CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXIII No. 19 November 9, 2021 276 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

Syllabuses and Indices of court opinions by
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Tel. (860) 757-2250

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

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ANTHONY A. *v.* COMMISSIONER OF CORRECTION* (SC 20499)

Robinson, C. J., and McDonald, Kahn, Ecker and Keller, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that the Department of Correction violated his constitutional rights to procedural due process in assigning him a certain sex treatment need score and to substantive due process in classifying him as a sex offender, even though he never had committed or been convicted of a sex offense. The petitioner had been convicted of unlawful restraint in the first degree and failure to appear, and had been found to be in violation of probation. Prior to the petitioner's incarceration, the state entered a nolle prosequi as to a charge of sexual assault in a spousal relationship after the petitioner's wife, M, recanted her statement to the police that the petitioner had sexually assaulted her during the same incident that formed the basis for the charges of which he was convicted. Following his release from incarceration, the petitioner pleaded guilty to new charges stemming from another incident and was sentenced to concurrent terms of incarceration. Upon his return to prison, the petitioner was notified that a classification hearing would be held to determine whether, on the basis of the prior charge of sexual assault in a spousal relationship, he would be assigned a sex treatment need score of greater than 1 and that, in making its determination, the department would be relying on the police report of the petitioner's arrest and the petitioner's Connecticut rap sheets. Prior to the hearing, the department denied the petitioner's requests that, at his hearing, he be permitted to present live witness testimony and to be represented by counsel. During the hearing, the petitioner denied sexually assaulting M and submitted several documents, including M's letter recanting her statement to the police, in support of his denial. Following the hearing, the hearing officer, T, notified the petitioner that she had assigned him a sex treatment need score of 3, that, in arriving at her decision, she reviewed not only the record concerning the earlier incident that led to the charge of sexual assault in a spousal relationship but also his complete Connecticut criminal record, including numerous corresponding police reports and arrest warrant applications, and that her supervisor, D, had reviewed and approved the petitioner's assigned sex treatment need score. Thereafter, the petitioner appealed, challenging the assigned score, and T and

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

D denied the appeal after discussing it briefly. As a result of his sex treatment need score, the petitioner could not be placed in a correctional facility lower than level three without authorization from the respondent, the Commissioner of Correction, which rendered him ineligible for a veterans program available only at a level two facility. He also was referred to the department's sex treatment program staff for an evaluation, but he refused to participate in the evaluation on the ground that the department had incorrectly classified him as a sex offender. In addition, the petitioner refused to sign his offender accountability plan, which resulted in his forfeiture of twenty-five days of earned risk reduction credit and his being barred from earning additional credit until he signed the plan, and it negatively impacted his eligibility for parole and community release. The habeas court rendered judgment denying the petitioner's habeas petition. With respect to the petitioner's procedural due process claim, the habeas court, applying the standard set forth in *Wolff* v. *McDonnell* (418 U.S. 539), considered and rejected each of the petitioner's contentions regarding the inadequacy of the process he was provided prior to being classified as a sex offender. The court also rejected the petitioner's claims that the sex offender classification violated his right to substantive due process and that his sex treatment need score constituted punishment not clearly warranted by law in violation of article first, § 9, of the Connecticut constitution. On the granting of certification, the petitioner appealed from the habeas court's judgment. *Held*:

1. The department violated the petitioner's constitutional right to procedural due process in classifying him as a sex offender, the petitioner not having been afforded all of the procedural protections required by *Wolff*: the petitioner was not provided an opportunity to call witnesses in his defense, as the department denied his request to call witnesses without knowing who the witnesses were or what they would say, or considering whether their presence would be unduly hazardous to institutional safety or correctional goals, and, under *Wolff*, in the absence of a showing by the department that the presence at the prison of the witnesses whom the petitioner planned to call would have been unduly hazardous to institutional safety concerns, the petitioner should have been permitted to call those witnesses; moreover, the petitioner was not provided adequate notice of the information on which department personnel would rely in determining his classification, as T conducted additional research after the classification hearing had concluded into the petitioner's criminal record, which included reviewing all of the petitioner's arrest records, in order to assess the reliability of M's recantation but never notified the petitioner that the facts of his past arrests would be used against him, and, under *Wolff*, the petitioner was entitled to this information to allow him an opportunity to marshal the facts in his defense, and the department did not satisfy the notice requirements of *Wolff* by notifying the petitioner that his Connecticut rap sheets would be reviewed as

part of the decision-making process; furthermore, the petitioner was not afforded an impartial decision maker to rule on his administrative appeal insofar as T and D ruled on that appeal from their own initial classification decision, and, although the petitioner was denied due process of law because of the manner in which the department conducted the classification hearing, this court concluded that there was sufficient evidence in the record to support the petitioner's classification as a sex offender in light of M's detailed statement to the police describing the petitioner's sexual misconduct and the petitioner's own statement to the police, which corroborated some of M's account of the incident.

2. The petitioner could not prevail on his claim that the habeas court incorrectly concluded that the department had not violated his state constitutional right to substantive due process by classifying him as a sex offender: contrary to the petitioner's argument, there was no evidence that the petitioner was classified as a sex offender on the basis of mental disability or psychiatric illness, and, therefore, because the petitioner was classified on the basis of neutral considerations that did not target a suspect class, his claim was subject to rational basis review rather than strict scrutiny; moreover, the petitioner's contention that the department's classification decision could not withstand rational basis review was unavailing, as the department's interests in effective population management and rehabilitation were both legitimate and rationally related to its classification policy and procedure, and the department's policy and process for classifying the petitioner as a sex offender did not come close to shocking the conscience.

3. The petitioner's classification as a sex offender on the basis of nonconviction information violated article first, § 9, of the Connecticut constitution, as the petitioner was not afforded the full panoply of the procedural protections set forth in *Wolff* prior to receiving that classification; accordingly, the habeas court's judgment was reversed, and the case was remanded with direction to issue a writ of habeas corpus and to direct the respondent to expunge the petitioner's sex treatment need score.

Argued December 10, 2020—officially released June 17, 2021**

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Sheldon* and *Norcott*, *Js.*, which reversed the habeas

** June 17, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court's judgment and remanded the case for further proceedings, and the respondent, on the granting of certification, appealed to this court, which affirmed the Appellate Court's judgment; thereafter, the petitioner filed an amended petition for a writ of habeas corpus, and the case was tried to the court, *Kwak*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Reversed*; *judgment directed.*

Vishal K. Garg, for the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (respondent).

Opinion

KELLER, J. In *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 166 A.3d 614 (2017) (*Anthony A. II*), this court affirmed the judgment of the Appellate Court, which concluded that the petitioner, Anthony A., had a protected liberty interest in not being incorrectly classified by the Department of Correction (department) as a sex offender for purposes of determining the petitioner's housing, security and treatment needs within the department.[1] Id., 674. Because the due pro-

[1] As a general matter, inmate "[c]lassification . . . does not involve deprivation of a liberty interest independently protected by the [d]ue [p]rocess [c]lause." *Bailey* v. *Shillinger*, 828 F.2d 651, 652 (10th Cir. 1987). Courts uniformly have held, however, that "an inmate who has not previously been convicted of a sex offense may be classified as a sex offender for purposes of a prison treatment program only if the prison affords him the procedural protections to which prisoners facing disciplinary sanctions involving liberty interests are generally entitled." *Gwinn* v. *Awmiller*, 354 F.3d 1211, 1218 (10th Cir.), cert. denied, 543 U.S. 860, 125 S. Ct. 181, 160 L. Ed. 2d 100 (2004); see also *Coleman* v. *Dretke*, 395 F.3d 216, 222 (5th Cir. 2004) ("prisoners who have not been convicted of a sex offense have a liberty interest created by the [d]ue [p]rocess [c]lause in freedom from sex offender classification and conditions"), cert. denied, 546 U.S. 938, 126 S. Ct. 427, 163 L. Ed. 2d 325 (2005); *Neal* v. *Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) ("the stigmatizing consequences of the attachment of the 'sex offender' label coupled with the subjection of the targeted inmate to a mandatory treatment program

cess clause prohibits the government from depriving a person of any such interest except pursuant to constitutionally adequate procedures, the case was remanded to the habeas court for a determination of whether the department had afforded the petitioner the process he was due prior to assigning him the challenged classification. Id., 686. Presently before us is the petitioner's appeal[2] from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court incorrectly determined that the respondent, the Commissioner of Correction, did not violate his right to procedural due process in classifying him as a sex offender.[3] The peti-

whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections").

