

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*
