issue the writ. In its March 25, 2019 order, the court declined to issue

⁵ In his appellate brief, the respondent states in relevant part: “If this court concludes . . . that the habeas court did have jurisdiction [over the second petition], the respondent concedes that the habeas court, *Newson, J.*, erred in declining to issue the writ under Practice Book § 23-24 on the ground that the [second petition] and the [first petition] were identical, because the petitions were not, in fact, identical. . . . If this court accepts the respondent’s concession of error, the habeas court abused its discretion in denying the petitioner’s petition for certification to appeal, and the decision of the habeas court declining to issue the writ therefore should be reversed.”

⁶ The precedent of our Supreme Court instructs that an appellate court “need not decide whether the habeas court abused its discretion in denying certification to appeal when there is an alternat[ive] ground for affirming the decision of the habeas court” (Internal quotation marks omitted.) *Marquez v. Commissioner of Correction*, 330 Conn. 575, 591, 198 A.3d 562 (2019). In light of our conclusion that the habeas court lacked jurisdiction to issue the writ pursuant to Practice Book § 23-24 (a) (1), we need not decide the question of whether the court abused its discretion in denying the petition for certification to appeal. We likewise do not consider the petitioner’s additional claims that the habeas court violated his right to due process by refusing to hold a hearing on the petition and that it abused its discretion in declining to furnish an articulation of its decision.

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the writ “because [the second petition] is identical to [the first petition]” On appeal, the petitioner contends that the court abused its discretion in so doing, as no such ground is contained in Practice Book § 23-24. We agree.

As a preliminary matter, we note that our review of a habeas court’s order declining to issue a writ of habeas corpus is governed by the abuse of discretion standard. See *Stephen S. v. Commissioner of Correction*, 199 Conn. App. 230, 235, 235 A.3d 639 (2020). “In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court’s ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.” (Internal quotation marks omitted.) *Walker v. Commissioner of Correction*, 223 Conn. 411, 414, 611 A.2d 413 (1992).

Titled “Preliminary Consideration of Judicial Authority,” Practice Book § 23-24 governs the authority of a court to issue a writ of habeas corpus and provides in relevant part: “(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available. . . .”⁷ By contrast, Practice Book § 23-29 governs the

⁷ As our Supreme Court has observed, “[i]f any of [the] three enumerated circumstances exist, then the writ never issues in the first place, and the judicial authority is required to notify the petitioner [that] it declines to issue the writ. . . . Section 23-24 thus reverses the usual sequence followed in the ordinary civil case; the habeas petition first is filed with the court, and the writ issues and service of process occurs only if the court determines, after a preliminary review of the petition, that the petition pleads a nonfrivolous claim within the court’s jurisdiction upon which relief can be granted.” (Citation omitted; internal quotation marks omitted.) *Gilchrist v. Commissioner of Correction*, 334 Conn. 548, 557, 223 A.3d 368 (2020).

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authority of a court to dismiss a petition for various reasons *after* a writ has been issued.⁸

In *Gilchrist v. Commissioner of Correction*, 334 Conn. 548, 555, 223 A.3d 368 (2020), our Supreme Court sought to “clarify the proper application of these two rules of practice.” The court explained that “the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. . . . Screening petitions prior to the issuance of a writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded pro se. . . . [I]n such a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under § 23-24, the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be

⁸ Practice Book § 23-29 provides: “The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists.”

addressed in the regular course after the proceeding has commenced.” (Citations omitted; internal quotation marks omitted.) *Id.*, 560–61. The court further emphasized that, “[i]n contrast [with Practice Book § 23-24], Practice Book § 23-29 contemplates the dismissal of a habeas petition *after the writ has issued* on any of the enumerated grounds.” (Emphasis added.) *Id.*, 561; see also *id.*, 563 (describing Practice Book § 23-29 as procedure utilized “[a]fter the writ has issued”).

In the present case, the habeas court declined to issue the writ pursuant to Practice Book § 23-24 “because [the second petition] is identical to [the first petition]” No such ground is set forth in § 23-24. For that reason, the court improperly declined to issue the writ on that basis.

In *Stephen S. v. Commissioner of Correction*, *supra*, 199 Conn. App. 231, this court reversed a habeas court’s decision to decline to issue a writ on the ground that the petition was identical to a previously dismissed petition. The petitioner in that case had filed a third habeas petition alleging ineffective assistance of counsel on the part of his trial and appellate counsel. *Id.*, 234. The habeas court declined to issue the writ pursuant to Practice Book § 23-24 (a) (2), stating that the petition was “wholly frivolous on its face, to wit: [t]he petition raises claims identical to those already raised, litigated, and resolved against the petitioner in [the first and second habeas actions].” (Internal quotation marks omitted.) *Id.*, 235. On appeal, the petitioner claimed that the court improperly declined to issue the writ because the claims raised in his third habeas petition were “different from the claims raised in his two prior habeas petitions” and were not “‘wholly frivolous on [their] face.’” *Id.*, 231. Relying on *Gilchrist v. Commissioner of Correction*, *supra*, 334 Conn. 560, this court concluded that the petitioner’s claims were not “‘obviously and unequivocally defective’ . . . but, rather, [were]

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cognizable claims that should have survived the ‘screening function’ of . . . § 23-24 and entitled the petitioner to present evidence in support of his claims.” (Citation omitted.) *Stephen S. v. Commissioner of Correction*, supra, 239. In light of the foregoing, this court concluded that the habeas court had abused its discretion in declining to issue the writ. *Id.*, 240.

That precedent compels a similar conclusion here. In the present case, the habeas court declined to issue the writ on the ground that the second petition was identical to the first petition. As the respondent concedes, the first and second petitions are not “identical.” The first petition was construed by the habeas court as a constitutional challenge regarding the department’s failure to allow the petitioner to continue to earn and apply new credits to his sentence. By contrast, the second petition specifically concerned risk reduction earned credits that allegedly had “already been earned and applied” pursuant to General Statutes (Supp. 2012) § 18-98e and allegedly had been forfeited by the department in violation of the ex post facto clause. Thus, the second petition plainly alleges a different and distinct claim from that set forth in the first petition. We therefore conclude that the court improperly declined to issue the writ on the ground that the second petition was identical to the first petition.

II

That determination does not end our inquiry. Although the respondent concedes that the stated basis of the habeas court’s decision is untenable, he argues, as an alternative ground of affirmance, that the court lacked subject matter jurisdiction over the second petition because the petitioner’s criminal offense predated the enactment of the risk reduction earned credit program.⁹ For that reason, the respondent maintains that

⁹ “An appellate court may affirm the judgment of the [habeas] court although it may have been grounded on a wrong reason,” particularly when the question of subject matter jurisdiction is involved. *Jobe v. Commissioner*

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the court reached the correct result in declining to issue the writ. See Practice Book § 23-24 (a) (1) (“[t]he judicial authority shall issue the writ unless it appears that . . . the court lacks jurisdiction”). We agree.

In *Perez v. Commissioner of Correction*, supra, 326 Conn. 374, our Supreme Court addressed a claim, similar to the one presented here, that “the retroactive application of [P.A. 13-3] to [the petitioner], when he committed his offense and was sentenced prior to the amendments’ effective date, violates the ex post facto clause of the United States constitution.” The Supreme Court rejected that claim, stating: “[W]hen the petitioner committed his offense in 2010, a violent offender for whom parole was available would become eligible for parole after he had served 85 percent of his definite sentence. See General Statutes (Rev. to 2009) § 54-125a (e). Although a short-lived 2011 amendment altered this calculation to include earned risk reduction credit; P.A. 11-51, § 25; [P.A. 13-3] restored the parole eligibility calculation to 85 percent of the violent offender’s definite sentence. Far from creating a genuine risk that the petitioner would be incarcerated for a longer period of time, [P.A. 13-3] simply returned the petitioner to the position that he was in at the time of his offense.” *Perez v. Commissioner of Correction*, supra, 378. The court also disagreed with the petitioner’s contention that, in conducting an ex post facto inquiry, a court may consider the statute that was in effect at the time of the plea and sentencing. *Id.*, 378–79. To the contrary, the court held that a court presented with an ex post facto challenge must compare “the statute *in effect at the time of the petitioner’s offense* to the challenged statute

of Correction, 181 Conn. App. 236, 237 n.3, 186 A.3d 1219 (2018), *aff’d*, 334 Conn. 636, 224 A.3d 147 (2020); see also *Reinke v. Greenwich Hospital Assn.*, 175 Conn. 24, 29–30, 392 A.2d 966 (1978) (appellate court may “affirm a trial court’s decision although based upon an erroneous ground if the same result is required by law”).

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. . . .” (Emphasis added.) Id., 380. Because the petitioner’s criminal offense occurred prior to the enactment of the risk reduction earned credit program in 2011, the court concluded that “the habeas court lacked jurisdiction” over the petitioner’s ex post facto claim. Id., 362; accord *James E. v. Commissioner of Correction*, 326 Conn. 388, 390, 163 A.3d 593 (2017) (applying *Perez* and concluding that habeas court properly dismissed petition alleging ex post facto violation for lack of subject matter jurisdiction); *Boria v. Commissioner of Correction*, supra, 186 Conn. App. 344–45 (same).

More recently, this court applied that precedent in the context of a habeas court’s decision to decline to issue a writ for lack of jurisdiction pursuant to Practice Book § 23-24 (a) (1). In *Whistnant v. Commissioner of Correction*, 199 Conn. App. 406, 409, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020), the petitioner, like the petitioner in the present case, committed the underlying criminal offense in 2008. In 2019, he filed a petition for a writ of habeas corpus that contained allegations nearly identical to those presented in the present case—namely, that “prior to the enactment of P.A. 13-3, he had earned risk reduction credit that the respondent had applied to advance his parole eligibility date . . . but, following the enactment of P.A. 13-3, the respondent stopped applying the credit that he had earned to advance his parole eligibility date. . . . [T]he petitioner [thus] asserted that P.A. 13-3, as applied to him retroactively, violated the ex post facto clause of the United States constitution.” (Emphasis added.) Id., 411. Pursuant to Practice Book § 23-24 (a) (1), the habeas court declined to issue the writ for lack of jurisdiction. Id., 408.

On appeal, this court explained that the petitioner had “made no claim that legislation regarding eligibility for parole consideration became more onerous after the date of his criminal behavior. Rather, he claim[ed]

that new legislation enacted in 2011 . . . after his criminal conduct . . . conferred a benefit on him that was then taken away in 2013. Such a claim, however, does not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 have no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed [the offense for which he is incarcerated]. . . . Indeed, with regard to his parole eligibility, P.A. 13-3 returned the petitioner to the same position that he was in at the time that he committed the [offense] in 2008." (Citation omitted; internal quotation marks omitted.) *Id.*, 421–22. We further acknowledged the precedent of our Supreme Court in *Perez* and *James E.*, which held that a habeas court lacks subject matter jurisdiction over ex post facto claims predicated on the retroactive application of P.A. 13-3 to petitioners whose underlying offenses were committed prior to the enactment of P.A. 11-51. *Id.*, 422. This court thus concluded that the habeas court properly declined to issue a writ pursuant to Practice Book § 23-24 (a) (1). *Id.*, 423.

The present case is indistinguishable from *Whistnant* in all material respects. Both cases involve petitioners who committed criminal offenses in 2008, years before the enactment of the risk reduction earned credit program in 2011. Both cases involve ex post facto challenges regarding credit that allegedly had been earned and applied prior to the enactment of P.A. 13-3. As in *Whistnant*, the enactment of P.A. 13-3 simply returned the petitioner in the present case to the same position in terms of parole eligibility that he was in at the time that he committed the offense on December 7, 2008. For that reason, the habeas court lacked subject matter jurisdiction over his second petition alleging an ex post facto claim predicated on the retroactive application of P.A. 13-3. See *James E. v. Commissioner of Correction*, *supra*, 326 Conn. 390–91; *Perez v. Commissioner of*

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Correction, supra, 326 Conn. 362; *Whistnant v. Commissioner of Correction*, supra, 199 Conn. App. 422. Because the court lacked jurisdiction over the second petition, we agree with the respondent that the habeas court's decision to decline to issue a writ of habeas corpus was proper pursuant to Practice Book § 23-24 (a) (1).

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE BOLOGNA *v.* RICHARD BOLOGNA
(AC 43848)

Elgo, Suarez and DiPentima, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her postjudgment motion for clarification. Pursuant to the parties' separation agreement, which was incorporated into the judgment of dissolution, the parties were to list their jointly owned home for sale prior to June 30, 2012, and equally divide the sale proceeds. Alternatively, either party could buy out the other's interest for 50 percent of the home's net value, which was to be calculated by subtracting any outstanding mortgages from the fair market value. The plaintiff was permitted to remain in the home until the date of sale, provided, inter alia, that she make the mortgage payments. Postjudgment, the parties agreed not to sell the home, and the plaintiff continued to reside in it and make the required mortgage payments, which increased in July, 2012, from interest only to principal and interest. In 2019, the plaintiff filed a motion for clarification, requesting that the trial court issue an order requiring the buyout price to be calculated using the mortgage balance as of the date of the separation agreement or as of June, 2012, in order to prevent the defendant from obtaining a windfall on the sale or buyout of the home, as the distribution of the sale proceeds or buyout price would not otherwise take into account the payments she had made on the mortgage between June, 2012 and 2019. Following a hearing, the trial court ordered the sale of the home, set the list price, required that the sale proceeds be equally divided in accordance with the separation agreement, and declined to change the calculation of the buyout price, and the plaintiff appealed to this court. *Held* that, in denying the plaintiff's postjudgment motion for clarification, the trial court did not improperly modify the

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parties' separation agreement but, rather, effectuated the terms of that agreement: the trial court correctly construed the plaintiff's motion for clarification as an impermissible motion for modification and properly determined that it did not have the authority to modify the terms of the agreement, as the agreement clearly stated the intent of the parties to equally divide the net proceeds of the sale of the home and to calculate the buyout price based on the mortgage amounts outstanding at the time of the buyout, the parties did not alter the manner in which the sale proceeds were to be distributed or the buyout price was to be calculated when they agreed to deviate from the judgment by not selling the home prior to the date required by the agreement, and, through her motion, the plaintiff sought to amend the agreement, rather than to clarify its terms, by altering the manner in which the buyout price was to be calculated, and such an amendment would cause a substantial change to the existing judgment; moreover, the separation agreement did not provide for a set off or credit for any mortgage payments made by the plaintiff, and the plaintiff acquiesced to the possibility that the defendant would receive more money from the sale or buyout of the home than initially contemplated when she decided, without further altering the terms of the agreement, not to sell the home or buy out the defendant prior to the date required by the agreement.

Argued April 8—officially released October 12, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *McLaughlin, J.*, denied the plaintiff's motion for clarification, and the plaintiff appealed to this court. *Affirmed.*

Michael J. Devine, for the appellant (plaintiff).

Jennifer Neal Bardavid, for the appellee (defendant).

Opinion

SUAREZ, J. In this postdissolution matter, the plaintiff, Stephanie Bologna, appeals from the judgment rendered by the trial court in response to her postjudgment motion for clarification as well as the court's denial of

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her motion for reargument and reconsideration of its ruling on her motion.¹ The court concluded, in accordance with the terms of the parties' separation agreement that was incorporated into the judgment of dissolution, that the plaintiff was obligated to divide equally the proceeds of the sale of the marital home with the defendant, Richard Bologna. On appeal, the plaintiff claims that the court improperly modified the dissolution judgment when it denied her motion for clarification. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The parties were married on June 1, 1997, and had two children born to the marriage. On May 6, 2010, the court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered a judgment of dissolution, which incorporated by reference a separation agreement dated May 2, 2010.² At the time the court rendered its judgment, the parties jointly owned, among other things, a marital home in Stamford. Article 5 of the separation agreement governs the division of the parties' marital home. Section 5.1 (a) of the separation agreement provides in relevant part: "Title to the Marital Home is currently held in the parties' joint names, as joint tenants with rights of survivorship. The Marital Home is currently subject to [a] first mortgage in joint names with Cendant, with a current outstanding balance of approximately \$651,000.00; and a Home Equity Line of Credit (HELOC) in joint names with Cendant, with a current outstanding balance of approximately \$49,000.00."

¹ In her brief to this court, the plaintiff has not distinctly challenged the court's denial of her motion for reargument and reconsideration. In light of the arguments raised in her brief, we consider any challenge with respect to that ruling to be encompassed by her claim of error with respect to the ruling on her motion to clarify.

² The parties utilized the services of a private mediator in negotiating the separation agreement and both parties retained separate counsel to review the agreement.

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Section 5.4 of the separation agreement governs the sale of the marital home and provides in relevant part: “Unless otherwise agreed to by the parties, the Marital Home shall be listed for sale according to the following:

“(a) By June 30, 2012 [t]he Marital Home will be listed for sale at a listing price that is agreed to by both parties

“(c) Upon the sale of [the] Marital Home, after payment of the taxes, mortgages, conveyance taxes, broker’s commission(s), [attorney’s] fees, and any other expenses reasonably incident to sale, as a property settlement the remaining proceeds shall be equally divided (50/50) between the parties. However, if the resulting sale results in a deficit, then said deficit shall also be equally divided (50/50) between the parties.”

Section 5.3 of the separation agreement provides in relevant part: “Until the closing of sale of the Marital Home, the parties agree to the following:

“(a) [The plaintiff] shall continue to live in the Marital Home. . . .

“(c) The parties shall continue to own the house as joint tenants with rights of survivorship.

“(d) Except as otherwise provided, *from the date of divorce until the closing of sale, [the plaintiff] shall pay the expenses related to the Marital Home (including but not limited to mortgage payments, taxes, insurance and utilities)*. If [the plaintiff] does not make any required payment (e.g. a monthly mortgage payment), then [the defendant] may, at his election, make such payment and deduct that amount from his next alimony payment(s).” (Emphasis added.)