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

[3] Because the appeal in *Anthony A. II* came to this court on a motion to dismiss, we took the facts alleged in the petition to be true; *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 670; including that the petitioner was "classified . . . as a sex offender, despite the fact that he had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. In its memorandum of decision, the habeas court found that, although the amended habeas petition "allege[d] that the assignment of a [sex treatment need] score [of 3] classifies the petitioner as a sex offender," in fact, "[t]he respondent merely has classified the petitioner as having sexual treatment needs, not as being a sex offender." Prior to February, 2012, the department's administrative directive 9.2 provided that all inmates were to be assessed for their "[s]ex offender treatment" need. Conn. Dept. of Correction, Administrative Directive 9.2 (8) (B) (6) (effective July 1, 2006). On February 23, 2012, pursuant "to the advice of the various [a]ssistant [attorneys general] who have assisted the [department] in litigation and policy . . . regarding sex treatment need scores," the department removed the word "offender" from the directive such that inmates would no longer be assessed for their sex offender treatment need but, rather, for their sex treatment need. All of the criteria for determining an inmate's sex treatment need remained the same, however, as did the penalties for an inmate's refusal to sign an offender accountability plan classifying him in need of such treatment. Moreover, the department's Objective Classification Manual provides that a sex treatment need score of 3 is given to "individuals [who] have a current conviction, pending charge *or known history of sexual offenses involving physical contact with the victim(s)* (necrophilia included)" and that "[a]n inmate who engages in predatory sexual behavior while incarcerated will [also] be given a score of 3." (Emphasis added.)

tioner also claims that the habeas court incorrectly determined that the challenged classification did not violate his right to substantive due process or his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution. We conclude that the petitioner was not afforded the procedural protections he was due prior to being classified as a sex offender and, therefore, that his classification violated his right to procedural due process under both the federal constitution and article first, § 9, of our state constitution.[4] We reject the petitioner's substantive due process claim. Accordingly, we reverse the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner was arrested and charged with several offenses, including sexual assault in a spousal relationship pursuant to General Statutes (Rev. to 2011) § 53a-70b, in connection with an incident that occurred on the evening of July 18 and the early morning hours of July 19, 2011, at the home of the petitioner's former wife, M. According to a police report, M informed the police that, on the night in question, she and the petitioner had been drinking and "smoking 'crack' " cocaine, which caused the petitioner to become paranoid and to act in a delusional manner. Believing that another person was in the house, the petitioner began searching for that person under the bed, in closets, and in the hallway outside the bedroom.

Conn. Dept. of Correction, Objective Classification Manual § III (D) (6), pp. 36, 37. Contrary to the habeas court's finding, therefore, although inmates are no longer assessed for their sex offender treatment need, the score assigned to the petitioner is reserved expressly for inmates with a "known history of sexual offenses"; id.; which is simply another way of saying inmates who are known sex offenders.

[4] As we explain more fully in part III of this opinion, we have long held that article first, § 9, of the Connecticut constitution is the criminal due process clause of our state constitution and that it affords no greater protections than the protections afforded under the federal constitution. See, e.g., *State* v. *Jenkins*, 298 Conn. 209, 259 n.39, 3 A.3d 806 (2010).

After repeatedly accusing M of having an affair, the petitioner "made her take off her clothing and [lie] on her back," whereupon he digitally penetrated her vagina and anus looking for " 'used condoms.' " Later, the petitioner became suspicious that another man had been using his video game system "and stuck [his] fingers inside [M's] vagina and anus again." When the petitioner continued to accuse her of having an affair, M, out of annoyance, lied to the petitioner that, in fact, she was having an affair with one of his friends, which caused the petitioner to become violent and to pour soda on M.

M informed the police that, following the soda incident, she went downstairs to shower and to get away from the petitioner. While she was showering, the petitioner entered the bathroom and threw cat litter, milk, flour and paint on her. He also slammed the shower door repeatedly in an apparent effort to "smash it." The petitioner then forced M back into the bedroom and onto the bed. When M attempted to get out of the bed, the petitioner restrained her and punched her in the face. M was able to summon the police when the petitioner left to use the bathroom. According to the responding officers, the house was in "shambles" when they arrived on the scene, with damage, "including but not limited to . . . broken doors, smashed glass windows, and red liquid splattered on [the] floor later identified as paint." The officers also observed bruising on M's arms and above her right eye. While being transported to a hospital, M informed the paramedics that the petitioner had sexually assaulted her, a claim she repeated to police officers when they interviewed her a short time later.

In the petitioner's statement to the police, he admitted to " 'getting high' " on cocaine and to questioning M about whether she was having an affair. The petitioner also stated that, throughout the night, as he lay in bed next to M, he touched the inside and outside of

her vagina despite her saying " 'no' " and that she was not in the mood, pushing his fingers away, and clenching her legs. The petitioner stated that, when M said "no," he would stop for a while before trying again, which happened "several times" throughout the night, and that, at one point, M "got [so] tired of him putting his fingers in her vagina [that] she . . . threw her phone at him." The petitioner stated that "he then took [the] phone and snapped it in half."

M subsequently recanted her statement to the police. In a notarized letter dated August 17, 2011, she stated that she "[did] not wish to pursue any . . . charges against [the petitioner]," that "the police report [concerning the night in question was] inaccurate" and that the petitioner "never sexually assaulted [her]." M explained that she and the petitioner "are very sexually active and [that] any marks [on her body that evening] came from [their] sexual activity . . . ." M further stated that her "face was injured when [she] came out of the shower and slipped on the wet floor," and that the petitioner "was not present" when she fell and "at no time tried to harm [her]." She concluded by asserting that "from the day [she] met [the petitioner] he [has] NEVER EVER [been] violent" and "has never laid a hand on [her] in any way." (Emphasis in original.)

On February 21, 2012, the prosecutor informed the trial court that she had met with M, who informed her that "she was abusing substances" on the night in question, that she no longer recalled her conversation with the police, and that she "now believes that something different happened [from the sexual assault that] was alleged to have happened . . . ." The prosecutor informed the court that M also stated that, "when she sobered up, she saw [that] what really happened . . . was not [that the petitioner had] sexually assault[ed] her," that, "when she . . . slipped and hit her head [in the bathroom] . . . she had a seizure and sometimes

. . . seizures make her believe things that are not actually true," and that she "has no memory of whatever she told the police, but [now] believes it to be . . . incorrect." Accordingly, the state entered a nolle prosequi on the charge of sexual assault in a spousal relationship. *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 671. The petitioner thereafter pleaded guilty to unlawful restraint in the first degree, failure to appear, and violation of probation, for which he was sentenced to an effective term of three years and six months of incarceration. *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 229, 122 A.3d 730 (2015) (*Anthony A. I*), cert. denied, 326 Conn. 668, 166 A.3d 614 (2017).

Upon his incarceration, the petitioner was classified pursuant to the department's administrative directive 9.2, which requires that "[e]ach inmate under the custody of the [respondent] . . . be classified to the most appropriate assignment for security and treatment needs to promote effective population management and preparation for release from confinement and supervision." Conn. Dept. of Correction, Administrative Directive 9.2 (1) (effective July 1, 2006) (Administrative Directive 9.2). An inmate's classification is based on the individual risk and needs of the inmate, which are determined by an assessment of seven risk factors and seven needs factors. Administrative Directive 9.2 (8) (A) and (B). For each factor, an inmate is assigned a score of 1 to 5, with 1 representing the lowest score and 5 representing the highest score. Administrative Directive 9.2 (6). Among the seven needs factors, inmates are assessed for their sex treatment need (STN). Administrative Directive 9.2 (8) (B) (6). An inmate's risk and needs level is used to determine "appropriate confinement location, treatment, programs, and employment assignment whether in a facility or the community." Administrative Directive 9.2 (3)

(A). Inmates are further provided an "overall classification assessment score" of 1 to 5 that corresponds to the highest rating assigned to any of the seven risk factors. Administrative Directive 9.2 (6) and (8) (C). "No inmate with [an STN] score of 2 or greater [may] be assigned an overall score below level 3 without authorization from the [respondent] or designee." Administrative Directive 9.2 (8) (C).

The department's Objective Classification Manual (manual) details the process for assigning an STN score. The manual provides that an inmate's STN score indicates whether they have "a record or known history of problem sexual behavior." Conn. Dept. of Correction, Objective Classification Manual § III (D) (6), p. 35 (2012) (Classification Manual). The manual further provides that, in assigning an STN score, the department may rely on "information acquired through [c]ourt [t]ranscripts, [presentence] [i]nvestigations (PSI), police reports, [department] [r]eports, Department of Children [and] Families . . . reports, etc." Id. "Information from charges which were nolled, acquitted, dismissed, withdrawn or dropped, which is part of a crime resulting in a conviction, [also] may be used to determine needs scores based [on] the description of the crime from [the relevant] police reports, [PSIs], or other reliable investigative reports." (Emphasis omitted.) Id., § III (A), p. 5. The manual further provides that a hearing is required before an STN score can be assigned based on "non-conviction information . . . ." Id., § III (D) (6), p. 36. An inmate who receives an STN score of 2 or higher "shall be referred to [the] sex treatment program staff for evaluation." Id. "Upon receipt of a referral, the sex offender program staff . . . conduct[s] an assessment to determine the inmate's eligibility to participate in sex offender programs. Inmates [are] prioritized for services based on clinical needs, motivation, available resources and release date." Conn. Dept. of Correction,

Administrative Directive 8.13 (7) (effective October 31, 2007).

On August 7, 2012, the petitioner learned that the department had assigned him an STN score of 3, which, under the manual, is given to inmates who "have a current conviction, pending charge or known history of sexual offenses involving physical contact with the victim(s) . . . ." Classification Manual, supra, § III (D) (6), p. 36. The petitioner's score was based on his and M's initial statements to the police recounting the events culminating in the petitioner's arrest on July 19, 2011. Because of his score, the petitioner's offender accountability plan (OAP) recommended that he participate in "sex treatment," stating that a failure to do so would "negatively impact" the petitioner's ability to earn risk reduction credit[5] and to participate in "supervised community release and/or parole." "The petitioner refused to sign the [OAP] and requested a hearing to prove that he had not sexually assaulted [M]. He claimed that the sex offender designation and treatment recommendation should be removed from his [OAP]. The department responded: 'You had a hearing on [July 7, 2012], and it was found to be verified in the police report that there was [nonconsensual] sexual contact. Therefore, your [STN] score . . . is accurate and will not be changed.' The petitioner's repeated efforts to modify his [OAP] to delete the sex offender designation were all unsuccessful." (Footnotes omitted.) *Anthony A.* v. *Commissioner of Correction*, supra, 159 Conn. App. 230.

On February 20, 2013, the then self-represented petitioner filed a petition for a writ of habeas corpus in which he claimed that he was incorrectly classified as a sex offender without due process of law. *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 672.

[5] Risk reduction credit is credit an eligible inmate may earn "toward a reduction of [his or her] sentence . . . ." General Statutes § 18-98e (a).

The habeas court concluded that the petitioner did not have a protected liberty interest in not being wrongly classified as a sex offender and dismissed the petition. Id., 673. The Appellate Court reversed the judgment and remanded the case to the habeas court, concluding that the petitioner did have such a protected liberty interest. Id., 674. This court thereafter affirmed the Appellate Court's judgment. Id., 686. In so doing, we explained that the Appellate Court, in reaching its decision, "first considered whether the petition had been rendered moot by the petitioner's release from prison prior to oral argument. . . . The [Appellate Court] observed that the petitioner had informed the court that, after his release, he had been arrested in connection with new charges and was being detained at New Haven Correctional Center. . . . Because of the petitioner's new arrest, the Appellate Court reasoned that there was a reasonable possibility that, should he return to prison, he will again be classified as being in need of sex offender treatment because the department [had] assigned him [an STN] score with a recommended sex offender treatment referral during his previous incarceration. . . . The [Appellate Court] concluded, therefore, [and we agreed] that the collateral consequences exception to the mootness doctrine applied." (Citations omitted; internal quotation marks omitted.) Id., 673–74; see id., 674 n.6.

On or about June 16 and 26, 2017, the petitioner pleaded guilty to the new charges and was sentenced to concurrent terms of incarceration. Following his return to the respondent's custody, on November 29, 2017, the petitioner was notified that a hearing would be held on December 27, 2017, to determine whether he would be assigned an STN score of greater than 1 based on his July 19, 2011 arrest for sexual assault in a spousal relationship. The petitioner was advised that, in making its determination, the department would rely

on the police report of that arrest as well as the petitioner's "CT State Rap Sheets." In advance of the hearing, the petitioner submitted an inmate request form requesting that, at his hearing, he be permitted to argue on his own behalf, to present documentary evidence, to present live witness testimony, and to be represented by counsel. The petitioner received a response from Elizabeth Tugie, the counselor supervisor of offender classification and population management at the department, granting his requests to argue on his own behalf and to present documentary evidence but denying his requests to present live witness testimony, stating that it was "[in]consistent with institutional safety concerns," and to be represented by counsel, stating that the hearing was "not intended to be adversarial but . . . to ensure that you are properly classified."

At his classification hearing, the petitioner denied sexually assaulting M, stating that M could not recall events from the night in question because she had been drinking and she suffers from seizures. The petitioner further stated that he and M had engaged in " 'normal sexual relations,' " that he "never touched [her] sexually without her consent and [that he] stopped touching her when she pulled away." In support of these assertions, the petitioner submitted several documents, including M's August 17, 2011 letter recanting her July 19, 2011 statement to the Meriden police and the transcript of his February 21, 2012 plea hearing, at which the prosecutor informed the trial court about M's recantation. The petitioner also submitted a letter from his former defense counsel that described an August 23, 2011 meeting counsel had with M, during which M "was adamant that [the petitioner] did not sexually assault her" and that "she did not want to press charges" against him. The letter further stated that M also informed counsel that she "wanted the protective order that was entered against [the petitioner] dropped."

Following the hearing, Tugie, who served as the hearing officer, notified the petitioner that he met "the requirements for assignment of an [STN] score as outlined in the [manual]" and, accordingly, that she had assigned him an STN score of "3VN."[6] The notice stated that, in arriving at her decision, Tugie had reviewed, in addition to the petitioner's July 19, 2011 arrest record, the petitioner's complete Connecticut criminal record, including "numerous corresponding police reports and arrest warrant applications . . . ." The notice further stated that Tugie's supervisor, David Maiga, had reviewed and approved the petitioner's assigned STN score and that, pursuant to the department's administrative directive 9.6, the petitioner could appeal the score, which he did. On March 5, 2018, Tugie and Maiga considered and denied the appeal after discussing it for approximately "thirty seconds." As a result of his STN score of 3, the petitioner could not be placed in a facility lower than level three without authorization from the respondent or the respondent's designee; see Administrative Directive 9.2 (8) (C); which rendered the petitioner, a veteran of the Iraq war, ineligible for a veterans program available only at a level two facility. Also, in light of his STN classification, the petitioner was once again referred to the sex treatment program staff for evaluation but refused to participate in that evaluation on the ground that the department incorrectly had labeled him a sex offender.[7] On March 20, 2018, the

[6] The manual defines the subcode "V" as: "Verified: Information used to classify the individual is documented in the official record and is considered accurate." Classification Manual, supra, § III (D) (6), p. 38. The manual further defines the subcode "N" as "[d]enot[ing] [that the] score [is] based on [nonconviction] information." Id.

[7] The habeas court found that the petitioner was referred to have his sexual treatment needs determined and that he "was determined [not to] require sexual offender treatment, and none was ordered or required by [the department]." That finding is contrary to the evidence presented to the habeas court. The petitioner testified that, as a result of his classification, he was asked to participate in an evaluation to determine whether he would receive sex treatment but that he refused to do so because he was "not a

petitioner was found guilty of refusing to sign his OAP. As punishment, the petitioner forfeited twenty-five days of earned risk reduction credit and was prospectively barred from earning additional risk reduction credit until he signed the OAP. The petitioner's refusal to sign the OAP also negatively impacted his eligibility for parole and community release.

On April 18, 2018, the petitioner, now represented by counsel, filed a third amended petition for a writ of habeas corpus in which he alleged that, in assigning his 2017 STN score, the department violated his constitutional right to procedural due process in the following ways: (1) by providing him inadequate notice of the evidence to be relied on in deciding his score; (2) by precluding him from presenting live witness testimony at the classification hearing; (3) by not having the hearing administered by an impartial decision maker; and (4) by basing the classification decision on insufficient evidence and failing to assess the credibility of M's allegations of sexual assault.[8] The petitioner further

sex offender." Tugie also testified that, although not certain, she did not believe that the petitioner met with the sex treatment program staff for an evaluation because the petitioner had refused to sign his OAP. Similarly, Maiga testified that, following his classification, a sex treatment referral was added to the petitioner's OAP. The petitioner refused to sign that OAP. According to Maiga, had the petitioner signed his OAP, he would have met with the sex treatment program staff to determine if he needed treatment. Accordingly, contrary to the finding of the habeas court, the petitioner was not evaluated by the sex treatment program staff for his sexual treatment needs, and, therefore, it was never determined that he did not require sex treatment.

[8] The petitioner also alleged that the department violated his right to procedural due process by not allowing him to be represented by counsel at his hearing, not providing him the opportunity to cross-examine his accusers, not providing him a sufficient explanation of the reasons for its classification decision, ignoring medical evidence he submitted, not providing a reasonable explanation for ignoring that evidence, and not adequately assessing the credibility or reliability of hearsay statements relied on to reach its classification decision. The petitioner failed to address these claims in his posttrial brief, and, accordingly, the habeas court deemed them abandoned. The petitioner does not raise any of those claims on appeal, and we do not discuss them.

alleged that, by classifying him as a sex offender, even though he had never committed or been convicted of a sex offense, the department violated his constitutional right to substantive due process as well as his right not to be "punished, except in cases clearly warranted by law" under article first, § 9, of the Connecticut constitution.[9]

A trial was held on the petition on July 10 and 30, 2018, at which Tugie testified that the petitioner's STN score was assigned based on nonconviction information, which she described as information relating to a crime of which an inmate has been convicted indicating that the inmate, in the course of committing that crime, engaged in conduct that constitutes "some semblance" of a sex offense, even though the inmate was not convicted of a sex offense. Tugie testified that, in assigning the petitioner his score, she had credited M's original statement to the police concerning the events of July 19, 2011, over M's subsequent recantation of that statement. Tugie further testified that, although the score was based on the petitioner's July 19, 2011 arrest for sexual assault in a spousal relationship, after the hearing, she requested and reviewed reports of other incidents of domestic disputes between the petitioner and M in order to assess the reliability of M's recantation. Tugie acknowledged that the petitioner was never notified that she would review these other records in making her decision. Tugie explained that, in her experience, it is "common for victims of domestic violence to recant their statements out of fear . . . [or] sometimes coercion" and that these other reports confirmed for her that M's recantation was not reliable.[10] Tugie noted,

[9] The petitioner further alleged a violation of his constitutional right to be free from cruel and unusual punishment but abandoned that claim in his posttrial brief.