Section 5.4 (d) of the separation agreement includes a buyout provision, which provides in relevant part: “At any time up to when [the] Marital Home must be listed for sale, the parties can discuss a buyout by one of the

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other's interest. If one party buys out the other, it shall be for 50% of the net value, calculated as follows: the fair market value as determined by the average of three appraisals or market analyses (one appraisal or market analysis provided by [the plaintiff], one appraisal or market analysis provided by [the defendant], and one apprais[al] or market analysis that is jointly selected), less the amount of any outstanding mortgages or other liens, and less the costs of refinancing said outstanding mortgages and liens. Under any buyout, the terms of a buyout shall include refinancing and satisfying any then-current joint mortgage(s), and a transfer of [the] seller's interest in the Property to the buyer. If within 30 days of commencing said discussions, the parties cannot agree to all the terms of a buyout, then the Marital Home shall be listed for sale" Additionally, pursuant to § 5.4 (e) of the separation agreement, the court "shall retain jurisdiction over issues regarding the Marital Home until the closing of sale has been completed."

Instead of listing the marital home for sale by June 30, 2012, in accordance with § 5.4 (a) of the separation agreement, the parties agreed that, in order to keep their children in the same home and school district, they would not sell the home. At the time the parties entered into the separation agreement, the mortgage on the marital home was an adjustable rate mortgage wherein the monthly mortgage payments applied only toward interest. In July, 2012, the terms of the mortgage on the marital home were to reset, wherein the monthly payments increased to include interest and principal. The plaintiff continued to live in the home with her children and paid all expenses, including the mortgage, taxes, and insurance. From 2012 to 2019, the plaintiff's mortgage payments reduced the principal balance by more than \$170,000.³

³ In her motion to clarify, the plaintiff stated that, specifically, her payments "resulted in an extra \$175,000 of equity." The dollar amount by which the principal was reduced is not relevant to the plaintiff's claim on appeal.

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From 2012 through 2019, the parties discussed several options to buy out the defendant's interest in the marital home but were unable to agree on the terms, and the house was never listed for sale. On June 7, 2019, the plaintiff filed a motion for clarification in which she requested that the court "intervene and issue a ruling that the buyout price should be calculated using the mortgage balances as they were at the time that the parties signed their separation agreement on May 2, 2010," or, alternatively, "when the property was supposed to be listed [for sale] in June of 2012." The plaintiff argued that "[t]he current situation was not contemplated by the parties at the time they signed the separation agreement on May 6, 2010, and as such the parties are not bound by the [buyout] provisions of [§] 5.4 (d)." She asserted that her mortgage payments from May, 2010 to June, 2019, added \$175,000 of equity to the marital home and that to calculate the buyout amount using the balance of the mortgage in June, 2019, "would result in a windfall of \$87,500 to the defendant." She added that she "ha[d] made numerous improvements to the property, to which the defendant has refused to contribute, and these improvements have either increased the fair market value of the property or prevented a loss of value." The plaintiff asserted that, "[s]hould the court rule that the buyout amount should be calculated using the mortgage balance of 2019 . . . the defendant would be unjustly enriched, and the plaintiff would be deprived of a fair and equitable division of the marital assets." On July 3, 2019, the defendant filed an objection to the motion for clarification in which he argued that the terms of the separation agreement were clear and unambiguous and that, by filing a motion for clarification, the plaintiff was improperly seeking "to alter the terms of the separation agreement to suit her purposes."

On November 5, 2019, the court, *McLaughlin, J.*, conducted an evidentiary hearing and heard testimony

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from the parties and witnesses.⁴ On November 19, 2019, the court issued a memorandum of decision in which it ordered the sale of the marital home, set the list price, and, in accordance with the separation agreement, ordered that the proceeds of the sale be equally divided. The court, citing *Roos v. Roos*, 84 Conn. App. 415, 853 A.2d 642, cert. denied, 271 Conn. 936, 861 A.2d 510 (2004), and *Roberts v. Roberts*, 32 Conn. App. 465, 629 A.2d 1160 (1993), concluded that it “[did] not have the authority to modify the parties’ separation agreement relating to the division of the marital home postjudgment.” The court stated: “The separation agreement is clear that the parties evenly share in the proceeds from the sale of the marital home as a ‘property settlement.’ ” Similarly, the court concluded that it “ha[d] no authority to alter the terms of the buyout provision in the separation agreement as the plaintiff requests. . . . The buyout provision allows either party to buy out the other’s interest in the marital home by paying 50 percent of the net value of the marital home. There is a specific process the parties must go through in reaching the net value. Included in that process is the reduction of the fair market value [l]ess the amount of any *outstanding* mortgages or other liens See Separation Agreement § 5.4 (d). The plaintiff asks the court to alter the language of this provision by allowing her to deduct the value of the mortgages on the marital home as of May, 2010. The clear language of the buyout provision requires the parties to reduce the fair market value of the marital home by any outstanding mortgages, not mortgages that no longer exist.” (Citation omitted; emphasis in original; internal quotation marks omitted.)

⁴ The plaintiff also filed a motion for contempt, postjudgment, and a motion for order, postjudgment, seeking orders to effectuate the sale of the marital home. On November 5, 2019, the court heard all motions simultaneously and, on November 19, 2019, entered orders related thereto. The plaintiff appeals only from the court’s order regarding the motion to clarify.

On December 9, 2019, the plaintiff filed a “postjudgment motion for reargument and reconsideration.” In her motion, the plaintiff argued that the court’s decision was based on clearly erroneous findings of fact and errors of law. Specifically, the plaintiff asserted that she was asking the court “for orders to *effectuate* the property division and did not seek to modify the property division.” (Emphasis in original.) In support thereof, the plaintiff relied on *Schneider v. Schneider*, 161 Conn. App. 1, 7, 127 A.3d 298 (2015), a case in which the parties’ separation agreement required the defendant to make the mortgage payments for their marital home. When the defendant stopped making those payments, the plaintiff made them on her behalf and filed a motion for an order that the defendant reimburse him for the payments, which the trial court denied. *Id.*, 2, 5. On appeal, this court concluded that the trial court’s denial constituted an improper modification of the property distribution order. *Id.*, 3. In the present case, the plaintiff contended in her motion for reargument and reconsideration that *Schneider* stands for the proposition that a request for reimbursements for mortgage payments constitutes an effectuation, not a modification, of a dissolution judgment. On December 17, 2019, the defendant filed an objection to this motion.

On January 6, 2020, the court, *McLaughlin, J.*, heard oral argument on the motion for reargument and reconsideration and, on January 7, 2020, issued an order denying the motion. In that order, the court considered this court’s decision in *Schneider* and determined that the case supported its conclusion. The court articulated: “[J]ust as the *Schneider* separation agreement required the defendant to make the mortgage payments for the marital home, the parties’ separation agreement [in the present case] requires the plaintiff to make all mortgage payments. The agreement does not provide for any

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credit to the plaintiff for those payments. The separation agreement provides for the parties to share evenly in the proceeds from the sale of the marital home. Thus, to give the plaintiff a credit for the mortgage payments she was required to make under the separation agreement would alter the percentage distribution of the proceeds from the sale of the marital home. In essence, the defendant would be reimbursing the plaintiff for payments she was obligated to make. The *Schneider* court found this result an improper transfer of property, postjudgment.”

The court reiterated that it “[did] not have the authority to modify a property distribution subsequent to the entry of the final divorce,” and stated that, “[f]or the court to now provide the plaintiff with a credit for the payments she was required to make under the separation agreement would be an impermissible modification of the separation agreement.” The court noted that “[t]he parties could have agreed to open the judgment and modify the separation agreement before the plaintiff started making the additional principal payments. They did not.”

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

The plaintiff claims that the court improperly modified the dissolution judgment when it denied her motion for clarification. Specifically, the plaintiff asserts that (1) “[i]n failing to recognize the initial noncompliance of the parties, the . . . court improperly modified the original decree,” (2) the “court’s denial gave a windfall to the defendant” because of the proceeds he would receive from the sale of the marital home, and (3) the “specific amount of the mortgage liabilities was assigned as part of the property settlement at the time of the dissolution and should be used in calculating the net value upon sale.” In response, the defendant

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contends that the court did not impermissibly modify its property distribution but, instead, properly effectuated the judgment. We agree with the defendant.

We begin by setting forth our standard of review and relevant legal principles. “[C]ourts have no inherent power to transfer property from one spouse to another; instead, that power must rest upon an enabling statute. . . . The court’s authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81. . . . Accordingly, the court’s authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final. . . . Although the court does not have the authority to *modify* a property assignment, a court . . . does have the authority to issue postjudgment orders *effectuating* its judgment.” (Emphasis in original; internal quotation marks omitted.) *Schneider v. Schneider*, supra, 161 Conn. App. 5–6.

“Under Practice Book [§ 17-4], a civil judgment may be opened or set aside . . . [when] a motion seeking to do so is filed within four months from the date of its rendition. . . . Absent waiver, consent or other submission to jurisdiction, however, a court is without jurisdiction to modify or correct a judgment, in other than clerical respects, after the expiration of [that four month period]

“Even beyond the four month time frame set forth in Practice Book § 17-4,⁵ however, courts have continuing

⁵ Practice Book § 17-4 provides in relevant part: “(a) Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court. . . .”

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jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted In cases in which execution of the original judgment occurs over a period of years, a motion for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. . . .

“Although a trial court may interpret an ambiguous judgment . . . a motion for clarification may not . . . be used to modify or to alter the substantive terms of a prior judgment . . . and we look to the substance of the relief sought by the motion rather than the form to determine whether a motion is properly characterized as one seeking a clarification or a modification. . . .

“In order to determine whether the trial court properly clarified ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court’s judgment. It is well established that the construction of a judgment presents a question of law over which we exercise plenary review. . . . In construing a trial court’s judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . .

“[T]he purpose of a clarification is to take a prior statement, decision or order and make it easier to under-

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stand. Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision. Moreover, motions for clarification may be made at any time and are grounded in the trial court's equitable authority to protect the integrity of its judgments."⁶ (Citation omitted; footnote added; footnote omitted; internal quotation marks omitted.) *Almeida v. Almeida*, 190 Conn. App. 760, 765–67, 213 A.3d 28 (2019).⁷

“In order to determine the substance of the trial court's actions here, we begin by examining the definitions of both alteration and clarification. An alteration is defined as [a] change of a thing from one form or state to another; making a thing different from what it was without destroying its identity. Black's Law Dictionary (4th Ed. 1968) [p. 71]. An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. *Id.* Similarly, a modification is defined as [a] change; an alteration or amendment which introduces new element into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. Black's Law Dictionary (6th Ed. 1990) [p. 905].

“Conversely, to clarify something means to free it from confusion. Webster's New World Dictionary of the

⁶ “[I]t is . . . within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment.” (Internal quotation marks omitted.) *Lawrence v. Cords*, 165 Conn. App. 473, 484, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

⁷ See also *Cunningham v. Cunningham*, 204 Conn. App. 366, 374, 254 A.3d 330 (2021) (noting that, in contrast with order that merely effectuates existing judgment, “[a] modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the [subject matter] intact”).

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American Language (2d Ed. 1972) [p. 272]. Thus, the purpose of a clarification is to take a prior statement, decision or order and make it easier to understand.” (Internal quotation marks omitted.) *Silver v. Silver*, 200 Conn. App. 505, 516, 238 A.3d 823, cert. denied, 335 Conn. 973, 240 A.3d 1055 (2020).

In the present case, the court properly concluded in its memorandum of decision that it did not have the authority to modify the terms of the separation agreement. The court found that, “[i]n or around July, 2012, the plaintiff and the defendant jointly refinanced the mortgage of the marital home to ensure the plaintiff could afford the mortgage payments. . . . Since that time, the plaintiff has continued to live in the home with her children. . . . From 2012 until 2019, the plaintiff made principal payments on the mortgage for the marital home thereby reducing the principal balance by over \$170,000.”⁸ The court stated: “The plaintiff asks the court to enter orders to give her the sole benefit of the increased equity” The court, citing § 5.4 (c) of the separation agreement, concluded that “[t]he separation agreement is clear that the parties evenly share in the proceeds from the sale of the marital home as a ‘property settlement.’” We agree.

Applying the foregoing principles to the present case, we conclude that the court correctly construed the

⁸ In the plaintiff’s postjudgment motion for reargument and reconsideration, she argued that the court made a factual error in its November 19, 2019 memorandum of decision in finding that the parties “refinanced” the marital home. Rather, she contended, “the terms of their *existing mortgage* required greater payments toward principal starting in 2012.” (Emphasis in original.) In its January 7, 2020 order denying the motion, the court stated: “The parties agree that there was no refinance of the mortgage. Rather, the terms of the mortgage existing at that time required payments toward principal after June 30, 2012. Up until June of 2012, the mortgage required payments of interest only.” Nevertheless, the parties acknowledge that the terms of their mortgage changed in June, 2012. Thus, whether the parties “refinanced” the mortgage is not relevant to our resolution of the instant appeal and we consider any error on the part of the court in its original ruling to be harmless.

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plaintiff's motion for clarification to be an impermissible motion for modification. It is clear from the separation agreement that the parties intended to list the marital home for sale by June 30, 2012, and to equally divide the net proceeds or deficit as a property settlement. The parties, by agreement, deviated from that judgment by not selling the home within the specified period of time, and the plaintiff continued making mortgage payments after the terms of the mortgage reset requiring payments toward its principal. The parties, however, did not alter the terms of the buyout provision of the separation agreement. Section 5.4 (d) of the agreement clearly states: "If one party buys out the other, it shall be for 50% of the net value, calculated as follows: the *fair market value* as determined by the average of three appraisals or market analyses . . . less the amount of any *outstanding mortgages* or other liens, and less the costs of refinancing said outstanding mortgages and liens. Under any buyout, the terms of a buyout shall include refinancing and satisfying *any then-current joint mortgage(s)*, and a transfer of seller's interest in the Property to the buyer. If within 30 days of commencing said discussions, the parties cannot agree to all the terms of a buyout, then the Marital Home shall be listed for sale pursuant to the terms set forth above." (Emphasis added.) The plaintiff's motion for clarification does not seek to free from confusion the terms of the separation agreement. Rather, it seeks to amend the separation agreement by introducing a new element into the details of the judgment by seeking a ruling that the buyout price be calculated using the mortgages' balances as they were at the time the parties signed the separation agreement or, alternatively, by calculating the price of the buyout as of when the marital home was supposed to be listed for sale in June, 2012. Such amendment would cause a substantial change in the existing judgment and, therefore, is an impermissible modification of the judgment.

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In support of her argument that the court modified the original judgment by denying her motion for clarification, the plaintiff again relies on this court's decision in *Schneider v. Schneider*, supra, 161 Conn. App. 1. As previously discussed in this opinion, in *Schneider*, the parties entered into a separation agreement that was incorporated into the dissolution judgment. Id., 3. "Under the plain terms of the agreement, the plaintiff would reside in the marital home and the defendant, in lieu of child support, would be responsible for one half of the home's holding costs until . . . the home's sale, or . . . the plaintiff's first court-ordered payment of \$10,050 toward their child's college expenses. Once either event occurred, the defendant would become fully responsible for paying the holding costs until the home was sold." (Footnote omitted.) Id. The parties "adhered to the provisions of the agreement and equally split the holding costs." Id., 4. When their child entered college, the plaintiff made the court-ordered payment of college expenses, relieving him of the obligation to pay one half of the home's holding costs. Id. "Nevertheless, the plaintiff and the defendant each continued to pay one half of the mortgage payments for another two and one-half years until the home's eventual sale" Id. The plaintiff, therefore, paid an additional \$51,331.96 toward the household expenses beyond what the judgment required. Id. The defendant conceded that she did not pay the entirety of the holding costs. Id. The plaintiff filed a motion for order seeking reimbursement from the defendant for the additional contributions he made toward the household expenses, which the trial court denied. Id., 4-5.

On appeal to this court, the plaintiff argued that the trial court's denial of his motion for order impermissibly modified the dissolution judgment. Id., 5. This court agreed and held that, by failing to make the court-ordered payments, the defendant violated the court's

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order. Id., 7. Moreover, the court held that the “[trial] court’s denial, when considered together with the distribution of the proceeds from the sale of the home, resulted in a windfall to the defendant, who was able to avoid paying one half of the holding costs for several years while still receiving the benefit of those payments when she received the sale proceeds.” Id., 8. This court concluded that the “practical result of the [trial] court’s determination was an additional transfer of property from the plaintiff to the defendant, and, as a result, it constituted an improper modification of the original judgment.” Id.

The present case is distinguishable from *Schneider*. Unlike in *Schneider*, the plaintiff in the present case was solely responsible for paying the holding costs of the marital home. Thus, the plaintiff was doing what was required under the terms of the judgment. Further, because the judgment did not require the defendant to make mortgage payments, there is no indication that he violated its terms. Rather, the parties mutually agreed to extend the sale by date so that their children could remain in the marital home and stay in the same school district. In July, 2012, the terms of the existing mortgage changed from requiring payments of interest only to requiring payments of both principal and interest. The separation agreement did not provide for a set off or a credit for those payments. The separation agreement simply states that, “[u]pon the sale of [the] Marital Home, after payment of the taxes, mortgages, conveyance taxes, broker’s commission(s), [attorney’s] fees, and any other expenses reasonably incident to [the] sale, as a property settlement the remaining proceeds shall be equally divided (50/50) between the parties.”