[10] Tugie testified that she had training as a "domestic violence facilitator" but did not provide any specific details as to what that role is or what the training for it entailed. It is unclear from the record whether the training Tugie received qualified her to assess the reliability of M's recantation in light of domestic disputes between the petitioner and M.

moreover, that she took into account the petitioner's own statements to the police following his July 19, 2011 arrest in determining the petitioner's score.

Tugie's supervisor, Maiga, also testified at the habeas trial. Maiga stated, among other things, that the department no longer classifies inmates as "sex offenders" but, rather, as inmates "having a sexual treatment need."[11] Maiga further testified that he first became aware of the petitioner's case following the Appellate Court's decision in *Anthony A. I* and that he and Tugie had discussed the impact of that decision on the department's classification policies before assigning the petitioner an STN score in 2017. Maiga explained that, under administrative directive 9.2 (8) (C), the petitioner was required to reside at a level three or higher facility based on his STN score and that such facilities are some of the more secure and restrictive housing options within the department.

Finally, the petitioner called Amanda Kingston, a forensic psychiatrist, to testify about an independent review of the petitioner's medical record she conducted to determine if he had a need for sex offender treatment. Kingston's conclusions are summarized in a report dated February 9, 2018, which was entered into evidence. In her report, Kingston noted that, although the petitioner previously has received several psychiatric diagnoses, his "psychiatric records do not indicate any history of problem sexual behaviors . . . ." The report concludes that the July 19, 2011 incident between the petitioner and M "appears to have occurred in the setting of psychosis due to [the petitioner's] underlying schizoaffective disorder [as] exacerbated by his cocaine use at the time" and does not "indicate an underlying sexual disorder or paraphilia." Kingston opined that "sexual offender treatment would not address the underlying risk factors that led to [the petitioner's] sex-

[11] See footnote 3 of this opinion.

ual behaviors in 2011" and that treatment focused on his underlying risk factors would be more appropriate.[12] Kingston testified that, due to time constraints, she was unable to interview the petitioner before drafting her report but that she did interview him twice after completing it and that those interviews had not changed her opinion.

On February 25, 2019, the habeas court issued a memorandum of decision in which it denied the petitioner's habeas petition. With respect to the petitioner's procedural due process claim, the court applied the standard set forth in *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), in which the United States Supreme Court held that "due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest"; *Superintendent* v. *Hill*, 472 U.S. 445, 453, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); which include "(1) advance written notice of the [action to be taken]; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and [to] present documentary evidence . . . and (3) a written statement by the [fact finder] of the evidence relied on and the reasons for the . . . action." Id., 454. The habeas court then considered and rejected each of the petitioner's contentions regarding the inadequacy of the process he was provided prior to being classified as a sex offender. With respect to the petitioner's claim that Tugie improperly refused to allow him to present live testimony at the

[12] On July 17, 2018, the petitioner became parole eligible. In advance of his parole eligibility, the petitioner refused a sex offender evaluation by the Board of Pardons and Paroles (board). As a result, David Rentler, the supervising psychologist for the board, was asked to review the petitioner's case to determine whether that evaluation would be required before the petitioner may receive a parole hearing. Rentler concluded that the evaluation was not required because the petitioner's conduct did "not appear to have an underlying sexual motivation" but, rather, resulted from "paranoia and suspicious beliefs likely induced by [drug use]."

hearing, the court observed that "it is not [the department's] policy to permit live witness testimony because of safety and security concerns" and that "the petitioner does not have a due process right to present the testimony of live witnesses, in particular not civilians such as [M], who is the protected person in a criminal protective order issued by a court.[13] The [department] had a reasonable basis to exclude such witnesses and properly used discretion when denying the petitioner's request to present live witnesses at the classification hearing." (Footnote added.)

The habeas court also rejected the petitioner's contention that there was insufficient evidence to support his STN score. The court explained that, in the prison context, due process is satisfied so long as there is " 'some evidence' " in the record supporting the challenged decision and that, in the present case, that standard was more than met in light of M's detailed statement to the police recounting the petitioner's sexual misconduct and "the petitioner's own statement regarding [his] several attempts at initiating sex by digitally penetrating [M's] vagina, despite her saying no, repeatedly." (Internal quotation marks omitted.) In reaching its decision, the habeas court rejected the petitioner's contention that, under *Luna* v. *Pico*, 356 F.3d 481, 489 (2d Cir. 2004), and *Sira* v. *Morton*, 380 F.3d 57, 78 (2d Cir. 2004), Tugie was required to conduct an independent investigation into M's "background and reputation for truthfulness" before she could rely on M's recanted statement, stating that the cited cases established no such requirement.

The habeas court next addressed the petitioner's contention that the department improperly failed to notify

[13] It is undisputed that the petitioner did not seek to call M as a witness, only his former defense counsel, the police officers who took M's statement, and Kingston.

him that it would consider his entire criminal record, not just the record of his July 19, 2011 arrest, in determining his STN score. The court concluded that the notification received by the petitioner, which stated that the department would consider his "CT State Rap Sheets," provided sufficient notice that "any law enforcement documents relating to his arrests and convictions could be reviewed." The court also credited Tugie's testimony that the petitioner's STN score was not based on any records other than his July 19, 2011 arrest record. To the extent Tugie reviewed any of the petitioner's other criminal records, the court concluded that it was strictly for purposes of deciding whether M's recantation was reliable. Finally, the court summarily rejected the petitioner's contention that Tugie and Maiga were not impartial decision makers, stating that there was simply no evidence to support that claim.

With respect to the petitioner's claim that the sex offender classification violated his right to substantive due process, the habeas court explained that, because the petitioner is not a member of a protected class, the department needed only a rational basis for classifying him as a sex offender, and that the department's "interest in managing the inmate population, assessing inmates for treatment while incarcerated, and facilitating their eventual transition back into society in a manner that safeguards society from repeat offenses" provided such a basis. In reaching its determination, the court rejected the petitioner's contention that "his classification is inherently suspect because he has mental disabilities [and because] the classification procedures target individuals with mental disabilities," stating that the petitioner had failed to present "any evidence that sexual disorders are mental disabilities" or that the "[department's classification system] targets such individuals." The court also rejected the petitioner's claim that his STN score constituted punishment

not clearly warranted by law in violation of article first, § 9, of the Connecticut constitution, concluding that the petitioner was not being punished as a result of his STN score but, rather, for refusing to sign his OAP.

On appeal to this court, the petitioner renews his claims before the habeas court that his classification as a sex offender violated his procedural and substantive due process rights, as well as his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution.

I

We begin with the petitioner's claim that the habeas court incorrectly concluded that he received all the process he was due prior to being classified as a sex offender. The petitioner contends that the department's "blanket policy" against live witness testimony violated *Wolff*'s mandate that inmates must be allowed to present live testimony unless doing so would "be unduly hazardous to institutional safety or correctional goals." *Wolff* v. *McDonnell*, supra, 418 U.S. 566. The petitioner further contends that the habeas court incorrectly determined that the department provided prior written notice of the evidence it would rely on in assigning him his STN score because the notification he received stated that, in addition to his July 19, 2011 arrest record, the department would review his "CT State Rap Sheets." The petitioner further contends that the habeas court incorrectly determined that Tugie and Maiga were impartial decision makers despite the fact that (1) they were aware of and had discussed his case following the Appellate Court's decision in *Anthony A. I*, and (2) they, rather than a disinterested decision maker, ruled on his appeal from the decision that they themselves had made. Finally, the petitioner contends that the habeas court incorrectly determined that Tugie was not required to undertake an independent credibility

assessment of M before crediting her July 19, 2011 statement to the police, a mistake the petitioner claims was compounded by the habeas court's clearly erroneous factual finding regarding M's reason for recanting that statement, namely, her inability to recall the events in question.

The respondent argues in response that the habeas court correctly determined that the petitioner received all of the protections he was due under *Wolff*, including adequate notice of the evidence the department would rely on in deciding his classification. The respondent contends that *Wolff* did not establish an absolute right to present live witness testimony, that Tugie testified that department "policy does not permit live witness testimony because of safety and security concerns," and that, under *Wolff*, it was proper for the habeas court to defer to that policy. The respondent further argues that the habeas court properly rejected the petitioner's claim that Tugie and Maiga were not impartial decision makers in light of the petitioner's failure to present any evidence to support that claim. Finally, the respondent argues that the habeas court correctly determined that there was sufficient evidence to support the petitioner's STN score in light of M's detailed statement to the police describing the petitioner's sexual misconduct and the petitioner's own statement, which largely corroborated M's statement.

We conclude that, although the petitioner was afforded some of the procedural protections required by *Wolff*, it is clear that he was not provided all of them. In particular, he was not provided (1) an opportunity to call witnesses in his defense, (2) adequate notice of the information to be relied on in determining his classification, (3) and an impartial decision maker to rule on his appeal.

Whether the department violated the petitioner's procedural due process rights presents a question of law

over which our review is plenary. See, e.g., *State* v. *Harris*, 277 Conn. 378, 393, 890 A.2d 559 (2006). It is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338, 952 A.2d 764 (2008).

In *Wolff*, the United States Supreme Court held that, when a disciplinary hearing may result in the loss of good time credits, due process requires that an inmate receive (1) advance written notice of the disciplinary charges, (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present documentary evidence in his defense, (3) an impartial decision maker, and (4) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action. *Wolff* v. *McDonnell*, supra, 418 U.S. 563–66, 571. In *Superintendent* v. *Hill*, supra, 472 U.S. 445, the Supreme Court expanded these protections to include a requirement that the fact finder's decision be supported by "some evidence" in the record. Id., 454. We previously have explained that "[the some evidence] standard is a lenient one, requiring only a modicum of evidence to support the challenged decision. [Id., 455]. Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. Id., 455–56; see also *Castro* v. *Terhune*, 712 F.3d 1304, 1314 (9th Cir. 2013) (characterizing test as minimally stringent)." (Internal quota-

tion marks omitted.) *Vandever* v. *Commissioner of Correction*, 315 Conn. 231, 245, 106 A.3d 266 (2014).

Although *Wolff* does not expressly require prior notice of the evidence to be relied on at the hearing; see *Wolff* v. *McDonnell*, supra, 418 U.S. 563; courts have recognized that such a requirement is implicit in the statement in *Wolff* that the notice must "inform [an inmate] of the charges [against him] . . . to enable him to marshal the facts and prepare a defense." Id., 564; see also, e.g., *Vitek* v. *Jones*, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (before prisoner may be transferred to mental hospital, *Wolff* requires prior "disclosure to the prisoner . . . of the evidence being relied upon" to support transfer); *Meza* v. *Livingston*, 607 F.3d 392, 409 (5th Cir. 2010) (concluding that, under *Wolff*, before parolee was labeled sex offender and required to participate in sex offender therapy, he was entitled to "disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense").

Federal courts uniformly have held that the due process requirements in *Wolff* apply to proceedings to determine whether an inmate who has not previously been convicted of a sex offense may be classified as a sex offender for purposes of rehabilitation, treatment, or parole. See, e.g., *Renchenski* v. *Williams*, 622 F.3d 315, 331 (3d Cir. 2010) (before inmate may be labeled sex offender and required to participate in sex therapy, he is entitled to " 'an effective but informal hearing,' " which includes protections outlined in *Wolff*), cert. denied, 563 U.S. 956, 131 S. Ct. 2100, 179 L. Ed. 2d 926 (2001); *Meza* v. *Livingston*, supra, 607 F.3d 410 ("[b]ecause [a parolee's] interest in being free from sex offender conditions is greater than an inmate's interest in [good time] credits, [the parolee] is owed, at a minimum, the same process due to inmates under *Wolff*"); *Gwinn* v. *Awmiller*, 354 F.3d 1211, 1218–19 (10th Cir.)

(because classification as sex offender reduces rate at which inmate can earn good time credits, inmate is entitled to procedural protections in *Wolff*), cert. denied, 543 U.S. 860, 125 S. Ct. 181, 160 L. Ed. 2d 100 (2004); *Neal* v. *Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (because classification of inmate as sex offender and mandatory successful completion of sex offender treatment program as precondition for parole eligibility implicate protected liberty interest, inmate is entitled to procedural protections in *Wolff*).

Although the court in *Wolff* cautioned that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority"; *Wolff* v. *McDonnell*, supra, 418 U.S. 566; it held that "inmate[s] facing disciplinary proceedings should be allowed to call witnesses"; id., 566; and recommended that prison officials who deny them that right "state [their] reason[s] for [doing so], whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." Id. Thus, courts have interpreted *Wolff* as establishing a right to call witnesses, albeit one that can be denied for good reason. See, e.g., *Ponte* v. *Real*, 471 U.S. 491, 495, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985) ("[c]hief among the due process minima outlined in *Wolff* was the right of an inmate to call and present witnesses . . . in his defense before the disciplinary board"); id., 499 (declining to place burden on inmate to show why action of prison officials refusing to call witnesses was arbitrary or capricious); *Renchenski* v. *Williams*, supra, 622 F.3d 331 (recognizing inmate's right to "present witness testimony . . . except upon a finding, not arbitrarily made, of good cause for not permitting such presentation" (internal quotation marks omitted)); *Meza* v. *Livingston*, supra, 607 F.3d 409 (inmate was entitled to "a hearing at which [he] is permitted to . . . call wit-

nesses"); *Gwinn* v. *Awmiller*, supra, 354 F.3d 1219 (inmate was entitled to "opportunity to present witnesses and evidence" in defense of charges); *Neal* v. *Shimoda*, supra, 131 F.3d 831 (stating that hearings to classify inmates as sex offenders do not implicate same safety concerns present in *Wolff* such that "an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense").

In the present case, it is undisputed that the department denied the petitioner's request to call witnesses without knowing who the witnesses were or what they would say, or considering whether their presence would be "unduly hazardous to institutional safety or correctional goals . . . ." *Wolff* v. *McDonnell*, supra, 418 U.S. 566. As previously indicated, the petitioner had planned to call his former defense counsel, the police officers who took M's statement, and Kingston, the forensic psychiatrist who interviewed him. According to Tugie, it did not matter whom he planned to call because the department's policy is not to allow live witness testimony under any circumstance.[14] Tugie also testified, however, that the department routinely allows police officers, lawyers, and medical staff into its facilities to meet with inmates, a practice that belies the safety and security concerns invoked to deny the peti-

[14] Contrary to the habeas court's determination, the witnesses the petitioner sought to present at his hearing, in particular the police officers who took M's statement and the petitioner's former defense counsel, to whom M retracted her sexual assault allegation, were relevant to the department's classification decision because each of those witnesses could have provided testimony that described the context and, thus, the reliability of both M's allegation and subsequent recantation. As previously indicated, Tugie testified that she conducted additional research into the petitioner's arrest record following the classification hearing to assist her in deciding the credibility of M's recantation and, therefore, the credibility of the petitioner's assertions that M's initial statement to the police was the product of her drug and alcohol use on the night in question.

tioner's request to call police officers, a lawyer, and a medical professional as witnesses at his hearing. Under *Wolff*, in the absence of a showing by the department that their presence at the prison would have been unduly hazardous to institutional safety concerns, the petitioner should have been permitted to call these witnesses. See, e.g., *Redding* v. *Fairman*, 717 F.2d 1105, 1114 (7th Cir. 1983) (although "prison officials have the discretion to refuse inmates' requests for witnesses to protect institutional safety or to keep the length of the hearing within reasonable limits . . . in this case no witnesses were allowed to testify at either hearing, and there is no indication that the requests were unreasonable"), cert. denied, 465 U.S. 1025, 104 S. Ct. 1282, 79 L. Ed. 2d 685 (1984).[15]

We also agree with the petitioner that the department did not provide him with adequate notice of the evidence it would use in determining his classification. As previously indicated, Tugie testified that, after the classification hearing had concluded, she conducted additional research into the petitioner's criminal record, which included reviewing all of the petitioner's arrest records, in order to assess the reliability of M's recantation. She further testified that she never notified the petitioner that the facts of his past arrests would be used against him. Under *Wolff*, the petitioner was entitled to this information so as to allow him "a chance to marshal the facts in his defense . . . ." *Wolff* v. *McDonnell*, supra, 418 U.S. 564; see also *Vitek* v. *Jones*, supra, 445 U.S. 494–96.

We disagree with the habeas court that the department satisfied the notice requirements of *Wolff* by noti-

[15] To reiterate, it is undisputed that the petitioner did not seek to call M, a person protected under a criminal protective order, as a witness. See footnote 13 of this opinion. Had the petitioner sought to do so, we would be presented with entirely different circumstances than those of the present case.

fying the petitioner that his "CT State Rap Sheets" would be reviewed as part of the decision-making process. It is well established that a "rap sheet" is a criminal history report produced by the state police containing no specific details about the underlying facts of any of the listed charges or convictions. See *United States Dept. of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 752, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) ("[r]ap sheets . . . contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject"). Police reports, on the other hand, are quite detailed and may contain incomplete or factually inaccurate information.

The petitioner next argues that the decision to classify him as a sex offender was not rendered by impartial decision makers because Tugie and Maiga discussed his case following the release of the decision in *Anthony A. I.* We disagree. Although "*Wolff* holds that prisoners are entitled to impartial [decision makers]"; *White* v. *Indiana Parole Board*, 266 F.3d 759, 767 (7th Cir. 2001); courts have interpreted this requirement as "prohibit[ing] only those officials who have [had] a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role, in the circumstances underlying the charge from sitting on the disciplinary body." (Internal quotation marks omitted.) *Redding* v. *Fairman*, supra, 717 F.2d 1113. The record contains no evidence of any personal involvement by Tugie or Maiga in the factual circumstances on which they based their initial decision to classify the petitioner as a sex offender; nor has the petitioner identified any other evidence that could possibly call into question their ability to impartially carry out their classification duties. See, e.g., *Gwinn* v. *Awmiller*, supra, 354 F.3d 1221 (no due process viola-

tion even though hearing officer was named in inmate's action challenging prison classification system because evidence "[did] not indicate that [the officer] was incapable of fairly weighing the evidence presented . . . and determining whether [the inmate] had actually committed the alleged [misconduct]"); id., 1220–21 (noting that "courts should be alert not to sustain routine or pro forma claims of disqualification" because, "[f]rom a practical standpoint, [unwarranted disqualifications] . . . would heavily tax the working capacity of the prison staff" (internal quotation marks omitted)).