As the plaintiff states in her brief to this court, the parties “mutual[ly] disregard[ed] . . . the court-ordered sale date” and “jointly agreed to go *outside the terms of their agreement* when they chose to ignore” that order. (Emphasis added.) The plaintiff cannot now

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seek to modify the judgment merely because the parties decided that they no longer wanted to list the home for sale by June 30, 2012. The court had the authority to effectuate the existing order, which it did by ordering the sale of the marital home and the equal division of the proceeds in accordance with the terms of the separation agreement. If the defendant receives more money from the sale of the marital home than he would have had the parties sold the home or exercised the buyout provision of the separation agreement in or around 2012, it is because the plaintiff acquiesced to this possibility by deciding not to sell the home or buy out the defendant at that time.

In her brief to this court, the plaintiff asserts that “neither party expected that the provisions of [§] 5.4 would be applicable some seven years after anticipated performance” Although it is true that the parties’ circumstances changed after they executed the separation agreement, this change resulted from the parties’ voluntary actions, which did not include altering the terms of the separation agreement. Accordingly, we conclude that the court did not improperly modify the separation agreement when it denied the plaintiff’s post-judgment motion for clarification. Rather, the court effectuated the terms of the existing separation agreement to which the parties previously had agreed.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE DANNER *v.* COMMISSION ON HUMAN
RIGHTS AND OPPORTUNITIES ET AL.

(AC 44194)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The plaintiff filed an affidavit of illegal discriminatory practice with the defendant Commission on Human Rights and Opportunities, alleging that the defendant A Co. wrongfully terminated her employment. Following an assignment of the matter to the commission’s Office of Public

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Hearings, a human rights referee granted A Co.'s motion for summary judgment, finding that there was no genuine issue of material fact. The plaintiff and the commission separately appealed the referee's decision granting the motion for summary judgment to the Superior Court. The plaintiff claimed that genuine issues of material fact existed. The trial court consolidated the appeals, sustained the consolidated appeal and remanded the matter for a trial before the Office of Public Hearings, concluding that the referee improperly rendered summary judgment because A Co. did not meet its burden of establishing that there were no genuine issues of material fact. On A Co.'s appeal to this court, *held* that the trial court properly sustained the consolidated appeal and remanded the matter for a hearing: the court properly considered the plaintiff's affidavit as competent evidence in opposition to A Co.'s motion for summary judgment as the plaintiff's affidavit of discriminatory practice was sworn and was properly considered pursuant to the applicable rule of practice (§ 17-49); moreover, the court properly conducted a plenary review of the record in considering whether genuine issues of material fact existed, as the deferential standard used to review administrative fact-finding did not extend to the determination of whether genuine issues of material fact existed in the summary judgment context; furthermore, the court did not err in considering whether genuine issues of material fact existed, as the record contained contradictory information, including a sworn statement by an employee of A Co. that the plaintiff's job duties required her to be physically present at the workplace and the plaintiff's sworn statement that she had received a workplace accommodation to work from home, and the referee, rather than identifying factual disputes raised by the competing affidavits, improperly decided the factual question by crediting the statements made in the affidavit of the A Co. employee and improperly determined that there were no genuine issues of material fact.

Argued March 2—officially released October 12, 2021

Procedural History

Appeals from the decision by a human rights referee for the named defendant rendering summary judgment in favor of the defendant Atos IT Solutions and Services, Inc., and denying the plaintiff's motion for reconsideration, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani, J.*, consolidated the appeals; thereafter, the court, *Cordani, J.* rendered judgment sustaining the appeal and remanding the matter to the named defendant for trial,

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from which the defendant Atos IT Solutions and Services, Inc., appealed to this court. *Affirmed.*

Martin J. Regimbal, pro hac vice, with whom was *Elizabeth F. Flynn*, for the appellant (defendant Atos IT Solutions and Services, Inc.).

Zachary T. Gain, for the appellee (plaintiff).

Michael E. Roberts, for the appellee (named defendant).

William Tong, attorney general, *Clare E. Kindall*, solicitor general, and *Colleen B. Valentine* and *Matthew F. Larock*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

ALVORD, J. This appeal arises out of an action by the plaintiff, Stephanie Danner, in which a human rights referee (referee) from the Office of Public Hearings (office) of the defendant Commission on Human Rights and Opportunities (commission) rendered summary judgment in favor of the defendant Atos IT Solutions and Services, Inc. (Atos). Thereafter, the plaintiff and the commission appealed to the Superior Court,¹ which

¹ In its memorandum of decision, the Superior Court stated: “Because the court finds that [Atos] has clearly not met its burden of establishing that no genuine issues of material fact exist and this finding is determinative of the appeal, the court has not decided the general issue of whether or not a [referee] in a public hearing context [before the commission] has the ability to grant a motion for summary judgment in any circumstance.”

The commission’s brief filed with this court is limited to arguing that “[t]his court should affirm the decision of the Superior Court on the alternative ground that the [referee] is not authorized to dispose of complaints at [a] public hearing through summary judgment.” The commission states: “In doing so, the court need not reach the arguments raised by Atos on appeal, or otherwise address the merits of the summary judgment motion itself.”

The state of Connecticut has, pursuant to Practice Book § 67-7, filed an amicus curiae brief in the present matter arguing that the referee has the authority to grant motions for summary judgment as a means of disposing of meritless complaints at a public hearing. The state did not participate in oral argument.

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consolidated the appeals. The court, following oral argument, sustained the appeal and remanded the matter to the office for trial. Atos appeals from the judgment of the Superior Court sustaining the appeal and remanding the matter to the office for trial. On appeal, Atos claims that the Superior Court erred in considering the plaintiff's affidavit of illegal discriminatory practice as evidence in opposition to Atos' motion for summary judgment and in relying on the averments contained in the affidavit to determine that genuine issues of material fact existed. Atos also claims that the Superior Court erred in failing to afford deference to the referee's decision.² We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to this appeal. On December 5, 2016, the plaintiff filed an affidavit of illegal discriminatory practice with the commission. In her affidavit, the plaintiff averred: "[Atos] has an office located at 7 McKee Place, Cheshire, Connecticut 06410. . . . [Atos] employs [fifteen] or more individuals. . . . [Atos] employed [the plaintiff]. . . . [Atos] hired [the plaintiff] in May, 2001. . . . [The plaintiff's] original job position was technical services manager. . . . On or about August 8, 2016, [Atos] transferred [the plaintiff] to help desk agent. . . . [Atos] employs David Hamilton. . . . Hamilton is a supervisory employee. . . . Hamilton supervised [the plaintiff]. . . . [The plaintiff] has a disability. . . . Specifically, [the plaintiff] suffers from bipolar disorder and anxiety disorder. . . . [Atos] was aware of the mental disability. . . . [The plaintiff] had workplace accommodations for her disability. . . . The workplace accommodation was working from home. . . . The

We conclude that the Superior Court correctly sustained the appeal on the basis that the referee improperly rendered summary judgment because there existed genuine issues of material fact. Accordingly, we decline to reach the alternative ground for affirmance raised by the commission and need not address the argument contained in the state's amicus brief.

² Because Atos' claims are interrelated, we consider them together.

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workplace accommodation was finite leaves of absences (continuous and intermittent). . . . In June, 2016, [the plaintiff] took a continuous leave of absence. The leave of absence went from June 14, 2016 through August 19, 2016. . . . The leave of absence was disability related. . . . The 2016 leave of absence was . . . protected [by the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2012)]. . . . Following her return from the FMLA protected 2016 leave of absence, [Atos] asked [the plaintiff] to submit documentation in support of her ongoing work from home accommodation. . . . [The plaintiff] complied with [Atos'] request and supplied documentation from her physician. . . . On October 17, 2016, [Atos] terminated [the plaintiff's] employment. . . . [Atos] told [the plaintiff] that the termination was due to a reorganization and that her 'job was no longer available'. . . . In October, 2016, [Atos] employed about [forty] help desk employees. . . . [The plaintiff] is unaware of any other help desk employee terminated at the time [the plaintiff] was terminated. . . . There were two new help desk employees training for the position prior to [Atos] terminating [the plaintiff's] employment. . . . [Atos'] website had the help desk agent II job posted as being open in Cheshire, Connecticut at around the same time that it terminated [the plaintiff's] employment. . . . [The plaintiff] can perform the essential functions of the job with or without a reasonable accommodation. . . . Any and all excuses to be offered by [Atos] to explain the termination decision would be a pretext to mask discrimination and/or retaliation. . . . [The plaintiff] charges [Atos] with disability discrimination, failure to accommodate and retaliation."

On October 3, 2017, the matter was sent to the office for a public hearing through the early legal intervention program. On December 26, 2018, Atos filed a motion for summary judgment, in which it argued that the plaintiff

could not establish a prima facie case of disability discrimination. Specifically, Atos argued that the plaintiff was not qualified to perform the functions of her position and that her employment was not terminated because of her disability. It further argued that, even if she could establish a prima facie case of discrimination, it had articulated a legitimate, nondiscriminatory reason for terminating her employment and that she could not demonstrate that such reason was pretextual. With respect to the plaintiff's claim of failure to provide reasonable accommodations for her disability, Atos argued that the plaintiff's only request, to work from home, was not a reasonable accommodation because being present in the office was an essential function that Atos was not required to waive. With respect to the plaintiff's claim of retaliation, Atos argued that there was no evidence indicating a causal connection between her requests for leave and to work from home and the termination of her employment.

In support of its motion, Atos submitted affidavits of Laurie Onderick, who was employed by Atos as a human resource specialist responsible for leave administration,³ and Hamilton, who was employed by Atos as

³ Onderick averred that she assisted the plaintiff with multiple requests for FMLA leave and accommodations starting in 2015, and ending in late 2015. Onderick averred: "Specifically, in October, 2015, [the plaintiff] requested and was granted intermittent FMLA leave. . . . From October, 2015 through June, 2016, Atos granted intermittent leave to [the plaintiff] each time it was requested. . . . In June, 2016, [the plaintiff] requested approximately three months of continuous FMLA leave from June 13 through September 8, 2016. A true and correct copy of the record showing the request for continuous leave is attached as [e]xhibit 1. . . . However, based on her prior intermittent FMLA leave, [the plaintiff] was only eligible for FMLA leave through August 9, 2016. Yet, as an accommodation, Atos approved the entirety of the requested continuous leave through September 8, 2016, despite the fact that she was not eligible for it after August 9, 2016. . . . After her continuous FMLA leave from June 13 through September 8, 2016, [the plaintiff] requested another year of intermittent FMLA leave, this time requesting leave from September 20, 2016 through September 20, 2017. The request was denied due to lack of paperwork from her physician. A true and correct copy of the record showing the requested leave is attached as

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service desk manager and was the plaintiff's manager throughout her employment, along with evidentiary exhibits attached to both affidavits. In his affidavit, Hamilton averred, *inter alia*, the following: "I managed [the plaintiff] for her entire employment with Atos beginning in 2001, when she became an employee of Atos as a service desk manager level I. In this position, she supervised service desk employees. . . . Due to the loss of numerous Atos clients and due to the fact that many of Atos' IT help desk positions, including those who reported to [the plaintiff], were being offshored to the Philippines in a cost saving effort, [the plaintiff's] managerial position was eliminated in August, 2016, as her supervisory role was no longer necessary. . . . The offshoring efforts began approximately seven years ago. . . . In order to avoid terminating her altogether, I reassigned [the plaintiff] as a service desk technician tasked with providing computer support services to Cooper University Health Center ('Cooper Hospital'), an Atos client. . . . In this role [the plaintiff] was expected to answer the helpline telephones, receive, analyze, and resolve client issues, and escalate issues when necessary. The problem solving aspects of her position required her to learn new things every day and to retain that knowledge. . . . I assumed the duty of supervision over any remaining U.S. based service desk technicians working out of the Cheshire, Connecticut office. . . . While [the plaintiff] was on FMLA leave in the summer of 2016, she and I communicated via instant messages. It was then that she

[e]xhibit 2. . . . She additionally asked to be permitted to work from home despite her physician advising that her only restriction was limited driving distances. A true and correct copy of the record showing that requested accommodation is attached as [e]xhibit 3. . . . After numerous communications between [the plaintiff] and Atos' human resources department, [the plaintiff] submitted revised physician paperwork on October 9, 2016, indicating a permanent [work from home] restriction. A true and correct copy of the record showing that requested accommodation is attached as [e]xhibit 4."

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informed me that her alleged bipolar and anxiety disorders had severely impacted her short term memory. Specifically, one of her messages to me read, ‘Honestly I don’t know what you guys are going to do with me. I have nobody to manage and I’d do a shitty job if I did.’ She further told me that she ‘was trying to cut down on the Klonopin but it’s at a why bother now. [Her] short term memory is really bad and [it’s] permanent.’ Exhibit I to this affidavit is a true and accurate copy of my text conversation with [the plaintiff]. . . .

“As a service desk technician on the Cooper Hospital account, it was critical that [the plaintiff] physically present to Atos’ Cheshire, Connecticut office where the account was managed. Onsite attendance was required as problems had to be quickly resolved among the technicians and the managers to minimize impact to the client’s services. Managers, like myself, had to be able to immediately and directly communicate with the service desk technicians assigned to us in case of failures to critical hospital systems. Delays in resolving such IT issues can literally have life or death implications. . . . For example, Atos was responsible for the computers located [in] Cooper Hospital’s operating rooms. If these computers went down during surgery or for an extended period of time, the results could be dire. The urgent and fast pace[d] nature of the services the service desk technicians had to provide in conjunction with the managers required service desk technicians to physically be in the office. Thus, it was an essential job function for service desk technicians assigned to the Cooper Hospital account to work out of the Cheshire office as opposed to remotely. All of the U.S. based service desk technicians assigned to the account did so. . . . Similarly, all of the Philippines based service desk technicians assigned to the Cooper Hospital account also worked together out of a local office as opposed to individuals working remotely from home.

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For the same reasons, none of these foreign based service desk technicians assigned to the Cooper Hospital [account] worked from home. . . . However, after September 14, 2016, [the plaintiff] only physically appeared for less than a single shift at the Cheshire office. . . .

“On October 9, 2016, I was informed that [the plaintiff’s] physician had ordered that she work from home on a permanent basis. . . . Because such restriction could not be accommodated due to the fact that [the plaintiff’s] position required that she present for work, I made the decision to terminate her. . . . Her last day of employment with Atos was October 17, 2016. . . . My decision to terminate [the plaintiff] was not based on her alleged bipolar disorder and anxiety, nor her requests to work from home or requests for leave. Instead, it was based solely on the fact that she could not perform an essential function of her job—physically presenting for work and she conceded she could not perform her duties. . . . On or around the day I terminated [the plaintiff], there was an online posting for a help desk analyst II position. However, the posting was in error and was unposted approximately one week later as the service desk was no longer hiring full time employees at this time. Thus, the position ultimately went unfilled by a full time employee. . . . I was laid off on November 7, 2017, as part of the same costs saving initiative that resulted in the elimination of [the plaintiff’s] original managerial position.”

On January 4 and 29, 2019, respectively, the commission and the plaintiff filed separate objections to Atos’ motion for summary judgment, in which they both argued that the referee is not authorized to render summary judgment in the administrative proceedings before the office. The plaintiff also objected on the ground that the early legal intervention decision to send the matter directly to public hearing necessarily meant that

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there had been established the existence of genuine issues of material fact. Atos filed replies to both objections.

On February 22, 2019, the referee granted Atos' motion for summary judgment. The referee first determined that she had the authority to render summary judgment in the administrative proceedings before the office. The referee next rejected the plaintiff's argument that the fact that her complaint had been transferred to the office for a public hearing necessarily established the existence of genuine issues of material fact.

Ultimately, the referee concluded that Atos had met its initial burden of demonstrating the absence of any genuine issues of material fact. Specifically, she stated that Atos "ha[d] made an affirmative evidentiary showing that there is not a factual dispute that the [plaintiff's] position as a service desk technician required her to be able to 'learn new things daily and to maintain such knowledge in order to receive, analyze, and resolve client issues, and determine to escalate issues when necessary.'" Referencing the plaintiff's text message to Hamilton, the referee found that, by the plaintiff's own admission, the plaintiff's "ability to perform her job duties was impaired as a result of her short-term memory loss due to the medications she was taking for bipolar disorder and anxiety." The referee further concluded that Atos had made an evidentiary showing that there was no factual dispute that the plaintiff's job duties required her to be present at Atos' Cheshire office and that her presence at the office was essential to her position. The referee concluded that Atos had met its initial burden of demonstrating the absence of any genuine issues of material fact both that the plaintiff was unable to perform the essential functions of her position and that an indefinite work from home accommodation was not a reasonable accommodation to which the plaintiff was entitled. Lastly, the referee concluded that

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Atos had met its initial burden of demonstrating that it had a legitimate, nondiscriminatory reason for terminating the plaintiff's employment.

The referee determined that “the [plaintiff] failed to present any concrete evidence demonstrating the existence of a disputed issue of material fact as to whether the [plaintiff] was able to perform the essential functions of the position, with or without a reasonable accommodation, to wit, that she was qualified for the job; whether the requested accommodation was a reasonable one and did not present an undue hardship on [Atos]; or whether the articulated business reasons for [Atos'] employment decisions were merely a pretext for discrimination.” Accordingly, the referee concluded that Atos was entitled to judgment as a matter of law.

As to the plaintiff's retaliation claim, the referee determined that Atos was entitled to judgment as a matter of law after determining that the plaintiff had not “countered [Atos'] evidence by calling the tribunal's attention to other evidentiary items demonstrating that the [plaintiff's] participation in a statutorily protected activity was a motivating factor in her termination under the causal connection standard . . . or that [Atos'] proffered reasons for the [plaintiff's] termination were pretextual.” (Citations omitted.) Accordingly, the referee granted Atos' motion for summary judgment as to all of the plaintiff's claims.

The plaintiff filed a motion for reconsideration, and Atos filed an opposition thereto. The motion was denied on March 20, 2019. Thereafter, the plaintiff appealed the decision of the referee to the Superior Court, and the parties briefed their positions. The court heard oral argument on July 9, 2020.