We agree with the petitioner, however, that Tugie and Maiga were not impartial decision makers when they ruled on the petitioner's appeal from their own initial classification decision. Although we are mindful not to overburden prison officials with needless disqualifications, the due process principle of fairness required that a different decision maker decide the merits of that appeal. See, e.g., *Withrow* v. *Larkin*, 421 U.S. 35, 58 n.25, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) ("[W]hen review of an initial decision is mandated, the [decision maker] must be other than the one who made the decision under review. . . . Allowing a [decision maker] to review and evaluate his own prior decisions raises problems . . . ." (Citations omitted.)); cf. *Reilly* v. *District Court*, 783 N.W.2d 490, 498 (Iowa 2010) (impartial decision maker was provided when inmate had "the opportunity to appeal the [disciplinary] decision to the deputy warden, who was not at the original hearing").

Finally, although, for the reasons previously stated, we conclude that the petitioner was denied due process of law because of the manner in which the department conducted his classification hearing, we agree with the habeas court that there was sufficient evidence in the record to support the department's classification decision. As we have explained, "the requirements of due process are satisfied if . . . there is any evidence in

the record that could support the conclusion reached . . . .'' (Citation omitted.) *Superintendent* v. *Hill*, supra, 472 U.S. 455–56. In the present case, the evidence consisted of M's detailed statement to two police officers (and the paramedics who attended her) that the petitioner had sexually assaulted her, and the petitioner's own statements to the police that corroborated some of M's account. As previously indicated, the petitioner informed the police that he continued to touch M's vagina despite her pushing him away, telling him '' 'no,' '' clenching her legs, and even throwing a phone at him. When combined with M's account, there was more than enough evidence to support the department's decision that the petitioner had likely committed a sex offense. See, e.g., *Vandever* v. *Commissioner of Correction*, supra, 315 Conn. 245 (''[the some evidence] standard is a lenient one'').

In arguing to the contrary, the petitioner cites *Luna* v. *Pico*, supra, 356 F.3d 481 and *Sira* v. *Morton*, supra, 380 F.3d 57, which he claims required Tugie to conduct an independent credibility assessment of M before crediting her statement. Both cases are readily distinguishable. In *Luna*, the court held that the evidence used to find an inmate, Alejandro Luna, guilty at two separate disciplinary hearings of assaulting a fellow inmate, Hector Lopez, failed to satisfy the '' 'some evidence' '' standard. *Luna* v. *Pico*, supra, 485, 489. The court stated that, at most, the evidence consisted of a bald accusation from Lopez, who later refused to testify at Luna's hearing. Id., 489. The court held that, under these circumstances, ''[d]ue process require[d] that there be some 'independent credibility assessment' '' of Lopez before crediting his bare accusation. Id., 489–90. In *Sira*, an inmate, Rubin Sira, following a disciplinary hearing, was found guilty of organizing inmates to participate in a prison demonstration. *Sira* v. *Morton*, supra, 65. The evidence relied on to find him guilty was supplied

by two prison officials who shared information they had learned from five confidential informants, none of whom testified at the hearing. Id., 63–65. Because the information provided to the prison officials by four of the informants constituted hearsay evidence and the fifth informant provided only conclusory accusations, the court determined that that evidence was not reliable and could not satisfy the "some evidence" standard in the absence of a credibility assessment of those informants and their underlying sources. Id., 79–81.

The present case is unlike *Luna* and *Sira* because, as previously explained, M initially provided a detailed, firsthand account to the police of the petitioner's sexual misconduct, which the petitioner himself partially corroborated in his own statement to the police. Accordingly, we conclude that there was sufficient, reliable evidence to support the petitioner's classification. We nonetheless acknowledge that, although there was sufficient evidence to support the classification, the testimony that the petitioner would have presented had he been allowed to do so may have cast that evidence in a different light sufficient to persuade Tugie that his sex offender classification was unwarranted. Moreover, as previously explained, because the petitioner was not afforded an opportunity to call witnesses in his defense, adequate notice of the evidence to be relied on by the department in making its classification decision, and an impartial decision maker ruling on his appeal, the department's classification of him as a sex offender violated his right to procedural due process.

II

We next address the petitioner's claim that the habeas court incorrectly concluded that the department did not violate his state constitutional right to substantive due process by classifying him as a sex offender. The petitioner argues that the department's system of classi-

fying prisoners as being in need of sex offender treatment "[is] subject to strict scrutiny under the state constitution because [it] targets a suspect class, namely, persons with mental disabilities," and that the classification system cannot withstand such scrutiny because "classif[ying] . . . the petitioner as having [an STN] score of 3, despite the fact that he has no need for [sex] treatment, is not narrowly tailored to further [the department's legitimate interest]" in "rehabilitating . . . and preparing [inmates] for reentry into society." The petitioner further argues that, "even if [his] claim is subject to rational basis review, the [department's] decision to classify [him] as a sex offender still violates substantive due process because the classification bears no reasonable relationship to any state purpose." We disagree.

"The substantive component of the [due process clause] . . . protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." (Internal quotation marks omitted.) *Greater New Haven Property Owners Assn.* v. *New Haven*, 288 Conn. 181, 201, 951 A.2d 551 (2008). "Despite the important role of substantive due process in securing our fundamental liberties, that guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. . . . Rather, [the guarantee] has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that our [n]ation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." (Internal quotation marks omitted.) Id., 202.

"[S]ubstantive due process analysis . . . provides for varying levels of judicial review to determine whether a state [policy] passes constitutional muster

in terms of substantive due process. . . . Similar to the analysis followed to determine equal protection challenges, [policies] that [impair] a fundamental constitutional right [or target] a suspect class . . . require that this court apply strict scrutiny to determine whether the [policy] passes [constitutional] muster . . . .'' (Citation omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 408, 119 A.3d 462 (2015); see also *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 831, 860 A.2d 715 (2004) (under strict scrutiny standard, ''state must demonstrate that the challenged [policy] is necessary to the achievement of a compelling state interest'' (internal quotation marks omitted)). Our state constitution provides: ''No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.'' Conn. Const., amend. XXI. We previously have held that ''[this] explicit prohibition of discrimination because of physical [or mental] disability defines . . . constitutionally protected class[es] of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test.'' *Daly* v. *DelPonte*, 225 Conn. 499, 513–14, 624 A.2d 876 (1993).

''In the absence of a claim of deprivation of a fundamental right [or the targeting of a suspect class], we have scrutinized such questions under a rational basis test. . . . [Under that standard] [t]he party claiming a constitutional violation bears the heavy burden of proving that the challenged policy has no reasonable relationship to any legitimate state purpose . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Matos*, 240 Conn. 743, 750, 694 A.2d 775 (1997); see also *Ramos* v. *Vernon*, 254

Conn. 799, 841, 761 A.2d 705 (2000) ("[e]qual protection rational basis review is for all material purposes . . . indistinguishable from the analysis in which we would engage pursuant to a [substantive] due process claim" (internal quotation marks omitted)).

We agree with the habeas court that there is simply no evidence that the petitioner was classified as a sex offender on the basis of mental disability or psychiatric illness. The habeas court credited Tugie's testimony that her decision to classify the petitioner as a sex offender was based on M's statement to the police that he sexually assaulted her and the petitioner's own statement to the police corroborating, in part, M's account. Tugie's reliance on this information was consistent with her testimony that an STN score that is assigned on the basis of nonconviction information means a score assigned on the basis of information contained in an official report relating to a crime of which an inmate has been convicted indicating that the inmate, in the course of committing that crime, engaged in conduct that bears "some semblance" of a sex offense. The petitioner has identified nothing in the record to suggest that Tugie considered his mental disability. Accordingly, because the petitioner was classified based on neutral considerations that do not target a suspect class, the petitioner's claim is subject to rational basis review. See, e.g., *United States* v. *LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) ("[s]ex offenders are not a suspect class"), cert. denied, 534 U.S. 1166, 122 S. Ct. 1181, 152 L. Ed. 2d 124 (2002).

The petitioner contends that the department's classification decision cannot withstand rational basis review because its practice of "leaving the [sex offender classification] in place for an inmate without [sex] treatment needs bears no reasonable relationship to [a department purpose]," that the procedure by which classifications are made, without input from a sex offender treatment

professional, is arbitrary, and that the restrictions on those inmates classified as sex offenders, precluding them from residing in a facility with a security level lower than three, is "entirely unrelated to treatment needs." These arguments are unavailing.

As previously indicated, the habeas court found that the petitioner's sex offender classification was "not punishment, but [a component] of [the department's] efforts to treat and rehabilitate [him]." Administrative directive 9.2 (1) explains that the policy served by classification, including sex offender classification, is "to promote effective population management and preparation for release from confinement and supervision." Sex offender classification, moreover, "focus[es] on the level of sexual [reoffense] risk and address[es] program intervention needs." Classification Manual, supra, § III (D) (6), p. 35. The department's interests in effective population management and rehabilitation are both legitimate and rationally related to its classification policy and procedure. See *McKune* v. *Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) ("[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism").

Accordingly, although the petitioner had every right to contest being classified as a sex offender on the basis of nonconviction information; see parts I and III of this opinion; the department's policy and process for classifying him as such do not come close to shocking the conscience. See *Waldman* v. *Conway*, 871 F.3d 1283, 1293 (11th Cir. 2017) (holding that classification of prisoner convicted of kidnapping minor as sex offender and conditions imposed thereto, including "requirement that he attend sex offender classes or therapy and his ineligibility for work release . . . are not so egregious as to shock the conscience" (internal quotation marks omitted)); *Coleman* v. *Dretke*, 395 F.3d 216,

224–25 (5th Cir. 2004) (denying claim that imposition of sex offender registration and therapy as conditions to parole of inmate not convicted of sex offense violates substantive due process because "sex offender treatment serves the government interest in protecting members of the community from future sex offenses" and therapy condition was not imposed "with the intent to injure"), cert. denied, 546 U.S. 938, 126 S. Ct. 427, 163 L. Ed. 2d 325 (2005). We therefore reject the petitioner's substantive due process claim.

III

We turn, finally, to the petitioner's claim that the habeas court incorrectly concluded that the department did not violate his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution, by classifying him as a sex offender on the basis of nonconviction information. As previously indicated, the habeas court rejected the petitioner's claim that his classification was "punishment" in violation of article first, § 9, concluding, instead, that "[t]he petitioner ha[d] punished himself by not signing his OAP and then receiving a disciplinary ticket for that refusal. . . . The negative consequences emanating from his own decision [not to] sign the OAP have resulted in the loss of [risk reduction credit] previously earned, the inability to earn [risk reduction credit], and inability to be confined in a lower security level facility where additional programs are available." (Citation omitted.) The habeas court also rejected the petitioner's contention that the restrictions imposed on him were not warranted by law within the meaning of article first, § 9, because "he has never been convicted of a sex offense and . . . there is insufficient credible evidence that [he ever engaged in] acts of sexual violence against [M]." The habeas court concluded, rather, that the evidence was more than sufficient to support

a finding that the petitioner had engaged in acts of sexual misconduct against M.

On appeal, the petitioner renews his claim before the habeas court that "[his] punishment . . . in the form of his classification as a sex offender is not warranted by law because [he] has never been convicted of a sex offense and there is not sufficient credible evidence to conclude that he ever committed a sex offense." We conclude that the petitioner's sex offender classification violated article first, § 9, because the petitioner was not afforded the process he was due under *Wolff* prior to receiving that classification.

Article first, § 9, of the Connecticut constitution provides that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law." We previously have held that this provision is the criminal due process clause of our state constitution and that it provides no greater protections than those available under the federal constitution. See, e.g., *State* v. *Jenkins*, 298 Conn. 209, 259 n.39, 3 A.3d 806 (2010) ("the defendant's reliance on [article first, § 9] is, in essence, superfluous, because, in the search and seizure context, [that section] is our criminal due process provision that does not provide protections greater than those afforded by either the fourth amendment [to the federal constitution] or its coordinate specific state constitutional provision, article first, § 7"); *State* v. *Mikolinski*, 256 Conn. 543, 555, 775 A.2d 274 (2001) ("[w]e have generally characterized article first, § 9, as one of our state constitutional provisions guaranteeing due process of law" (internal quotation marks omitted)); *State* v. *Lamme*, 216 Conn. 172, 184, 579 A.2d 484 (1990) (because article first, § 9, affords no greater rights than federal constitution, "the principles underlying constitutionally permissible *Terry*[16] stops . . . define when

[16] *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d (1968).

[investigative] detentions are 'clearly warranted by law' under article first, § 9" (footnote added)).

"Read in its entirety, the text [of article first, § 9] indicates that the [meaning] to be assigned to the phrase 'clearly warranted by law' depends on the particular liberty interest that is at stake. Such a construction is, of course, entirely consonant with the general contours of a constitutional safeguard rooted in flexible principles of due process." Id., 178. Thus, we have held that "[t]he historical roots of [the phrase] 'except in cases clearly warranted by law' appear . . . to provide protection for personal freedom through a blend of statutory and constitutional rights that, like the text of . . . article first, § 9, incorporates no single constitutional standard." Id., 179.

In the present case, the liberty interest at stake is a prisoner's right not to be incorrectly classified as a sex offender and subjected to all the burdens attendant to that classification. See, e.g., *Renchenski* v. *Williams*, supra, 622 F.3d 326 ("[i]t is largely without question . . . that the sex offender label severely stigmatizes an individual, and that a prisoner labeled as a sex offender faces unique challenges in the prison environment"). In determining what protections attach to that right, "we [must remember] that one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison. . . . Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (Internal quotation marks omitted.) *Vandever* v. *Commissioner of Correction*, supra, 315 Conn. 244; see also *Bell* v. *Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("[a] detainee simply does not possess the full range

of freedoms of an unincarcerated individual"); *Roque* v. *Warden*, 181 Conn. 85, 93, 434 A.2d 348 (1980) ("[p]risoners retain rights under the due process clause . . . but these rights are subject to reasonable restrictions imposed by the nature of the institution to which they have been lawfully committed" (citations omitted)). In other words, what is "warranted by law"; Conn. Const., art. I, § 9; for an incarcerated person is simply not the same as what is warranted for an unincarcerated person. As we explained in part I of this opinion, however, one of the rights that a prisoner retains while incarcerated is the right not to be classified as a sex offender on the basis of nonconviction information, without first being afforded the procedural protections set forth in *Wolff*. Because the petitioner did not receive the full panoply of those protections, we conclude that his classification violated article first, § 9, of our state constitution.

The judgment is reversed and the case is remanded to the habeas court with direction to issue a writ of habeas corpus and to direct the respondent to expunge the petitioner's STN score.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* COURTNEY G.*
(SC 20290)

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

Syllabus

Convicted of multiple counts of first degree sexual assault and risk of injury to a child in connection with the sexual abuse of S, the daughter of the

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

defendant's girlfriend, N, the defendant appealed. S first disclosed the abuse, which began when she was eight years old, at a meeting with several members of her family, including N, that occurred when S was seventeen. At trial, S testified that she was crying during the meeting. Thereafter, the trial court, over defense counsel's objection, allowed N to testify about S's demeanor during the meeting, and N also testified that S had been crying. The defendant testified at trial and denied any inappropriate contact with S. In response to a question from the prosecutor, the defendant stated that he had an interest in the case insofar as he did not want to go to jail and leave his children behind. During closing and rebuttal arguments, the prosecutor stated that the defendant, having been present in the courtroom and having listened to S and N testify, displayed a "lack of outrage" at the accusations against him. The prosecutor also purported to summarize the reasonable doubt standard, telling the jury that proof beyond a reasonable doubt is based on common sense and life experience and determined by a totality of the evidence rather than "just . . . one picky little point." The prosecutor also remarked on defense counsel's failure to cross-examine S, calling S's testimony "unchallenged and uncontroverted." On appeal, the defendant claimed that the trial court improperly admitted N's testimony about S's out-of-court demeanor and that the prosecutor made certain improper remarks during closing and rebuttal arguments. *Held*:

1. There was no merit to the defendant's claim that the admission of N's testimony regarding S's out-of-court demeanor was improper because any error relating to the admission of that testimony was harmless: N's testimony that S was crying during the family meeting was unlikely to have substantially swayed the jury's verdict because it was cumulative of other properly admitted evidence, namely, S's own uncontested testimony, of peripheral importance to the state's case, and did not relate to the elements of the crimes charged; moreover, defense counsel did not object to S's testimony that she cried during the family meeting, and counsel had the unfettered opportunity to cross-examine N on that point.
2. The defendant could not prevail on his claim that the prosecutor engaged in certain improprieties during closing and rebuttal arguments:

   a. The prosecutor did not violate the defendant's right to confrontation by commenting on his "lack of outrage" because that remark was a permissible comment on the defendant's testimonial demeanor: although it was unclear whether the prosecutor was referring to the defendant's demeanor while testifying, which is a permissible subject of commentary insofar as it constitutes evidence on which the jury may properly rely in assessing the defendant's credibility, or his courtroom demeanor unrelated to his demeanor while testifying, which is an improper subject of commentary, this court concluded that, when the prosecutor's remark was viewed in context, the jury reasonably would have construed it as

a reference to the defendant's testimonial demeanor, as the prosecutor immediately followed her remark with a description of the defendant's testimony on the witness stand; moreover, defense counsel did not object to the remark and, during his own closing argument, apparently construed it as a reference to the defendant's demeanor on the witness stand.

b. Certain remarks made by the prosecutor were not improper: the prosecutor's remarks regarding the defendant's "lack of outrage" did not improperly appeal to the jurors' emotions and passions but, instead, asked the jurors to assess the defendant's credibility in light of his testimonial demeanor and implicitly urged them to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying; moreover, the prosecutor did not improperly dilute the presumption of innocence or infringe on the defendant's right to testify by referring to the defendant's interest in the case or improperly express her personal opinion on the defendant's credibility by questioning inconsistencies in the defendant's testimony that he never was alone with S, as those comments were based on the defendant's properly admitted testimony and the inferences that reasonably could be drawn therefrom rather than on the prosecutor's personal opinion; furthermore, it was clear from the context that the prosecutor was referring to defense counsel's closing argument, and not to the defendant's testimony, when she stated that the jury could not consider the statement that the defendant is an innocent man wrongly accused, and, because that statement was consistent with both the law and the trial court's instructions, it did not improperly mislead the jury; in addition, the prosecutor's comments regarding S's lack of motive to lie and testimonial demeanor were not expressions of her personal opinion but called on the jurors to draw inferences based on their common sense and life experience, and, accordingly, the prosecutor did not improperly vouch for S's credibility.