On July 13, 2020, the court, *Cordani, J.*, issued its memorandum of decision, in which it concluded that the referee improperly rendered summary judgment

because Atos had not met its burden of establishing that there were no genuine issues of material fact. The court first noted that the plaintiff's complaint is in the form of an affidavit and constitutes competent counter evidence in considering the motion for summary judgment. The court considered the affidavits of the plaintiff and of Hamilton and identified the following genuine issues of material fact: whether (1) "the [plaintiff's] employment [was] terminated because of a reorganization and her job [was] no longer . . . available as she reported that she was told, or because she could not perform an essential function of the job by being physically present in the office as . . . Hamilton stated"; (2) the job posting for the plaintiff's position was actually a mistake; (3) two new employees were training for the plaintiff's position at the time she was terminated; (4) the plaintiff already had been granted an accommodation for working from home as she had claimed, and, if yes, Atos was retracting a previously granted accommodation; (5) being physically present was an essential job function given that the same job was performed by people in the United States and in the Philippines, who presumably coordinate with each other; (6) working at home was a reasonable accommodation given the requirements of the position; (7) the plaintiff could perform the essential job functions as she had asserted; (8) it was a coincidence that the plaintiff's managerial position was allegedly eliminated in August, 2016, at the same time she was making her accommodation request, given that the offshoring of service desk positions had been ongoing for seven years; and (9) alleged comments made by the plaintiff in text messages meant that the plaintiff could not "learn new things daily and maintain such knowledge." The court also identified as a genuine issue of material fact what the essential job functions were for the plaintiff's position.

The court concluded that the referee's decision contained factual findings that were inappropriate in the

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context of a motion for summary judgment. Specifically, the court stated: “For instance, the [referee] found that the [plaintiff] could not perform the essential functions of her job in the face of the [plaintiff’s] sworn assertion that she could and in the face of the fact that the [plaintiff] had already been performing her job from home for some time. Each of the issues of material fact noted by the court above have been either explicitly or implicitly decided against the [plaintiff] by the [referee] in arriving at her final decision. The [referee] appears not to have given any evidentiary weight to the [plaintiff’s] affidavit/complaint, which is inappropriate in this summary judgment context.” Accordingly, the court sustained the appeal and remanded the matter to the office for a hearing. Thereafter, Atos filed the present appeal.

On appeal, Atos claims that the Superior Court erred in sustaining the consolidated appeal. First, it argues that the court erred in considering the plaintiff’s affidavit as competent counter evidence to Atos’ motion for summary judgment. The plaintiff responds that “[a]ffidavits are competent counter evidence that a nonmoving party may submit in opposition to a motion for summary judgment.” We agree with the plaintiff.

We first set forth our standard of review. Our review of the question of whether the Superior Court considered properly the plaintiff’s affidavit as competent evidence in opposition to the motion for summary judgment involves a question of law over which our review is plenary. See *Teodoro v. Bristol*, 184 Conn. App. 363, 374–75, 195 A.3d 1 (2018) (issue of whether excerpt from certified deposition transcript must be separately certified as such, apart from certification of original transcript from which it was excerpted, in order to make it admissible in support of or in opposition to motion for summary judgment is entitled to plenary review).

Atos argues that the Superior Court’s determination that the plaintiff’s affidavit, as a sworn statement, constitutes competent counter evidence in considering a motion for summary judgment is “devoid of any supporting authority and is counter to controlling case law.” The only authority cited by Atos, however, discusses the role of the pleadings in framing the issues for summary judgment. See *White v. Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014) (“[t]he pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial”); *TD Bank, N.A. v. Salce*, 175 Conn. App. 757, 768–69, 169 A.3d 317 (2017) (“[I]t is not enough . . . merely to assert the existence of such a disputed issue . . . [instead] the genuine issue aspect requires the party to bring forward before trial evidentiary facts, or substantial evidence outside of the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . Mere statements of legal conclusions or that an issue of fact does exist are not sufficient to raise the issue.” (Internal quotation marks omitted.)).

The affidavit of discriminatory practice filed by the plaintiff is unlike a civil complaint, in that it is sworn and in the form of an affidavit. Affidavits are properly considered pursuant to the rule of practice governing summary judgment motions, Practice Book § 17-49, which rule the referee expressly identified as governing her adjudication of Atos’ motion. See Practice Book § 17-49 (“[t]he judgment sought shall be rendered forthwith if the pleadings, *affidavits* and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law” (emphasis added)); see also Practice Book § 17-46 (“[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,

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and shall show affirmatively that the affiant is competent to testify to the matters stated therein”). Atos has provided this court with no authority prohibiting consideration, during summary judgment proceedings, of attestations contained in a signed and notarized affidavit of illegal discriminatory practice. Accordingly, we are not persuaded by Atos’ claim.

In the alternative, Atos argues that, even if the attestations of the plaintiff properly were considered, they were insufficient to create genuine issues of material fact. Specifically, it contends that the plaintiff’s affidavit “is conclusory, supported by nothing other than [the plaintiff’s] rank speculation, and replete with irrelevant and unsupported allegations.”

Before addressing whether the record reveals genuine issues of material fact, we turn to the interrelated argument of Atos that the Superior Court erred in failing to afford deference to the referee’s decision. It argues that, “[i]n finding the complaint created genuine issues of material fact warranting denial of Atos’ motion for summary judgment, the Superior Court failed to provide substantial deference to the [referee’s] findings as to the impact of the complaint on the motion and merely substituted its own judgment for that of the [referee].” It contends that the Superior Court “strayed well beyond its ‘strictly limited’ and ‘very restricted’ role of simply determining whether the [referee] acted ‘unreasonably, arbitrarily, illegally or in abuse of [her] discretion.’” We disagree with Atos’ claim.

We first set forth our own standard of review. “Determining the appropriate standard of review is a question of law, and as a result, it is subject to plenary review.” *Crews v. Crews*, 295 Conn. 153, 161, 989 A.2d 1060 (2010).

In rendering her decision, the referee cited the well established standard for summary judgment set forth

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in Practice Book § 17-49. “[Section] 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . .

“In ruling on a motion for summary judgment, the court’s function is not to decide issues of material fact . . . but rather to determine whether any such issues exist. . . . The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment.” (Citations omitted; internal quotation marks omitted.) *Episcopal Church in the Diocese of Connecticut v. Gauss*, 302 Conn. 408, 421–22, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012).

Atos’ contention is that the Superior Court was obligated to afford “considerable deference” to the referee’s determination that there were no genuine issues of material fact. In making this argument, Atos relies on

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the substantial evidence rule governing judicial review of administrative fact-finding under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. It asserts that the referee had “a ‘substantial basis of fact’ on which to make her ruling” and cites *Rajasekhar v. Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain, Docket No. CV-18-5024428-S (January 14, 2020), for the proposition that “[a] plaintiff who challenges an agency decision has the heavy burden of demonstrating that the department’s *factual conclusion* lacks substantial support on the whole record.” (Emphasis added; internal quotation marks omitted.) In contrast with the present summary judgment procedure, the factual findings in *Rajasekhar* were made by an investigator following a fact-finding hearing that involved sworn testimony from the plaintiff and three representatives of the plaintiff’s former employer.⁴ Id.

We are not persuaded by Atos’ argument that the deferential standard employed to review administrative fact-finding extends to the determination of whether genuine issues of material fact existed in the summary judgment context. First, we note that, even with respect to judicial review of administrative agency actions, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). Second, with respect to summary judgment in general, “[i]ssue-finding, rather than issue-determination, is the key to

⁴ Atos also cites *Barnes v. Premier Education Group, LP*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016997-S (April 7, 2017). Unlike the present case, the decision in *Barnes* was rendered following a fact-finding conference during which both parties presented evidence, including witness testimony. Id.

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the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist.” (Internal quotation marks omitted.) *Hospital of Central Connecticut v. Neurosurgical Associates, P.C.*, 139 Conn. App. 778, 783, 57 A.3d 794 (2012); see also *Teodoro v. Bristol*, supra, 184 Conn. App. 374 (“[t]he court’s task in reviewing the parties’ submissions is *not* to decide any factual issues they raise, but only to decide if, in fact, they raise any such factual issues, as by demonstrating a potential inconsistency or conflict in the admissible evidence concerning one or more facts upon which the movant’s right to judgment depends” (emphasis in original)).

Finally, it is axiomatic that a reviewing court conducts a plenary review of the record, viewing the evidence in the light most favorable to the nonmoving party, to determine whether a genuine issue of material fact exists such that summary judgment was improperly rendered. See *Windsor Federal Savings & Loan Assn. v. Reliable Mechanical Contractors, LLC*, 175 Conn. App. 651, 660, 168 A.3d 586 (2017); *Rivera v. CR Summer Hill, Ltd. Partnership*, 170 Conn. App. 70, 76, 154 A.3d 55 (2017); *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 625, 57 A.3d 391 (2012). On the basis of the foregoing legal principles, we conclude that the deferential standard advocated by Atos does not apply to the present case and that the Superior Court properly conducted a plenary review of the record in considering whether genuine issues of material fact existed.

Having resolved the issue of the Superior Court’s standard of review, we next consider Atos’ argument that the Superior Court improperly determined that genuine issues of material fact exist with respect to the plaintiff’s claims. In accordance with the standard of review previously set forth, we conduct a plenary review of the

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record. See *Rivera v. CR Summer Hill, Ltd. Partnership*, supra, 170 Conn. App. 76.

With respect to the plaintiff's discrimination and reasonable accommodation claims, the referee concluded that there were no genuine issues of material fact that the plaintiff was unable to perform the essential duties of her position and that a work from home accommodation was not reasonable. Specifically, the referee determined that Atos had made an affirmative evidentiary showing that there was no factual dispute that the plaintiff's essential job duties required her to be physically present at the Cheshire office.⁵ Although Hamilton averred as much, the plaintiff averred that she had received the workplace accommodation of working from home and that she had, shortly before her employment was terminated, provided additional documentation, at Atos' request, in support of her *ongoing* work from home accommodation. The plaintiff further averred that she can perform the essential functions of the job. On appeal, Atos states that permitting the plaintiff to work from home permanently would be an unreasonable accommodation. It states that it "should not be punished, for exceeding its legal obligations by *permitting [the plaintiff] to initially work from home in her new role.*" (Emphasis added.) Thus, Atos appears to acknowledge that the plaintiff worked from home in her new role.

"When the evidence in a summary judgment record reasonably is susceptible to competing inferences, it is

⁵ The referee also concluded that, "[b]y her own admission, the [plaintiff's] ability to perform her job duties was impaired as a result of her short-term memory loss due to the medications she was taking for bipolar disorder and anxiety." The only evidence the referee identified in support of this conclusion consisted of the July, 2016 text messages. We agree with the Superior Court that there existed a genuine issue of material fact in light of the plaintiff's sworn assertion that she could perform the essential functions of the job.

improper for a trial court, in ruling on the summary judgment motion, to choose among those inferences.” *Doe v. West Hartford*, 328 Conn. 172, 197–98, 177 A.3d 1128 (2018). Faced with competing affidavits, the referee improperly credited the statements contained in Hamilton’s affidavit. See *id.*, 197 (“[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties”). Thus, we agree with the Superior Court that genuine issues of material fact existed.

Moreover, we agree with the Superior Court that there exists a genuine issue of material fact with respect to the stated reasons for terminating the plaintiff’s employment. The plaintiff averred that she was told that her employment was terminated due to a reorganization, while Hamilton averred that he terminated her employment because she could not perform the essential functions of the position. Rather than merely identifying the factual dispute raised by the competing affidavits, the referee improperly decided the factual question by crediting the statements made in Hamilton’s affidavit. See *id.*

Additionally, we note that the record lends support to the plaintiff’s argument that Atos “has proffered two different and contradictory explanations at different times to explain its termination decision.” Atos contends in its appellate brief that “[i]t has never been alleged that [the plaintiff’s] termination was because the service desk technician position was being eliminated.” It argues that “[i]t was her prior managerial position that was eliminated.” Our review of the record reveals that, in the plaintiff’s affidavit, she averred that Atos terminated her employment on October 17, 2016. In its answer, Atos denied this averment as stated and alleged that, “[o]n or about October 17, 2016, [the plaintiff’s] position was eliminated.” The plaintiff further

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averred that Atos “told [her] that the termination was due to a ‘reorganization’ and that her ‘job was no longer available.’” Notably, in its answer, Atos admitted this averment and further alleged that “[the plaintiff’s] position was no longer needed in the [United States] due to offshore activity.” Thus, Atos admitted having told the plaintiff that her termination was due to a reorganization and that her job was no longer available. In support of Atos’ motion for summary judgment, however, Hamilton averred that he terminated the plaintiff’s employment because “she could not perform an essential function of her job—physically presenting for work and she conceded she could not perform her duties.”

The Superior Court concluded that the foregoing issues, among others,⁶ constituted “genuine issues of material fact that arise directly from the competing affidavits of the [plaintiff] and . . . Hamilton. These issues go to the very heart of the discrimination and retaliation claims. The [referee’s] decision clearly contains factual findings by the [referee] that are not appropriate in the context of a motion for summary judgment.” We agree with the Superior Court. Faced with competing averments on the issues of the essential functions of the job, reasonable accommodations, and the reason for the termination of the plaintiff’s employment, the referee erred in determining that there were no genuine issues of material fact. Thus, summary judgment was not properly rendered.

Lastly, Atos argues that the Superior Court improperly “based its reversal on factual arguments neither party raised” Specifically, it argues that the plaintiff and the commission both objected to summary judgment with “purely procedural arguments” and “neither

⁶ We need not consider the other issues the Superior Court identified as genuine issues of material fact.

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objection makes any reference whatsoever to the substance of [the plaintiff's] complaint nor do the objections set forth any allegedly disputed facts." We disagree that the court erred in determining whether genuine issues of material fact should have precluded summary judgment. Although the commission's objection focused exclusively on the referee's authority to render summary judgment, the plaintiff's objection included an argument that the early legal intervention decision to send the matter directly to a public hearing necessarily meant that there had been established the existence of genuine issues of material fact. Moreover, it is undisputed that the referee considered the substance of the plaintiff's affidavit in deciding the summary judgment motion. The referee expressly stated that she had "view[ed] the complaint and the submitted evidentiary materials in the light most favorable to the [plaintiff]" Accordingly, the Superior Court did not err in considering whether genuine issues of material fact existed.

The judgment is affirmed.

In this opinion the other judges concurred.

ELLIS ROBINSON ET AL. v. WILLIAM
TINDILL ET AL.
(AC 43995)

Elgo, Cradle and Clark, Js.

Syllabus

The plaintiffs, who owned residential property adjacent to that of the defendants, T and E, sought declaratory and injunctive relief and damages for trespass resulting from T's construction of a fence that encroached on the plaintiffs' property. The parties previously had constructed privacy fences on their properties on opposite sides and within inches of a chain-link fence that was located on a portion of the boundary line between their backyards. T thereafter constructed an extension to the defendants' privacy fence and, without the plaintiffs' permission,

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removed portions of the chain-link fence. T also constructed a split rail fence that extended the privacy fence along or near the boundary line. A surveyor thereafter found that a portion of the split rail fence encroached on the plaintiffs' property. The defendants filed special defenses alleging that they were entitled to establish a divisional fence, pursuant to statute (§ 47-43), on the boundary of their property. The defendants further claimed that § 47-43 permitted placement of the fence on the plaintiffs' property. The trial court granted the plaintiffs' motion for summary judgment as to liability, finding against the defendants on the plaintiffs' claim of trespass, and against T for conversion as to the chain-link fence. The court concluded that a majority of the length of the fences T constructed was not located on the dividing line of the parties' properties and, thus, could not be considered a divisional fence pursuant to § 47-43. After a hearing in damages, the court granted the plaintiffs injunctive relief and awarded them nominal damages for conversion as to the chain-link fence and for trespass as to the split rail fence. On appeal, the defendants claimed, inter alia, that the court erred in finding them liable for trespass because the fence at issue was compliant with § 47-43. *Held:*

1. The defendants could not prevail on their claim that the trial court improperly found them liable for trespass, which was based on their assertion that their privacy fence was a divisional fence pursuant to § 47-43 and was within the permitted limit of intrusion on the plaintiffs' property: contrary to the defendants' assertion, the clear and unambiguous language of § 47-43 requires a divisional fence to be centered on the property line at issue, the parties did not dispute that the defendants' fence was not centered on the property line, and the defendants failed to demonstrate how any of the other statutes they cited pertaining to fences undermined the plain language of § 47-43; moreover, this court found unavailing the defendants' assertion that the placement of their fence did not constitute a trespass because the fence did not exceed the width permitted by § 47-43 for materials used to construct a divisional fence, as an interpretation of § 47-43 that allows a property owner to construct a divisional fence on a neighbor's property would render the centering language in § 47-43 superfluous; furthermore, it was undisputed that the split rail fence encroached on the plaintiffs' property, and the middle of the fence did not sit on the mutual boundary line of the parties' properties.
2. This court declined to review the defendants' unpreserved claim that the trial court improperly found E liable for trespass because the split rail fence was a fixture appurtenant to the property she owned, the defendants having failed to argue to the trial court that the plaintiffs did not properly raise or brief the issue of "trespass of ownership by fixture"; moreover, the two paragraphs of argument in the defendants' opposition to the plaintiffs' motion for summary judgment was devoid

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- of analysis or legal authority that was relevant to the bases on which they challenged on appeal the trial court's judgment as to E.
3. The trial court's judgment finding T liable for conversion could not stand, as the plaintiffs never pleaded conversion in their complaint or briefed it in their motion for summary judgment; because the plaintiffs' complaint alleged that T's conduct in dismantling portions of the chain-link fence constituted trespass, the defendants were never given notice or afforded an opportunity to defend a claim of conversion; accordingly, the judgment was reversed as to the court's finding that T was liable to the plaintiffs for conversion.

Argued April 15—officially released October 12, 2021

Procedural History

Action, inter alia, to recover damages for trespass, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Middlesex, where the court, *Domnarski, J.*, granted the plaintiffs' motion for summary judgment as to liability; thereafter, following a hearing in damages, the court, *Frechette, J.*, rendered judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed in part; judgment directed.*

Michael A. Zizka, for the appellants (defendants).

Joshua C. Shulman, for the appellees (plaintiffs).

Opinion

CRADLE, J. This case arises from the erection of a fence by the defendants, William Tindill (Tindill) and Erika Tindill, between their property and the adjacent property owned by the plaintiffs, Ellis Robinson and Nicole Robinson. The defendants appeal from the judgment of the trial court rendered in favor of the plaintiffs after a hearing in damages and the court's prior order granting the plaintiffs' motion for summary judgment as to liability and finding both defendants liable for trespass and Tindill liable for conversion. On appeal, the defendants claim that the court erred (1) in finding

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them liable for trespass because the fence at issue was a statutorily compliant divisional fence pursuant to General Statutes § 47-43, (2) in finding Erika Tindill liable for trespass, even though she played no role in erecting the fence, and (3) in finding Tindill liable for conversion because the plaintiffs failed to plead, or present any evidence in support of, a claim for conversion. We affirm in part and reverse in part the judgment of the trial court.

The following undisputed facts, as set forth by the court, and procedural history are relevant to our resolution of this appeal. The plaintiffs own property located at 113 Glen View Terrace in New Haven. The defendants reside at 119 Glen View Terrace. “The plaintiffs acquired their property in 2003, and . . . Erika Tindill acquired her property, [where she resides with Tindill], in 2004. There is a chain-link fence located on a portion of the mutual boundary line between the plaintiffs’ and the defendants’ properties. This chain-link fence, which had been installed prior to when the parties acquired their respective premises, can be described as located between the backyards of the two lots. Over the years, the plaintiffs and the defendants each constructed their own privacy fences on opposite sides of the chain-link fence. The sides of these privacy fences were very close to, meaning within inches of, the chain-link fence, resulting in the chain-link fence being sandwiched between the two closely built privacy fences.

“On July 8, 2017 . . . Tindill commenced a fence-building project. Between July 8 and 11, 2017, Tindill constructed a six foot high, approximately thirty foot long extension to his existing privacy fence. This extension made the [defendants’] entire privacy fence approximately sixty feet long. The privacy fence, as extended, runs along the mutual boundary line but is located entirely on Erika Tindill’s property. To accommodate the post and panels for the extended privacy

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fence, Tindill removed the end corner post, as well as the supporting top metal rod, of the chain-link fence.” “[T]he plaintiffs never gave permission to, or authorized, Tindill to remove the fence post and top rod. There is no evidence that the removed fence parts have been reinstalled or replaced.”

“Beginning on July 11, 2017, Tindill also constructed a three and one-half [foot] high split rail fence. The split rail fence extended from the privacy fence to a point in the vicinity of the sidewalk alongside Glen View Terrace. Thus, to summarize, from the undisputed facts, it appears that Tindill constructed three fences, total, along the mutual boundary line on three separate occasions: (1) the original privacy fence, (2) the extension to the privacy fence, and (3) the split rail fence. . . .

“Tindill [averred that he] installed the split rail fence ‘along or near the [m]utual [b]oundary’ After Tindill constructed the split rail fence, the plaintiffs hired Michael D. Phipps, a licensed surveyor, to survey the neighboring properties and officially establish the location of the mutual boundary line. The survey map [that] Phipps prepared, which both parties have submitted along with their respective motions for summary judgment, indicates that the mutual boundary line is 100 feet in length. . . . In an affidavit dated April 8, 2019, Phipps stated that the split rail fence [that] Tindill constructed encroaches on the plaintiffs’ property. . . . Although it does not appear that the split rail fence encroaches on a large area of the plaintiffs’ property, the defendants do not dispute that a ‘few inches’ of the split rail fence posts may lie on the plaintiffs’ side of the mutual boundary line. . . . The defendants have not submitted their own professionally prepared survey, do not dispute Phipps’ survey and, in fact, also rely on the survey in their efforts to prove their case.” (Citations omitted.) “It is undisputed that at least one of the vertical posts of the split rail fence [that] Tindill

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installed extends onto the plaintiffs' property. There is no evidence to establish that the plaintiffs gave the defendants permission to install a fence post that would be located on the plaintiffs' property."

On May 9, 2018, the plaintiffs commenced this action by way of a one count complaint, alleging that Tindill destroyed the chain-link fence that had existed on the boundary of the parties' properties and constructed a "new, approximately six foot high wooden stockade fence" in its place. The plaintiffs further alleged that Tindill also constructed "an approximately three and one-half foot wood rail fence" along another portion of the parties' property boundary. The plaintiffs alleged that Erika Tindill is the owner of the property at 119 Glen View Terrace and that, "acting through . . . Tindill, [she] caused the fence to be built such that it encroaches on the land of [the] plaintiffs" The plaintiffs sought a declaratory judgment establishing the boundary line of the parties' properties, an injunction requiring the defendants to remove their fence from the plaintiffs' land, and damages for trespass.

On July 12, 2018, the defendants filed an answer and two special defenses to the plaintiffs' complaint. In their first special defense, the defendants alleged that they were entitled to establish a divisional fence on the boundary of their property pursuant to General Statutes §§ 47-43 and 47-49, and, to the extent that it is located on the plaintiffs' property, "such placement is partial and no greater than allowable pursuant to the aforesaid statutes." In their second special defense, the defendants alleged that the plaintiffs had allowed the chain-link fence "to deteriorate and to become a useless, unsightly nuisance in violation of . . . § 47-43." They alleged that they were entitled to seek remedies for such nuisance pursuant to General Statutes § 47-51,¹

¹ Despite this allegation, the defendants did not actually file a counterclaim alleging nuisance.

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and that they were entitled to erect a divisional fence to replace it pursuant to §§ 47-43 and 47-49. The plaintiffs thereafter denied all of the allegations contained in the defendants' special defenses.

In April, 2019, both parties filed motions for summary judgment, each arguing that they were entitled to judgment as a matter of law. In support of their motions, both parties filed memoranda of law, affidavits and exhibits. Both parties represented to the court that the essential facts underlying their claims were not in dispute. Following a hearing on the parties' motions for summary judgment, the court, *Domnarski, J.*, issued a memorandum of decision filed October 8, 2019. The court rendered summary judgment in favor of the plaintiffs as to liability only, against both defendants on the plaintiffs' claim of trespass, and against Tindill for conversion as to the plaintiffs' claim related to the chain-link fence.

On February 20, 2020, the court, *Frechette, J.*, held a hearing in damages. On February 26, 2020, the court issued a written order awarding "injunctive relief in favor of the plaintiffs against the defendants as follows: within thirty days of the date of this order, at their sole expense, the defendants are to relocate the split rail fence and fence posts as depicted in exhibit 2, so as not to encroach on the plaintiffs' property. The defendants are to also repair any damages to the plaintiffs' property and restore it to its natural condition." The court also awarded nominal damages to the plaintiffs of \$50 for "conversion of the chain-link fence," and nominal damages of \$50 for trespass as to the split rail fence. This appeal followed.

I

The defendants first claim that, because the fence at issue was a divisional fence pursuant to § 47-43, the trial court erred in finding them liable for trespass. The

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defendants argue that the court erred in concluding that their fence was not a divisional fence because it was not centered on the mutual boundary line. They further contend that, although the fence was not centered on the property line, it was well within the limit of intrusion onto the plaintiffs' property that is permitted by § 47-43. We are not persuaded.

In concluding that the defendants' fence was not a divisional fence under § 47-43, the trial court set forth the following additional facts: "At some point in time, Phipps . . . installed stakes in the ground, which Tindill believed to be on the boundary line. The defendants have submitted photographs that show the survey stakes and the defendants' privacy fence. It is clear from one of the photographs that the defendants' original privacy fence, and the 2017 extension thereto, were installed on the defendants' side of the boundary line. . . . [Thus] a majority of the length of the fences [that] Tindill constructed were not located *on* the dividing line of the two properties. The survey map shows that, where the split rail fence begins, in the vicinity of the privacy fence, it is located on the defendants' side of the line. As the fence travels toward the sidewalk and the lot corner, however, it gradually approaches and then enters onto the plaintiffs' property. . . . [T]he defendants have not contested Phipps' statement in his affidavit that a portion of the split rail fence is on the plaintiffs' property."²

"In his affidavit, Tindill stated that he 'constructed a [split rail] fence along or near the [m]utual [b]oundary, running from the extended privacy fence to Glen View

² In their memorandum of law in support of their objection to the plaintiffs' motion for summary judgment, the defendants stated: "For the purposes of this case, the defendants are not contesting the accuracy of the plaintiffs' survey. That survey shows that the fences constructed by . . . Tindill lie along or within inches of the mutual property boundary."

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Terrace.’ . . . [Tindill] further state[d], ‘Before installing the extension of the privacy fence and the [split rail] fence, I measured the distance of the line of installation from both the house on the Tindill [p]roperty and the house on the Robinson [p]roperty to be sure that the fence would be located on the [m]utual [b]oundary or within the Tindill [p]roperty.’ . . . [T]he privacy fence and its extension are on the defendants’ side of the boundary. These privacy fences constitute approximately two-thirds of the length of the fences between the two properties. It appears from the survey that only a portion of the split rail fence is actually located *on* the boundary line.” (Citations omitted; emphasis in original; footnote added.)

The court further found: “[T]he mutual boundary line was established by the original subdivision map referred to on the subject survey and in . . . Erika Tindill’s deed [to her property] Although the mutual boundary line had been established, it appears that Tindill did not accurately locate the boundary line when he took his measurements. As a result, he did not place all of the split rail fence on his side of the boundary, as he did with the other fences [that] he built. Furthermore, if there was an intention to construct a divisional fence, the split rail fence and the privacy fence should have been built on the established dividing line for its entire length.” (Citation omitted.) The court concluded: “Thus . . . because most of the total length of the fences Tindill constructed is not on the dividing line, the fences cannot be considered a ‘divisional fence’ within the meaning of § 47-43 or the related fence statutes.”³

³ The defendants also claim that the trial court erred in finding that “the defendants’ fence(s) cannot qualify as a divisional fence because a split rail fence is not one of the types of ‘city’ fences listed in [§ 47-43].” In light of our conclusion that the court correctly determined that the defendants’ fence was not a divisional fence because it did not sit on the center of the mutual boundary line, we need not address this claim.

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On appeal, the defendants argue that the trial court misinterpreted the language of § 47-43. Specifically, the defendants challenge the court’s determination that § 47-43 requires that a divisional fence be centered on the mutual boundary line. “The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal.” (Citations omitted; internal quotation marks omitted.) *State v. Bemer*, Conn. , , A.3d (2021).

With the foregoing principles in mind, we begin with the statutory language at issue in this case. Section 47-43 provides in relevant part: “The proprietors of lands shall make and maintain sufficient fences to secure their particular fields. . . . Adjoining proprietors shall

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each make and maintain half of a divisional fence, *the middle line of which shall be on the dividing line . . .*”⁴ (Emphasis added.) The clear and unambiguous language of § 47-43 requires a divisional fence to be centered on the property line at issue. Here, it is undisputed that it is not.⁵

Our case law, although scant, has held that a fence that does not sit on the mutual boundary line is not a divisional fence. See *Grosby v. Harper*, 4 Conn. Cir. 196, 199, 228 A.2d 563 (hedge not divisional fence because only portion of it was centered on property line and remainder was on defendant’s property; divisional fence does not “apply to such fences as may be erected by each proprietor on his own land, though near and parallel to the boundary line”), cert. denied, 154 Conn. 718, 222 A.2d 810 (1966); *Hillgen v. Printz-Kopelson*,

⁴ Section 47-43 also describes the types of fences that constitute divisional fences: “Within cities and adjacent to house lots, a tight board fence four and one-half feet high, an open picket fence four feet high, the opening between pickets not to exceed four inches, or a slat rail fence four feet high, the opening between slats not to exceed six inches, the lower slat not over six inches from the ground, a fence not less than four feet high of chain link galvanized wire not smaller than number nine gauge supported upon galvanized tubular steel posts set in concrete, all end and corner posts to be suitably braced, and all to be substantially erected, or any other fence which in the judgment of the selectmen or other officials charged with the duty of fence viewers is equal thereto, shall be a sufficient fence; in places outside of incorporated cities, a rail fence four and one-half feet high, a stone wall four feet high, suitably erected, a wire fence consisting of four strands not more than twelve inches apart, stretched tightly, the lower strand not more than twelve inches and the upper strand not less than four feet from the ground, with good substantial posts not more than sixteen feet apart, and any other fence which in the judgment of the selectmen is equal to such a rail fence, shall be a sufficient fence.” General Statutes § 47-43.

⁵ In paragraph 11 of Phipps’ affidavit, he indicated that “[t]he 3.5 foot wood rail fence encroaches on the [plaintiffs’] property.” In paragraph 13, Phipps indicated that “[t]he center of the 3.5 foot wood rail fence is not on the mutual boundary line for the entirety, or even the majority, of its length.” As the plaintiffs correctly describe, the fence here at issue does not sit on the center of the mutual boundary line; it is a “diagonal fence that intersects with the boundary line.”

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Docket No. CV-96-0383208-S, 2001 WL 589106, *3 (Conn. Super. May 11, 2001) (fence that ran only short distance along part of boundary line was not divisional fence).

Despite the plain and unambiguous language of § 47-43, the defendants nevertheless contend that the fact that the fence Tindill erected did not sit on the boundary line was not fatal to their claim that the fence was a divisional fence under § 47-43. The defendants argue that the court improperly interpreted the language of § 47-43, specifically, the language that provides that the middle line of a divisional fence “shall be on the dividing line,” in that it “focused solely on that language without examining its context, either within § 47-43 or within the entirety of chapter 823 [of the General Statutes].”⁶ Specifically, the defendants argue that “[t]he history and context of chapter 823 show that its intent was not to require a precise location for a divisional fence but to establish a joint duty to erect such fences, with the burdens to be equitably shared by abutting landowners.” Aside from setting forth the language of other statutes pertaining to the erection or maintenance of fences, the defendants have failed to demonstrate how any of the other statutes to which they cite undermine the plain language of § 47-43. The requirements prescribed by § 47-43 governing the location and manner of erecting divisional fences do not frustrate or conflict with the goal of the statutory scheme, as argued by the defendants, to ensure that such fences are erected. More specifically, there is nothing in those other statutes that excuses noncompliance with the requirements of § 47-43 or supports the defendants’ argument that a fence that is not centered on the property line and is “merely misaligned” may be considered a divisional fence. Indeed, as the defendants state in their brief to this court, “[t]he remaining provisions of . . . chapter [823] are merely supportive; they specify how the goal

⁶ Chapter 823 of the General Statutes is titled: “Fences.”

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of erecting such a [divisional] fence may be achieved in a variety of different circumstances.”⁷

The defendants further contend that, because the goal of § 47-43, and, the entirety of chapter 823, is to assure that a divisional fence will be constructed, “it makes little sense to conclude that the mere misalignment of a fence should be viewed as a trespass or should warrant a court[’s] ordering its removal, especially where, as here, the ‘intrusive’ portion of the fence is well within the space that a properly aligned fence would have occupied on the plaintiffs’ property.” In asserting this argument, the defendants are referring to the portion of § 47-43 that contemplates the dimensional qualities of the various materials of which a divisional fence may be constructed. Section 47-43 provides that a divisional fence, “the middle of which shall be on the dividing line . . . shall not exceed in width, if a straight wood fence or hedge fence, two feet; if a brick or stone fence, three feet; if a crooked rail fence, six feet; and, if a ditch, eight feet, not including the bank, which shall be on the land of the maker.” The defendants rely on this language to assert that, because their fence did not exceed the width permitted by § 47-43 and did not encroach on the plaintiffs’ property for more than one-half of that width, the placement of their fence on the plaintiffs’ property did not constitute a trespass. The fatal flaw in the defendants’ argument is that the middle of their fence did not sit on the dividing property line as required by § 47-43. To interpret § 47-43 to allow a property owner to construct a divisional fence on a neighbor’s property would render the centering language of the statute superfluous.⁸

⁷ Moreover, the defendants’ argument is belied by the plain and unambiguous language of § 47-43. Although we read each statute in the context of the entirety of the statutory scheme, it is not the prerogative of this court to ignore the plain language set forth in the statute.

⁸ The defendants also argue that the plaintiffs failed to establish a prima facie claim of trespass because they failed to prove that the trespass was intentional or that it caused direct injury. Because these arguments were

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The defendants repeatedly have acknowledged that, in constructing the fences in July, 2017, Tindill set out to extend their privacy fence. The trial court found, and it is undisputed, that neither the original privacy fence nor the extended privacy fence erected by the defendants were located on the mutual boundary line. They were both located wholly within the defendants' property. The split rail fence is on the defendants' property where it meets the second installment of the defendants' privacy fence but, then, as it approaches the road, crosses the property line and encroaches on the plaintiffs' property. Because the middle of the fence does not sit on the mutual boundary line, the trial court did not err in concluding that it was not a divisional fence.

II

The defendants also contend that the trial court erred in finding Erika Tindill liable for trespass. In addressing the plaintiffs' claim against Erika Tindill, and rejecting the defendants' argument that she cannot be liable for trespass because she did not personally install or direct the installation of the fence that encroached on the

neither raised before the trial court; see *Guiliano v. Jefferson Radiology, P.C.*, 206 Conn. App. 603, 622, A.3d (2021); nor briefed beyond a mere mention in the defendants' brief to this court; see *State v. Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); we decline to review them.

The defendants additionally contend that, because § 47-43 provides for various permissible intrusions on each property owner's land, the court erred in finding a trespass because the plaintiffs did not have exclusive possession of the land on which the fence was placed. As explained herein, the plain language of § 47-43 requires a divisional fence to be centered on the boundary line of the properties at issue, and the language of the statute that pertains to the overhang of the fence contemplates the varying dimensional widths, which are based on the materials used to construct the fence. That language does not allow, as the defendants argue, a divisional fence to be constructed exclusively on one of the properties that it is purporting to divide. There is nothing in the language of the statute that supports the defendants' argument that § 47-43 divests a property owner of the exclusive ownership of his or her land, and the defendants have provided no legal support for this argument.

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plaintiffs' property, the trial court found that "the split rail fence at issue is a fixture that is appurtenant to the real estate Erika Tindill owns. Consequently, she is the owner of the fence, including those portions of the fence that trespass [on] the plaintiffs' property. As the owner of the property that continues to be a trespass on the plaintiffs' property, she, too, is liable to the plaintiffs for the trespass." The defendants argue on appeal that "[t]he issue of 'trespass by ownership of a fixture' was not properly raised or briefed and should have been deemed abandoned."⁹ Because the defendants failed to present this argument to the trial court, which, in turn, did not address it, it was not properly preserved for our review.

"We have repeatedly held that this court will not consider claimed errors on the part of the trial court unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . [T]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambush of the trial judge." (Citation omitted; internal quotation marks omitted.) *Noonan v. Noonan*, 122 Conn. App. 184, 190, 998 A.2d 231, cert. denied, 298 Conn. 928, 5 A.3d 490 (2010). It is a well settled principle that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted . . . but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks

⁹ The defendants also claim that, "[e]ven if the issue of 'trespass by ownership of a fixture' had been properly raised, the trial court's decision was erroneous as a matter of law." In so arguing, the defendants appear to assert that, once the fence was erected by Tindill on the plaintiffs' property, the fence belonged to the plaintiffs and, therefore, could not have constituted a trespass by the defendants. We decline to address this baseless claim.

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omitted.) *Burton v. Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

In their memorandum of law in support of their objection to the plaintiffs’ motion for summary judgment, the defendants argued that the plaintiffs “have offered no proof whatsoever that Erika Tindill approved, consented to, or otherwise had any influence whatsoever over [Tindill’s] actions” and, thus, “cannot claim that . . . Tindill was acting as [Erika] Tindill’s agent,” and “[t]hat is . . . the sole allegation they made against [Erika] Tindill in their complaint.” The defendants further argued: “Apparently recognizing their failure in this regard, the plaintiffs have attempted to shift their legal theory, claiming that [Erika] Tindill is somehow liable as the owner of a ‘fixture’ that is partially located on her property. Unsurprisingly, they have not cited a single precedent to back up this frivolous—and previously unpleaded—argument.”¹⁰ The defendants then argued that a trespass must be intentional and that, “even if . . . Tindill could reasonably be said to have ‘trespassed’ by constructing a split rail fence partially on [the] plaintiffs’ side of the mutual boundary, but well within the parameters allowed by . . . § 47-43, there

¹⁰ In their complaint, the plaintiffs alleged that Erika Tindill is the owner of the property at which she resides with Tindill. The plaintiffs further alleged that, “acting through . . . Tindill, [she] caused the fence to be built such that it encroaches on the land of [the] plaintiffs and is claiming for a boundary line a line that is not the true line.” In their memorandum of law in support of their motion for summary judgment, the plaintiffs argued as to Erika Tindill: “Fences are fixtures: Our Supreme Court has long held that fences are fixtures to real property. . . . Erika Tindill is the record owner of the [defendants’] property, of which the fences are fixtures.” (Citations omitted.) On that basis, the plaintiffs argued: “Even if the defendants will not admit that . . . Erika Tindill allowed or permitted the actions [that] . . . Tindill claims to have individually taken, she cannot escape the reality that a fixture on her property (split rail fence) encroaches on [the plaintiffs’] property. It does not matter if . . . Erika Tindill took any action to construct the fence herself. She owns and possesses the [defendants’] property, and a fixture on her property encroaches on the [plaintiffs’] property.”

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can be no claim against [Erika] Tindill absent evidence of her intent.” (Emphasis omitted.)

The defendants now contend on appeal that, because the plaintiffs failed to assert this theory of “trespass by ownership of a fixture” in their complaint, the trial court erred in finding Erika Tindill liable on that basis. Although the defendants mentioned that this theory of liability was “previously unpleaded” by the plaintiffs and that the sole allegation against Erika Tindill was based on an allegation that she acted through Tindill, they did not distinctly argue to the trial court that it could not find Erika Tindill liable on this basis because the plaintiffs failed to plead it in their complaint. The defendants, likewise, provided no legal authority or analysis, pertaining to the interpretation or sufficiency of pleadings, to the trial court for its consideration of this contention. Consequently, the trial court did not address any alleged inadequacies in the plaintiffs’ complaint.

The defendants also claim that “[t]he plaintiffs’ failure to support [their] new theory with any authority should also have foreclosed any review by the trial court.” The defendants did not argue, as they do now, that the trial court was precluded from reviewing the plaintiffs’ claim because the plaintiffs had failed to provide any legal authority in support of it. Although the defendants argued, in a single sentence, that the plaintiffs had not cited any legal authority to support their claims against Erika Tindill, they did not argue that the plaintiffs’ failure to do so precluded the trial court from reviewing the claim, nor did they cite any legal authority themselves in support of this notion.

In sum, in opposing summary judgment as to the plaintiffs’ claim that Erika Tindill was liable for trespass because she owned the property to which the fence that encroached on the plaintiffs’ property was an

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appurtenant fixture, the defendants set forth two paragraphs of argument, which was devoid of analysis or legal authority that is relevant to the bases on which the defendants now challenge the judgment of the trial court as to Erika Tindill. Accordingly, because the defendants did not properly raise these arguments to the trial court, we decline to review them.¹¹

III

The defendants also claim that the trial court erred in finding Tindill liable, and awarding the plaintiffs monetary damages, for conversion. They contend that the court erred in finding Tindill liable for conversion because the plaintiffs never pleaded conversion in their complaint or briefed it in their motion for summary judgment. We agree.

In their complaint, the plaintiffs alleged: “On or about July 9, 2017 . . . Tindill destroyed a chain-link fence along a portion of the boundary between the premises known as 113 Glen View Terrace and the premises known as 119 Glen View Terrace, New Haven, Connecticut. . . . Tindill constructed a new, approximately six foot high wooden stockade fence in place of [the] plaintiff[s]’ chain-link fence that had been in place for more than a decade.” The plaintiffs further alleged that Tindill “destroyed property of [the] plaintiffs, i.e., the chain-link fence.”

In addressing the plaintiffs’ claim regarding the chain-link fence, the trial court first noted that it was undisputed that Tindill removed the end corner post and top

¹¹ Moreover, this court has observed that, “[w]hile the lack of an appropriate pleading cannot be ignored, neither can it be ignored that there is no element of surprise to the defendant—at all times, the defendant has been on notice that this was an issue in the case, even if not properly pleaded” (Internal quotation marks omitted.) *Manzo-III v. Schoonmaker*, 188 Conn. App. 343, 349 n.7, 204 A.3d 1207, cert. denied, 331 Conn. 925, 207 A.3d 27 (2019). Here, the defendants had adequate notice of the plaintiffs’ theory of liability as to Erika Tindill and were afforded ample opportunity to address it.

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supporting metal rod of the chain-link fence and that both parties considered the chain-link fence to be on or near the mutual boundary line of their properties. The court determined that, “[b]ecause the chain-link fence is located on the mutual boundary line of the parties’ properties, the chain-link fence is an appurtenant fixture attached to both properties. Thus, the owners of the adjoining lots are joint owners of the fence located on the mutual boundary line, and each had an ownership interest in the parts that Tindill removed.” The court reasoned: “It is undisputed that the plaintiffs never gave permission to, or authorized, Tindill to remove the fence post and top rod. There is no evidence to establish that the removed fence parts have been reinstalled or replaced. As stated [previously], the plaintiffs had an ownership interest in the subject fence parts. Because Tindill has deprived the plaintiffs of their ownership interest in those fence parts by removing them without permission, he is liable to the plaintiffs for those fence parts.” On that basis, the court found Tindill liable for conversion.

The defendants claim on appeal that the trial court erred in finding Tindill liable for conversion because the plaintiffs did not allege conversion in their complaint. “The tort of [c]onversion occurs when one, *without authorization*, assumes and exercises ownership over property belonging to another, to the exclusion of the owner’s rights.” (Emphasis in original; internal quotation marks omitted.) *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 43–44, 761 A.2d 1268 (2000). “To establish a prima facie case of conversion, the plaintiff had to demonstrate that (1) the material at issue belonged to the plaintiff, (2) that the defendants deprived the plaintiff of that material for an indefinite period of time, (3) that the defendants’ conduct was unauthorized and (4) that the defendants’ conduct harmed the plaintiff.” *Stewart v. King*, 121 Conn. App. 64, 74 n.4, 994 A.2d 308 (2010).

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The plaintiffs contend that, although they did not expressly plead conversion in their complaint, the allegations contained therein may be liberally construed as sounding in conversion. “[T]he interpretation of pleadings is always a question of law for the court. . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery.” (Citations omitted; internal quotation marks omitted.) *Travelers Ins. Co. v. Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002).

Here, although the plaintiffs alleged that Tindill destroyed their property when he dismantled portions of the chain-link fence, the plaintiffs’ complaint alleges that Tindill’s conduct constituted a trespass and sought damages only for trespass. At no time, either in their complaint or motion for summary judgment, did the plaintiffs allege that Tindill’s conduct constituted conversion. In fact, in their memorandum of law in support of their motion for summary judgment, the plaintiffs argued that Tindill “committed a trespass” when he removed portions of the chain-link fence. Because the plaintiffs’ claim pertaining to the chain-link fence was limited to an alleged trespass by Tindill, the defendants were never given notice of or afforded an opportunity to defend a claim of conversion.¹² Accordingly, the trial

¹² We note the contrast between the conversion claim, which was mentioned for the first time in the trial court’s memorandum of decision, and the claim that Erika Tindill was liable for trespass by virtue of her status

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court's judgment finding Tindill liable for conversion cannot stand.

The judgment is reversed with respect to the determination that William Tindill is liable for conversion and the case is remanded with direction to vacate that finding; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

as the owner of the property to which the fence was an appurtenant fixture, which was briefed and argued by the parties during the summary judgment proceedings.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* RAFAEL ORTIZ, SC 20348

Judicial District of Hartford

Murder; Prosecutorial Impropriety; Jury Instructions; Whether Prosecutor’s Comment that Defendant Did Not Cross Examine Witness Deprived Him of Fair Trial; Whether Trial Court Erred in Precluding Evidence of Witnesses’ Prior Convictions. The victim, Benjamin Baez, Jr., and his friend, Enrique Lugo, had been smoking PCP when Lugo drove them to Main Street in Hartford around midnight on June 11, 2003, to buy more. Around the same time, the defendant drove to the same location with Lisa Rosario. Another witness, Wilbur Irizarry, arrived at same location and heard the victim ask the defendant if he could sell some of the defendant’s narcotics. The defendant declined, and the victim replied that he was going to rob the defendant anyway and walked backed to Lugo’s car. The defendant retrieved a firearm from his vehicle, walked to Lugo’s car, and shot the victim. Lugo immediately drove the victim to the hospital, where he died from a chest wound. The witnesses to the shooting were uncooperative at the time of the initial investigation, but cold case investigators developed a suspect in 2015 and began contacting Rosario, Irizarry and Lugo. Each witness identified the defendant from a photographic array as the perpetrator, but Rosario recanted her statements in a phone call with defense counsel shortly before trial. At trial, the parties put an agreement pertaining to Rosario on the record before her testimony. Defense counsel agreed not to introduce evidence of the recantation as a matter of strategy, and the state in exchange agreed not to offer into evidence Rosario’s prior consistent statements or evidence that the defendant had contacted her from prison with an illegal cell phone. Defense counsel also agreed to limit his cross examination of Rosario to asking whether she was on PCP on the night of the murder. During closing argument, the prosecutor commented that “[t]he defendant didn’t even cross [examine]” Rosario regarding certain aspects of her account, and the jury convicted the defendant of murder. On appeal to the Supreme Court pursuant to General Statutes § 51-199 (b) (3), the defendant claims that the prosecutor’s comment during closing argument constituted prosecutorial impropriety that deprived him of a fair trial. The state argues that the defendant was not deprived of a fair trial and, moreover, that this court should reject the defendant’s invitation to reverse his

conviction using its supervisory powers. The defendant also claims that the court abused its discretion in precluding him from asking Lugo and Irizarry about certain prior felony convictions for impeachment purposes because the convictions were more than ten years old. He argues that those evidentiary rulings were harmful and deprived him of his constitutional right to confrontation. The defendant finally claims that the trial court erred in its jury instructions and specifically argues that the court erred by refusing to charge (1) that the defendant “is not obligated to present any evidence, and [the jury] may not draw any unfavorable inference from that” and (2) that the jury could not consider uncharged misconduct unless it “conclusively” supported the state’s claim regarding a witness’ motive to testify. He argues that the instructional errors were of constitutional magnitude and that it was reasonably possible that they misled the jury. The state counters that it is not reasonably possible that the jury was misled or, in the alternative, that any error was harmless.

STATE *v.* JASON JOHNSON, SC 20437
Judicial District of Hartford

Criminal; Whether Confrontation Rights Violated by Testimony of Forensic Biologist and DNA Analyst Concerning Work Performed by Others Who Did Not Testify at Trial; Whether Defendant Entitled to New Trial Because Prosecutor Failed to Correct Misleading Testimony; Whether Defendant Deprived of Fair Trial by Witnesses’ Repeated Reference to Complainants as Victims. The defendant was convicted of two counts of first degree sexual assault, two counts of first degree unlawful restraint and second degree assault stemming from an incident in which he raped two women, F and M, in an abandoned apartment building in Hartford. At his trial, Jennifer Nelson, who is a technical reviewer for testing performed by the forensic biology section of the state lab, testified about the serological tests performed on the items contained in the sexual assault evidence kits for F and M and the forensic reports prepared in conjunction with the examinations. Nelson also testified about a forensic report for various tests performed on the defendant’s clothing and other of the defendant’s items that were seized by the police. Nelson explained that once the analysts completed the tests and wrote the reports, she read through the case notes and reports and then signed off on the reports indicating that she agreed to all of the testing and examinations that were performed on the items involved. There was also testimony at trial from Lana Ramos, who is

an analyst in the DNA unit of the state forensic laboratory. Ramos compared the known DNA profiles of F and M and the defendant with the DNA profiles generated from various pieces of evidence. Ramos testified about the DNA analysis performed on the samples submitted by the forensic biology unit and explained the results contained in five DNA reports prepared by her. Although Ramos examined the profiles generated to determine the source or sources of the DNA on the various samples, she did not generate all of the profiles that she examined and did not generate the profiles that were developed from the defendant's buccal swab and the known bloodstains of F and M. The defendant filed this direct appeal to the Supreme Court from his conviction, claiming that the trial court violated his right to confrontation by permitting the hearsay testimony of Nelson and Ramos concerning work performed by others who did not testify at trial. The defendant also claims on appeal that he is entitled to a new trial because the prosecutor failed to correct the misleading testimony of F. Specifically, the defendant argues that, during a pretrial meeting concerning certain criminal charges that were pending against F, the prosecutor told F that she would inform the prosecutor handling F's cases that F was hoping to get into a program to help her maintain sobriety and obtain job skills and housing. The defendant further argues that when, at his trial, F denied asking for such help, the prosecutor failed to correct her testimony and that the prosecutor further misled the jury by presenting the testimony of her investigator who stated that no offers or promises were made to F. The defendant additionally claims on appeal that he was deprived of a fair trial because the state's witnesses repeatedly referred to the complainants as victims.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* KERLYN M. TAVERAS, SC 20496
Judicial District of Danbury

Criminal; Whether Appellate Court Properly Held That Trial Court Erred in Finding That Defendant Had Violated a Condition of His Probation by Committing Breach of the Peace at a Preschool. The defendant pleaded guilty to assault and threatening charges in connection with three separate criminal cases, and the court imposed a sentence that included a period of probation. Later, the defendant was involved in an incident in which he engaged in a verbal confrontation with staff members at a preschool after he arrived

late to pick up his child. After Sondra Cherney, a staff member, said something to the defendant as he walked through the building's inner set of doors to leave the preschool, the defendant stated, "you better watch yourself, you better be careful," and attempted to reenter the building through the locked doors. As a result of that incident, the defendant was charged with breach of the peace in the second degree in violation of General Statutes § 53a-181 (a). The defendant's probation officer thereafter applied for a violation of probation warrant and, in an accompanying affidavit, averred that the defendant had said, "you better watch your back." After a hearing, the trial court found, by a preponderance of the evidence, that the defendant violated his probation by committing breach of the peace in the second degree, and it revoked his probation. The defendant appealed, claiming that the evidence was insufficient to establish that he violated his probation because the words he used to express his frustration with the staff members did not constitute fighting words or a true threat, which are two forms of speech that are not protected by the first amendment to the federal constitution. The state, however, claimed that the defendant violated § 53a-181 (a) on the basis of his nonverbal conduct, arguing that the trial court reasonably could have inferred that the alleged threat was a component of the defendant's nonverbal conduct when he attempted to open the door to reenter the preschool after having made the remarks at issue. A majority of the Appellate Court (183 Conn. App. 354) rejected the state's claim, noting that the record did not indicate the tone in which the statement at issue was communicated or that the defendant made any threatening gestures in conjunction with the statement. Next, the majority concluded that the defendant's statement that "you better be careful, you better watch yourself" did not constitute fighting words within the meaning of § 53a-181 (a) (1) or (3), as it did not have the tendency to provoke imminent retaliation from an average person in Cherney's position. It also concluded that the defendant did not make a true threat within the meaning of § 53a-181 (a) (3), explaining that neither of the statements "you better watch yourself, you better be careful" or "you better watch your back" communicated an explicit threat or conveyed his intent to harm or assault Cherney. Accordingly, the majority reversed the judgments of the trial court revoking the defendant's probation in the three cases. The dissent to the majority opinion concluded that the record contained sufficient evidence to support a finding by the preponderance of the evidence that the defendant, through his conduct and demeanor, engaged in threatening behavior in a public place in violation of § 53a-181 (a) (1). The state was granted certification to appeal, and the Supreme Court

will decide whether the Appellate Court properly held that the trial court erred in finding that the defendant had violated a condition of his probation by committing breach of the peace in the second degree at a preschool.

STATE *v.* JOSEPH V., SC 20504
Judicial District of Waterbury

Criminal; Whether Denial of Request for Specific Unanimity Charge Was Proper; Whether Appellate Court Correctly Concluded Information Not Duplicitous When State Presented Evidence of More Than One Separate and Distinct Incident That Could Serve as Basis of Conviction; Whether Appellate Court Correctly Concluded That Although Information was Duplicitous as to Counts Two and Three, Specific Unanimity Instruction Not Required Because Trial Court Instruction Did Not Sanction Nonunanimous Verdict. The defendant, Joseph V., was charged with sexual assault, risk of injury to a child and conspiracy to commit risk of injury to a child. At trial, the defendant filed a motion for a bill of particulars seeking to compel the state to provide additional information with respect to each charge. In the alternative, the defendant requested that, if the court denied his motion, it provide a specific unanimity instruction to avoid the risk of a nonunanimous verdict. The court denied the defendant's motion and also declined to deliver the unanimity instruction. Instead, the court instructed the jury that it must consider each count separately and return a separate, unanimous verdict for each count. The defendant was convicted and appealed. The Appellate Court (196 Conn. App. 712) affirmed the trial court and held that, with respect to the sexual assault count, the defendant had not demonstrated that a risk of a nonunanimous verdict existed. The Appellate Court found that the sexual assault statutory subsection under which the defendant was charged was not comprised of alternative methods for committing the offense but rather consisted of a single type of criminal conduct that is prohibited, namely, sexual intercourse, which may be proven by different types of specific acts. The court concluded that there thus was no risk that the jurors were not unanimous with respect to the alternative bases of criminal liability. With respect to the risk of injury to a child and conspiracy to commit risk of injury to a child counts, the Appellate Court held that these counts were duplicitous but concluded that the trial court's instructions with respect to these counts did not expressly sanction a nonunanimous verdict as the trial court had provided general unanimity instructions

as well as unanimity instructions specifically pertaining to these counts. The defendant has been granted certification to appeal on the following issues: (1) whether the denial of the defendant's request for a specific unanimity charge was correct and whether a specific unanimity charge is required only when a defendant is charged with violating multiple subsections or multiple statutory elements of a statute, (2) whether the Appellate Court correctly concluded that the information was not duplicitous when the state presented evidence of more than one separate and distinct incident that could have served as the basis of conviction on all three counts, and (3) whether the Appellate Court correctly concluded that, although the information was duplicitous as to counts two and three, a specific unanimity instruction was not required because the trial court's instruction did not sanction a nonunanimous verdict.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* ADRIAN FLORES, SC 20512
Judicial District of Windham

Criminal; Whether Evidence Sufficient to Sustain Convictions; Whether Defendant's Statement to Police Improperly Admitted Because Video Recording Not Preserved in Accordance With § 54-1o and Presumption of Inadmissibility Not Overcome; Whether Codefendant's Cooperation Agreement Was Improperly Admitted. The defendant was convicted of two counts of home invasion, two counts of burglary in the first degree, attempt to commit robbery in the first degree, two counts of conspiracy to commit home invasion, two counts of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree. The charges stemmed from an incident in which the defendant and Benjamin Bellavance broke into a single family home in Woodstock in order to steal money and drugs. The defendant and Bellavance wore face masks and carried box cutters. Bellavance carried a machete and a duffel bag containing zip ties, duct tape, chisels and plastic gloves. When approached by the residents of the home, Bellavance raised the machete, and then both men fled from the home. The defendant filed this direct appeal from his convictions to the Supreme Court. On appeal, the defendant claims that there was insufficient evidence to support his conviction of attempted robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (3) and 53a-49 (a) (2)

because the state failed to prove the required elements that he possessed the specific intent to commit a larceny through the use or threatened use of force and that he attempted to threaten or inflict immediate force by means of a dangerous instrument. He further claims that, because attempted robbery in the first degree was the predicate felony for the charge of home invasion in violation of § 53a-100aa (a) (1), there was also insufficient evidence to support the home invasion conviction. The defendant also claims on appeal that his convictions of burglary in the first degree and home invasion in violation of §§ 53a-101 (a) (1) and 53a-100aa (a) (2), respectively, should be reversed because there was insufficient evidence that he was armed with a dangerous instrument, which is a required element of both crimes. The defendant additionally claims that the state failed to prove that he committed the crime of conspiracy to commit home invasion in violation of §§ 53a-48 (a) and 53a-100aa (a) (1) because there was insufficient evidence of an agreement to enter the residence and commit robbery. In addition to his sufficiency of the evidence claims, the defendant claims that the trial court erred in denying his motion to suppress his written police statement because the video recording of the statement was not preserved in accordance with General Statutes § 54-1o and the presumption of inadmissibility of such statements could not be overcome under the exception set forth in the statute for situations where it is proven by a preponderance of the evidence that the statement was voluntarily given and reliable. Finally, the defendant claims that the trial court's admission into evidence of a cooperation agreement into which Bellavance entered with the state in connection with his testimony in this case was improper, arguing that it constituted improper vouching of a witness' truthfulness because the agreement contained a provision stating that Bellavance understood that he would be subject to prosecution if he did not testify truthfully.

STATE *v.* NECTOR MARRERO, SC 20525
Judicial District of Stamford-Norwalk

Criminal; Prosecutorial Impropriety; Whether It Was Prosecutorial Impropriety for Prosecutor to Ask Leading Questions of Hostile Witness During Direct Examination. In the early morning of December 27, 2015, the defendant, Nector Marrero, kicked in the door of his ex-girlfriend's home and physically assaulted her. In her initial report to the police, the victim gave the defendant's cell phone number. The next day, she gave a written statement to police

naming the defendant as her attacker. Thereafter, the police began searching the area for the defendant. After receiving a tip that the defendant had been in contact with his current girlfriend, Amber Greco, who was then incarcerated, the police obtained Greco's prison phone records. The records revealed that Greco had exchanged several phone calls with someone using the same phone number that the victim had identified as the defendant's phone number to the police. In one of the phone calls, which was made less than thirty-six hours after the victim reported the incident, a male caller whom Greco called "N" admitted that, after getting drunk at "Little Joe's house," he had gone to "[his] bitch[s]" house and "kicked in the door and . . . just started fighting." In another phone call, the same caller told Greco that he was "on the run" because the police had gone to his mother's house to ask about Greco's "stolen car," which the police had connected to him in their search for him. The defendant was eventually arrested and charged with home invasion, first degree burglary, and second degree assault. At his jury trial, the defendant presented an alibi defense and called his friend, Joseph "Little Joe" Ferraro, who testified in support of the defense that the defendant had been with him at his home on the evening of the alleged assault. During direct examination of the victim, the prosecutor asked leading questions that identified the victim's injuries, highlighted the fact that she had changed her story, and suggested that she had previously identified the defendant as the caller in the prison records and that the defendant had threatened her to induce her to withdraw her accusations. The defendant was convicted of the charged offenses, and he appealed to the Appellate Court (198 Conn. App. 90). On appeal, the defendant claimed that the prosecutor violated his due process right to a fair trial by using excessive leading questions in his direct examination of the victim to make prejudicial statements of fact and induce the jury to rely upon such statements as a basis for finding him guilty. The court disagreed, holding that none of the leading questions were improper on either an evidentiary or constitutional basis. The court noted that the victim was demonstrably hostile to the prosecution throughout her testimony, that the prosecutor did not vouch for the truth of the facts suggested in the questions or ask questions in such a way as to suggest that he personally disbelieved her denials or had extrinsic evidence to contradict those denials, that the prosecutor had a good faith basis for believing that many of the facts were true, and that many of the facts were supported by substantial evidence in the record. Accordingly, the Appellate Court affirmed the judgment of conviction. In this certified appeal by the defendant, the Supreme Court will decide whether the

Appellate Court properly concluded that the prosecutor's asking leading questions of a hostile witness during direct examination did not constitute prosecutorial impropriety.

ERIC THOMAS KELSEY *v.* COMMISSIONER OF CORRECTION,
SC 20553

Judicial District of Tolland

Habeas Corpus; Appellate Review; Whether Appellate Court Properly Concluded that Abuse of Discretion Is Appropriate Standard of Review of Dismissal of Petition Following Finding of No Good Cause for Delay under General Statutes § 52-470; Whether Appellate Court Correctly Determined that Habeas Court Did Not Err in Finding that Petitioner Failed to Establish Good Cause. The petitioner was convicted of conspiracy to commit robbery in the first degree and felony murder in December, 2003, and he was sentenced to forty years incarceration. After an unsuccessful direct appeal, the petitioner brought his first petition for a writ of habeas corpus, which the habeas court denied. The petitioner appealed that denial to the Appellate Court, which dismissed his appeal, and the Supreme Court denied his petition for certification to appeal in July, 2012. Nearly five years later, on March 22, 2017, the petitioner filed a second petition for a writ of habeas corpus challenging the same convictions and raising, inter alia, ineffective assistance of counsel claims with respect to his criminal trial counsel and prior habeas counsel. The respondent, the Commissioner of Correction, pursuant to General Statutes § 52-470, requested a show cause hearing as to why the petition should be permitted to proceed because it was filed more than two years after the final judgment on the petitioner's prior habeas petition. Section 52-470 (d) provides that "there shall be a rebuttable presumption" that a habeas petition "has been delayed without good cause" if the petition is challenging the same conviction as a prior petition and the petition was filed more than two years after a final judgment on the prior petition. When the rebuttable presumption applies and the respondent requests a show cause order, § 52-470 (e) provides that "the court shall dismiss the petition" if the petitioner had not demonstrated "good cause" for the delay. Here, the petitioner testified at the show cause hearing that he was unaware of the two year time limitation for bringing a subsequent habeas action, that his prior habeas counsel never informed him of that deadline, and that he lacked access to a law library at times during his incarceration. The habeas court found that the petitioner failed to establish good

cause, dismissed the petition, and, on the granting of certification, the petitioner appealed to the Appellate Court (202 Conn. App. 21). The Appellate Court first found that the appropriate standard of review to apply was whether the habeas court had abused its discretion in dismissing the petition after finding that the petitioner had not established good cause to overcome the rebuttable presumption of delay, rejecting the petitioner's argument for plenary review because the habeas court had made more than a strictly legal determination based on the pleadings alone. The Appellate Court then affirmed the judgment of dismissal on the ground that the habeas court had not abused its discretion in declining to find good cause. The Supreme Court granted the petitioner certification to appeal, limited to whether the Appellate Court properly found that abuse of discretion was the appropriate standard of review and whether it correctly determined that the habeas court did not err in finding that the petitioner had failed to establish good cause. The petitioner argues that the proper standard of review is plenary and that the Appellate Court erred in concluding that, in light of his self-represented status, his ignorance of the § 52-470 (d) deadline, and his lack of access to a law library, the habeas court properly found that he failed to establish good cause.

STATE *v.* TERRY FREEMAN, SC 20554
Judicial District of Ansonia-Milford

Criminal; Execution of Arrest Warrant; Whether Appellate Court Properly Affirmed Trial Court's Denial of Defendant's Motion to Dismiss on Basis of Its Determination State Had Executed Arrest Warrant Without Unreasonable Delay. On November 5, 2018, a detective with the West Haven Police Department received a letter from the defendant containing information about an armed robbery that had occurred at the Wine Press Liquor Store in West Haven on November 29, 2013. The next day, the detective visited the defendant at the Carl Robinson Correctional Institution in Enfield where the defendant was incarcerated on unrelated charges. The defendant confessed to his involvement in the November 29, 2013 robbery. On November 9, 2018, an arrest warrant was prepared. On November 15, 2018, a Superior Court judge signed the warrant. On November 19, 2018, a West Haven police officer obtained the signed warrant and submitted a request that the Office of the State's Attorney prepare an application for a writ of habeas corpus to transport the defendant to the Superior Court in the judicial district of Ansonia-Milford for service of the arrest warrant. On November 21, 2018, the

Office of the State's Attorney prepared the application for a writ of habeas corpus requesting that the defendant be transported to the court on December 6, 2018. On November 27, 2018, a prosecutor and a clerk of the court signed the writ of habeas corpus, and on December 6, 2018, the defendant was transported to the Superior Court where he was served with the arrest warrant. The defendant appealed to the Appellate Court from the conviction, rendered after his conditional plea of *nolo contendere*, of robbery in the first degree. He claimed that the trial court erred in denying his motion to dismiss, arguing that the prosecution was time barred by the five year statute of limitations set forth in General Statutes § 54-193 (b). He argued that the trial court misinterpreted and misapplied *State v. Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), and *State v. Swebilus*, 325 Conn. 793, 159 A.3d 1099 (2017), when it held, based on the record before it, that the delay in service of the arrest warrant seven days beyond the statute of limitations was reasonable. The state argued that the stipulated facts admitted into evidence showed the requisite effort made by the state and the reasonableness in the delay in the execution of the arrest warrant. The Appellate Court (201 Conn. App. 555) affirmed the trial court's denial of defendant's motion to dismiss. The Appellate Court found that there was evidence showing the state's efforts in expeditiously obtaining the arrest warrant and processing the execution of the warrant, such as the stipulated facts showing that the state prepared and signed the warrant and prepared a writ of habeas corpus before the statute of limitations had expired. As such, the Appellate Court determined that the trial court properly relied on this evidence in determining that the delay was reasonable. In this certified appeal by the defendant, the Supreme Court will decide whether the Appellate Court correctly held that the trial court properly denied the defendant's motion to dismiss based on its determination that the state executed the arrest warrant without unreasonable delay.

VOGUE *v.* ADMINISTRATOR, UNEMPLOYMENT
COMPENSATION ACT, SC 20570
Judicial District of New London

Unemployment Compensation; Whether Defendant Correctly Determined That Plaintiff Was Liable for Unpaid Unemployment Compensation Contributions Because On-Premises Tattoo Artist Was Employee under General Statutes § 31-222 (a) (1). At all relevant times, the plaintiff leased retail space at a mall in Waterford and, among other things, sold body jewelry and provided

body piercing services. In 2013, it entered into an agreement with Mark Sapia, a tattoo artist, whereby Sapia would offer tattoo services on the plaintiff's premises and, in exchange, would give the plaintiff a portion of his profits. In 2016, the defendant audited the plaintiff. It determined that Sapia was an employee and not an independent contractor as represented by the plaintiff, classified certain of the plaintiff's payments to Sapia as wages, and concluded that the plaintiff was liable for unemployment compensation payments on those wages as required by the Unemployment Compensation Act, General Statutes § 31-222 et seq. After unsuccessful challenges of the defendant's decision to the Employment Security Appeals Division and its Board of Review (board), the plaintiff filed an appeal in the trial court, which dismissed the appeal. The plaintiff thereafter appealed to the Appellate Court (202 Conn. App. 291), which affirmed the trial court's judgment. The plaintiff claimed that the trial court improperly affirmed the board's decision that the plaintiff had failed to satisfy the criteria laid out in General Statutes § 31-222 (a) (1) (B) (ii) (I), (II), and (III) to prove its position that Sapia was an independent contractor. These criteria, which are known as the ABC test, provide that an individual is an independent contractor for unemployment compensation purposes when (A) the individual is free from the employer's direction or control, (B) the service at issue is performed outside the usual course or place of the employer's business, and (C) the individual is customarily engaged in an independently established business of the same nature as the service. The Appellate Court observed that the plaintiff's claim focused on whether it had satisfied part (B) of the test where it argued that it did not provide tattoo services in the usual course of its business. The court noted that its inquiry was governed by *Mattatuck Museum-Mattatuck Historical Society v. Administrator, Unemployment Compensation Act*, 238 Conn. 273 (1996), where the Supreme Court held in relevant part that " 'usual course of business,' as used in [the statute], means that the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities." The court then determined that the conclusion that tattoo services were within the plaintiff's usual course of business was neither unreasonable nor arbitrary, citing evidence that the plaintiff had advertised online that it offered tattoo services in addition to selling body jewelry and providing body piercing services, that the plaintiff provided Sapia with his workspace, that Sapia used the plaintiff's credit card machine at no cost, and that the plaintiff issued a waiver and listed its name and contact information on receipts in connection with Sapia's tattoo services. In this certified

appeal by the plaintiff, the Supreme Court will determine whether the Appellate Court properly affirmed the trial court's judgment dismissing the plaintiff's appeal from the board's decision that the defendant correctly determined that the plaintiff was liable for unpaid unemployment compensation contributions in relation to Sapia.

INTERNATIONAL INVESTORS *v.* TOWN PLAN & ZONING
COMMISSION OF THE TOWN OF FAIRFIELD *et al.*,
SC 20579

Judicial District of Fairfield

Zoning; Special Permits; Statutory Construction; Whether Zoning Statutes Allow Conditioning Special Permit Approval on Completion of Development within Specified Time Period; Whether Special Permit and Site Plan Approval Issued to Developer Expired Upon Failure to Complete Construction within Allotted Time and Zoning Commission's Extension of Approval was Invalid. The defendant Fairfield Commons, LLC (Fairfield Commons), owns land in the town of Fairfield. The plaintiff, International Investors, is an abutting landowner. In 2006, Fairfield Commons applied for a special permit and a coastal site plan review in relation to the proposed construction of a building on the property. The defendant Town Plan and Zoning Commission of the Town of Fairfield (commission) approved the application, and the special permit became effective on April 8, 2009. Under the zoning regulations in effect at that time (2009 regulations), approval of a special permit was conditioned upon completion of the proposed use within two years, and the failure to meet this deadline rendered the approval void. In February, 2011, the commission amended the 2009 regulations to remove these provisions (2011 amendment). Shortly thereafter, the town provided confirmation to Fairfield Commons that, pursuant to the 2011 amendment and General Statutes § 8-3 (i), the special permit and site plan review approval was effective until April 8, 2014. Subsequently, the legislature amended § 8-3 (m) to extend the time period for which site plan approvals remain valid to nine years. Several years later, Fairfield Commons requested an extension of the approval, which the commission granted on April 10, 2018. The plaintiff appealed to the Superior Court, claiming that (1) the 2009 regulations governed the approval, and, therefore, the approval had expired on April 8, 2011, (2) the 2011 amendment and § 8-3 (m) did not apply retroactively to the approval, and (3) even assuming that they applied retroactively, the 2011 amendment and § 8-3 (m) were germane only to site plans, not special permits. The trial

court agreed with the third claim and, thus, concluded that the commission improperly extended the special permit approval. The court further concluded, however, that a zoning commission has no statutory authority to restrict the duration of a special permit and that special permits “run with the land” and, thus, are valid indefinitely once recorded. Accordingly, the court denied, in part, the plaintiff’s appeal. Following the granting of its petition for certification to appeal, the plaintiff appealed to the Appellate Court (202 Conn. App. 582), which reversed the trial court’s judgment with respect to its conclusion that the special permit approval granted to Fairfield Commons had not expired. The court determined that General Statutes § 8-2 (a) empowers a zoning authority to impose a temporal condition on a special permit and that the trial court had improperly concluded that special permits, once recorded, are valid indefinitely and cannot be temporally restricted. In this certified appeal by the plaintiff, the Supreme Court will decide whether the Appellate Court correctly concluded that (1) § 8-2 (a) permits a zoning authority to condition approval of a special permit on the completion of development within a specified time period and (2) the special permit and site plan approval issued to Fairfield Commons had expired upon its failure to complete construction within the allotted time and the commission’s extension of the approval was invalid.

ALISON BARLOW *v.* COMMISSIONER OF CORRECTION, SC 20591
Judicial District of Tolland

Habeas; Whether Habeas Court Improperly Failed to Consider All Information and Advice Counsel Conveyed to Petitioner That Indirectly Bore Upon His Decision of Whether to Accept Plea Offer in Concluding That Petitioner Was Prejudiced by Counsel’s Deficient Performance with Respect to Plea Offer. In 1997, the petitioner was charged with several crimes, including attempt to commit murder. He was offered a plea deal by the court that included a sentence of nine years to serve. The petitioner, however, did not accept the court’s plea offer. After a trial, the defendant was convicted as charged and sentenced to thirty-five years of incarceration. In 2010, the petitioner brought this habeas action, claiming that his trial counsel, Attorney Sheridan Moore, rendered ineffective assistance by failing to advise him adequately regarding the court’s plea offer. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner, in order to prevail on a claim of ineffective assistance of counsel, must establish both that counsel’s performance was deficient and that

the deficiency prejudiced the defense. The habeas court dismissed the petitioner's ineffective assistance of counsel claim. The petitioner appealed, and the Appellate Court reversed the dismissal in *Barlow v. Commissioner of Correction*, 150 Conn. App. 781 (2014). In addition, the court concluded that Attorney Moore's performance with respect to the plea offer was deficient because she "gave the petitioner no professional assessment of the court's offer . . . in the context of the facts underlying the charges against him and his potential total sentence exposure." The case was remanded to the habeas court for a determination of whether the petitioner was prejudiced as a result of counsel's deficient performance. At trial on remand, the petitioner presented his own testimony and expert testimony from Attorney Brian Carlow. Attorney Carlow testified that competent trial counsel would have advised the petitioner to accept the plea offer, given the strength of the case against the petitioner and the likelihood of a conviction and a lengthy sentence. The petitioner testified in turn that, had he been advised about the strengths and weaknesses of his case and the reasonableness of the plea offer, he would have accepted it. The habeas court credited the testimony of both witnesses and concluded that the petitioner had established prejudice under the second prong of *Strickland*, as modified by *Ebron v. Commissioner of Correction*, 307 Conn. 342 (2012), cert. denied sub nom. *Arnone v. Ebron*, 569 U.S. 913 (2013), finding that, had the petitioner been adequately advised by counsel regarding the court's plea offer, there was a reasonable probability that he would have accepted it. The court accordingly granted the habeas petition. The respondent Commissioner of Correction appealed to the Appellate Court, and the Supreme Court thereafter transferred the appeal to itself. The respondent claims that the habeas court erred in effectively excluding from its prejudice analysis as deficient per se all of the information and advice that Attorney Moore conveyed to the petitioner that indirectly bore upon his decision whether to accept or reject the plea offer, namely, the police witness statements and the petitioner's maximum sentencing exposure. The respondent asserts that such "contemporary evidence" in the record "predominates over" the habeas court's "post hoc" credibility determinations and that, therefore, the court's conclusion that the petitioner established that he was prejudiced by Attorney Moore's deficient performance under the second prong of *Strickland*, as modified by *Ebron*, should be reversed.

IN RE AISJAHA N., SC 20612
Juvenile Matters at Waterbury

Child Protection; Whether Trial Court Violated Respondent’s Due Process Rights by Failing to Ensure She Appeared via Video during Virtual Trial on Motion to Transfer Permanent Legal Guardianship; Whether Supreme Court Should Exercise Supervisory Authority to Require That Trial Courts in Child Protection Cases Ensure That All Participants Appear via Video during Virtual Trials or Waive Their Rights to Do So after Canvass. The minor child was adjudicated as neglected in October 2019, and the Appellate Court affirmed the judgment in an appeal by the respondent mother in *In re Aisjaha N.*, 199 Conn. App. 485, cert. denied, 335 Conn. 943 (2020). In October 2020, the petitioner, the Department of Children and Families, filed a motion to vest permanent legal guardianship of the minor child in her maternal grandmother. The trial on the motion was held on January 25, 2021, via the Microsoft Teams videoconferencing platform due to the COVID-19 pandemic. The respondent did not appear at the virtual trial via two-way video imaging and instead participated by telephone only. Counsel for the respondent initially indicated that the respondent did not want to testify but later represented after closing argument that the respondent wanted to testify. The trial court did not canvass the respondent as to whether she wanted to appear via two-way video imaging for purposes of her testimony. Before the respondent’s testimony, the petitioner stated for the record that the respondent “is currently just on the phone, she’s not on video.” All counsel stated that they did not object to the respondent’s audio-only testimony. The respondent provided brief testimony, and the trial court indicated that it would issue a written memorandum of decision on a later date. It did so and granted the petitioner’s motion to transfer legal guardianship of the minor child to the material grandmother. The respondent appealed the trial court’s judgment to the Appellate Court, and the Supreme Court transferred the appeal to its own docket. The Supreme Court will decide whether the trial court violated the respondent’s due process rights by failing to ensure that she was present by two-way video technology at the virtual trial conducted via Microsoft Teams in connection with the motion to transfer permanent legal guardianship of the minor child. It will also decide whether it ought to exercise its supervisory authority to reverse the trial court’s judgment pursuant to a procedural rule that would require trial courts conducting virtual trials in child protection cases to ensure that all participants appear by two-way video technology or otherwise waive their rights to do so after a brief canvass. The petitioner argues that the respondent’s unpreserved first claim is not

reviewable under *State v. Golding*, 213 Conn. 233 (1989), because the record is inadequate, the respondent waived her right to appear via video, and any constitutional error would be harmless because of the overwhelming evidence in support of its motion. The petitioner argues in response to the respondent's second claim that the exercise of the Supreme Court's supervisory authority is not warranted in light of existing precedent standing for the proposition that telephonic testimony is constitutional in the child protection context.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

IN RE RILEY B., SC 20613
Juvenile Matters at New Haven

Child Protection; Whether Denial of Motion to Intervene to Seek Posttermination Visitation is Appealable Final Judgment; Whether Trial Court Properly Dismissed Respondent's Motion to Intervene on Res Judicata Grounds and without Opportunity for Respondent to Show Material Change in Circumstances; Whether Posttermination Visitation May Be Sought After Termination of Parental Rights. The trial court terminated the parental rights of the respondent mother in the minor child in January 2020, and that judgment was affirmed on appeal in *In re Riley B.*, 203 Conn. App. 627, cert. denied, 336 Conn. 943 (2021). The respondent subsequently filed a motion seeking posttermination visitation with the minor child pursuant to *In re Ava W.*, 336 Conn. 545 (2020), which provides for and governs such motions. The trial court denied the motion on the merits in September 2020, noting that *In re Ava W.* had not addressed motions for posttermination visitation made after the termination of the movant's parental rights and that the respondent had not demonstrated that posttermination visitation was "necessary or appropriate to secure the welfare . . . of the child" pursuant to *In re Ava W.* In October 2020, the respondent filed a motion to intervene in the child protection action that also requested posttermination visitation with the minor child on the ground that there had a positive material change in circumstances since the denial of her prior motion that warranted visitation. The trial court dismissed the motion to intervene on the ground of res judicata in that it had treated the respondent as a party in deciding her prior motion on the merits. The respondent appealed from the trial court's dismissal of her motion to intervene to the Appellate Court, and the Supreme Court transferred the appeal to its docket under Practice Book § 65-2. The Supreme Court will

decide the threshold jurisdictional issue of whether the appeal should be dismissed for lack of a final judgment because the respondent does not have a colorable claim to intervention as of right. If it determines that there is a final judgment, the Supreme Court will also decide whether the trial court properly dismissed the respondent's motion to intervene seeking posttermination visitation with the minor child on res judicata grounds where she argues that the trial court lacked subject matter jurisdiction to decide her prior motion for posttermination visitation. The Supreme Court will further decide whether the trial court properly dismissed the respondent's motion to intervene where she argues that she was not afforded an opportunity to persuade the trial court that there had been a material change in circumstances warranting visitation. Finally, the respondent asks that, before the case is remanded to the trial court for further proceedings, the Supreme Court clarify the standard governing motions for posttermination visitation with respect to whether such a motion may be filed after the termination of the movant's parental rights.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

IN RE ANNESSA J., SC 20614

Juvenile Matters at Hartford

Child Protection; Whether Mother's Unpreserved Constitutional Claims on Appeal Regarding Virtual Termination Trial Were Unreviewable under *State v. Golding*; Whether Appellate Court Properly Expanded *In re Ava W.* Standard for Deciding Motions for Posttermination Visitation. In 2018, the minor child was adjudicated neglected and committed to the custody of the petitioner, the Department of Children and Families. In 2019 and 2020, the trial court approved a permanency plan of adoption and the termination of the parental rights of the respondent mother and father. The termination of parental rights trial was held in September and October 2020 via the Microsoft Teams videoconferencing platform due to the COVID-19 pandemic. The trial court thereafter issued a memorandum of decision terminating the respondents' parental rights. It also denied the respondents' motions for posttermination visitation, finding that they had not "met their burden to prove posttermination visitation . . . is necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the minor child]" in accordance with *In re Ava W.*, 336 Conn. 545 (2020), which governs such motions. The respondents appealed to the Appellate Court (206 Conn. App.

572), which affirmed the trial court's judgment as to the termination of the respondents' parental rights but reversed it as to the denials of their motions for posttermination visitation. The mother claimed as to the termination of her parental rights that the virtual trial violated (1) her right to a "public civil trial at common law" under the Connecticut constitution and (2) her right to due process under the federal constitution because she was prevented from confronting witnesses. These claims were unreserved, and the Appellate Court therefore considered whether they were reviewable under *State v. Golding*, 213 Conn. 233 (1989). The court concluded that the state constitutional claim was unreviewable under *Golding* because the mother did not establish that she had a fundamental state constitutional right to an in court, in person termination trial. The court also concluded that the due process claim was unreviewable under *Golding* because the record was inadequate to review the claim where there was no evidence regarding relevant COVID-19 health and safety considerations. The Appellate Court agreed with the respondents, however, that the trial court applied the incorrect legal standard in deciding their motions for posttermination visitation and held that it erred in determining that they had to show that posttermination visitation was "required for [the minor child's] well-being, welfare, protection, proper care or suitable support." Instead, the Appellate Court concluded that, per *In re Ava W.*, the proper standard is "whether posttermination visitation is 'necessary or appropriate' . . . taking into account the traditional best interest analysis and the type of additional factors identified in *In re Ava W.*" The Supreme Court will decide in the mother's certified appeal whether the Appellate Court properly held that her claims regarding the constitutionality of the virtual trial were unreviewable under *Golding*. The Supreme Court will further decide in the petitioner's certified appeal whether the Appellate Court properly expanded the *In re Ava W.* standard for deciding motions for posttermination visitation.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

*Jessie Opinion
Chief Staff Attorney*

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-0002: Targeted Case Management (TCM) for Integrated Care for Kids (InCK) in New Haven

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2022, this SPA will amend Attachments 3.1-A, 3.1-B, and 4.19-B of the Medicaid State Plan in order to establish a new Targeted Case Management (TCM) target group for children under age twenty-one and women who are pregnant or up to twelve months post-partum who reside in New Haven, Connecticut. Eligible individuals in the target group will be assessed to determine the appropriate level of need for each person into one of three tiers of Service Integration Level (SIL), which measures the degree to which each person has been determined to need TCM services. SIL Tier 1 reflects a low intensity of need and those members will not receive TCM services. SIL Tier 2 is reflects a moderate intensity of need and those members will receive moderate intensity of TCM services. SIL Tier 3 reflects a significant intensity of need and those members will receive more intensive TCM services. Based on available data, eligible individuals will be preliminarily attributed to TCM InCK providers and, where possible based on available data, assigned a preliminary SIL level for each calendar year.

All TCM InCK services are voluntary. Each Medicaid member can choose their TCM InCK provider and can opt out of TCM InCK or change TCM InCK providers at any time. TCM InCK will not duplicate or modify existing Medicaid covered services and members will continue to have access to the standard Medicaid benefit. TCM InCK providers must serve the New Haven area and have care coordinators and care coordinator supervisors on staff who meet the applicable qualifications.

TCM InCK providers will be paid a per member per month (PMPM) amount, which will be calculated by dividing a total annual amount of \$7 million (reduced by the amount to be projected to be paid for outreach and assessment PMPM payments, described below) by the number of estimated attributed eligible TCM InCK member-months and allocating the amounts so that the payment for SIL Tier 3 is significantly higher than the payment level for SIL Tier 2. Before a TCM InCK provider has assessed an individual to confirm that the person is either SIL Tier 2 or SIL Tier 3, for each applicable month, the TCM InCK provider provides outreach and assessment services to all attributed individuals across all SIL Tier levels to confirm each individual's SIL tier level. The outreach and assessment PMPM is anticipated to be a PMPM payment amount equivalent to 80% of the PMPM amount for SIL Tier 2 for all attributed members for each provider. Those outreach and assessment payments will be available no longer than six months after the individuals

were first attributed to the TCM InCK provider. All of these methodologies are subject to change based on additional analysis and stakeholder engagement. DSS anticipates that, effective on or after January 1, 2023, an alternative payment methodology (APM) will be implemented for TCM InCK where providers will be required to complete additional reporting in order to receive the full level of PMPM payments. DSS anticipates that effective on or after January 1, 2024, the APM will be enhanced so that a specified percentage of the PMPM payments will be withheld to be allocated based on TCM InCK providers' performance on quality measures that will be designed.

The purpose of this SPA is to improve care coordination and improve physical and behavioral health outcomes for the target population specified above, consistent with the state's federal InCK grant with the Center for Medicare and Medicaid Innovation (CMMI) within CMS. The City of New Haven was selected as Connecticut's pilot location for the InCK program after a competitive selection process was initiated and completed by DSS. In March 2019, DSS selected Clifford Beers Clinic in New Haven as the Local Lead Organization for Connecticut's application to CMMI for the state's participation in the federal InCK grant program. In December 2019, CMS announced that it approved Connecticut's InCK application. DSS and Clifford Beers Clinic, together with various state agency and non-governmental stakeholders, have been working to develop an InCK proposal to improve the lives of children in New Haven.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately \$7 million in State Fiscal Year (SFY) 2023 and \$7 million in SFY 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: <https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments>. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference "SPA 22-0001: TCM for InCK in New Haven."

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 27, 2021.

Connecticut Housing Finance Authority

Notice of Intent to Amend Procedures

In accordance with Section 1-121 of the Connecticut General Statutes, NOTICE IS HEREBY GIVEN that the Connecticut Housing Finance Authority proposes to amend Procedures:

Statement of Purpose:

To amend the Procedures of the Authority, specifically section III(E) Single Family Housing, Emergency Mortgage Assistance Payment Program, as described below.

Summary of Proposed Procedures Change:

The Emergency Mortgage Assistance Payment Program Procedures are being amended in accordance with the Public Act 21-101 to provide emergency lien assistance and to otherwise expand certain existing provisions.

Copies of the proposed Procedures (III(E) Single Family Housing, Emergency Mortgage Assistance Payment Program) may be obtained by visiting www.chfa.org. All interested persons may submit written data, views and arguments in connection with the above-stated proposed Procedures by email to PublicComment@chfa.org or by mail to attention Kelly Ryder, Connecticut Housing Finance Authority, 999 West Street, Rocky Hill, CT 06067 no later than 30 days after the publication of this notice.