c. Two of the prosecutor's remarks were improper: the prosecutor's description of the reasonable doubt standard was an improper statement of the law, as a reasonable doubt may be based on a single point, so long as that point has a foundation in the evidence and produces a real and honest doubt in the jurors' minds, or on an evidentiary consideration outside of the jurors' own common sense or life experience, and, in light of the fundamental role the reasonable doubt standard plays in the criminal justice system, counsel should utilize a previously approved definition or the one set forth in the trial court's jury instructions instead of paraphrasing the standard; moreover, the prosecutor improperly mischaracterized the evidence and risked diluting the state's burden of proof by informing the jury that S's testimony was "unchallenged and uncontroverted," because, although defense counsel did not cross-examine S, the defendant, during his testimony, expressly denied touching S inappropriately, and, contrary to the prosecutor's suggestion, defense

counsel was not required to cross-examine S in order to undermine her credibility or to prove the defendant's innocence.

d. Applying the factors set forth in *State* v. *Williams* (204 Conn. 523), this court could not conclude that the prosecutor's improper statements deprived the defendant of his right to a fair trial: neither of the improprieties were invited by the defense, they were isolated and infrequent, and the state's case was not so weak as to be overshadowed by them; moreover, defense counsel did not object to the prosecutor's misstatement of the reasonable doubt standard, that impropriety was not blatantly egregious or inexcusable, and was counterbalanced by defense counsel's frequent description of the high burden imposed on the state, and the trial court's instruction to the jury, which accurately described the reasonable doubt standard and directed the jurors to disregard counsel's recitation of the law to the extent that it differed from the court's own instructions, served to cure the impropriety; furthermore, although the prosecutor's improper reference to S's unchallenged and uncontroverted testimony was central to one of the critical issues in the case, namely, S's credibility in light of the lack of physical evidence or eyewitnesses, the trial court promptly issued the curative instruction requested by defense counsel, that instruction specifically targeted the impropriety, and, when that impropriety was viewed in the context of the whole trial, its impact was minimal, especially in light of the jury's finding of not guilty on certain other charges.

Argued October 22, 2020—officially released June 21, 2021**

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of two counts each of sexual assault in the first degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

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

attorney, and *Maxine Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. Following a jury trial, the defendant, Courtney G., was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the trial court improperly admitted evidence of the victim's out-of-court demeanor, and (2) the prosecutor made improper remarks during closing argument and rebuttal in violation of his sixth amendment right to confrontation and his fourteenth amendment right to a fair trial. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. The victim, S, was born in October, 1997. When S was four years old, her mother, N, began dating the defendant. By 2005, the defendant, N, and S lived together in an apartment on Poplar Street in New Haven. One day, when S was eight years old, she was home alone with the defendant while her mother was at work. S took a shower and then went into her bedroom to get dressed. S was wearing a tank top and underwear when the defendant approached her and asked her to come into the living room so he could apply lotion to her body. The defendant took S's hand and brought her into the living room, where he removed her tank top and applied lotion to her back, arms, and chest. The defendant then pushed S down onto the couch, removed her underwear, pushed her legs open, and licked her vagina. S was scared, and she tried to move the defendant's head away but was unable to do so. When the defendant was done, he told S not to say anything because her mother "would kill him." The

defendant sexually assaulted S in this manner more than once when they lived on Poplar Street.

When S was in seventh or eighth grade, she and her family, which included N, the defendant, and her two younger siblings, moved to an apartment on Read Street in New Haven. When S lived on Read Street, the defendant would enter S's bedroom and ask to see her naked. On more than one occasion, the defendant picked S up, brought her to his bedroom, put her on the bed, and held her down while he licked her vagina.

In March, 2015, when S was seventeen years old, she and her family lived in an apartment on Winchester Avenue in New Haven. S's bedroom was in the dining room, and a black curtain was hung in the doorway to separate the dining room from the kitchen. On March 8, 2015, S and her cousin, T, who was one year older than S, were getting ready to go out. T showered and then went into the dining room to dress while S showered. T was naked, except for her bra, and she sat on S's bed to put on her underwear. At this point, the defendant, who was in the kitchen, asked T if he could ask her a question. T responded in the affirmative, and the defendant told T she had to "promise that [she] wouldn't tell anybody about what he's about to ask." The defendant then asked T if she "shaved." T responded "no . . . ." The defendant asked T if he "can . . . see." T replied "[n]o. That's not appropriate."

After T was dressed, she went into the kitchen and noticed that she "could see straight through" the black curtain into the dining room. In light of T's state of undress and the ability to "see pretty much everything" in the dining room from the kitchen, T realized that the defendant had been referring to her vagina when he asked her if she shaved. Upset, T went into the bathroom to report the defendant's question to S. When S heard what the defendant had asked T, S began to cry.

That night, T made a series of phone calls to her mother, her aunt, and N. After receiving T's phone call, N was shocked and angry. N called the defendant at work and informed him that their relationship was over and that he should "come get [his] stuff." The defendant asked N, "why, [is it] because [he] asked [T] if she was a shaver?" Shortly after speaking to N, the defendant texted S and asked her if he was "a dead man walking."

The next day, there was a family meeting at which S, N, T, S's grandmother, and S's aunts were present. At the meeting, S disclosed that the defendant also had asked her if she shaved her vagina. S also revealed that the defendant had touched her breasts. S was "too scared" to disclose any further details of the defendant's sexual abuse because this was her "first time talking about it" and "everybody was staring at [her] . . . ." S and the others were crying during the meeting. A few days later, S and her mother reported the sexual abuse to the police.

The defendant was arrested and charged with three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1) and three counts of risk of injury to a child in violation of § 53-21 (a) (1). Following a jury trial, at which the defendant testified, the jury found the defendant not guilty of one count of sexual assault in the first degree and one count of risk of injury to a child but found the defendant guilty of the remaining charges.[1] The trial court sentenced the defendant to a total effective sentence of twenty years of imprisonment,

[1] Each count of sexual assault and risk of injury corresponded to a different time period and location: counts one and two were predicated on the defendant's conduct "on dates in 2005, in the area of Poplar Street," counts three and four "on dates between 2009 [and] 2010, in the area of Read Street," and counts five and six "on dates [between] 2011 [and] 2014, in the area of Winchester Avenue . . . ." The jury found the defendant not guilty of the crimes charged in counts five and six but found the defendant guilty of the crimes charged in counts one through four.

execution suspended after fifteen years, followed by fifteen years of probation. This appeal followed.[2]

I

The defendant first claims that the trial court improperly admitted N's testimony that S was crying during the March, 2015 family meeting because evidence of S's demeanor at the meeting was irrelevant and, even if relevant, more prejudicial than probative. The following additional facts and procedural history are relevant to our resolution of the defendant's claim.

Prior to trial, the defendant filed a motion in limine to preclude the state "from offering any 'demeanor evidence' unless the defendant opens the door by challenging [S's] testimony or credibility regarding any out-of-court statements or delayed reporting." (Footnote omitted.) Specifically, the defendant sought to exclude "testimony from witnesses concerning their observations of [S's] emotional state at the time of the disclosure, for example, whether [S] was crying, shaking, trembling, scared, or other similar information." The defendant filed a memorandum of law in support of his motion, in which he argued that, pursuant to *State* v. *Burney*, 288 Conn. 548, 954 A.2d 793 (2008), and *State* v. *Daniel W. E.*, 322 Conn. 593, 142 A.3d 265 (2016), evidence of a complainant's demeanor at the time of a delayed disclosure of sexual assault is inadmissible "unless the defendant opens the door by challenging the complainant's testimony or credibility regarding any out-of-court statements or delayed reporting. The demeanor testimony has minimal, if any, probative value unless the defendant challenges the complainant's credibility regarding any out-of-court statements or delayed reporting." The defendant further argued that evidence of S's demeanor at the time of her disclosure would be

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

unduly prejudicial because it "is likely to enflame the emotions, passions and sympathy of the jury."

At trial, S testified during the state's case-in-chief that she first reported the defendant's sexual abuse at the family meeting in March, 2015, when she told her mother, grandmother, aunts, and cousin that the defendant had touched her breasts. S further testified that, at the time of her disclosure, she, along with everyone else present at the meeting, was crying. Defense counsel did not object to or move to strike S's testimony regarding her demeanor at the time of her disclosure. Additionally, defense counsel did not cross-examine S and, therefore, did not challenge her credibility on the basis of her delayed disclosure of the abuse.

On the second day of the defendant's trial, the state presented the testimony of S's mother, N. In light of the defendant's pending motion in limine, the state made an offer of proof outside the presence of the jury regarding N's testimony of S's demeanor at the family meeting. During the offer of proof, N testified that she, S, and everybody else at the family meeting had been crying. Following the offer of proof, defense counsel objected to the admission of N's demeanor testimony, pointing out that he had not challenged S's credibility, and, "[a]s a result, this highly prejudicial, highly inflammatory testimony simply is not probative of anything at this point" pursuant to *Burney* and *Daniel W. E.* The state disagreed, arguing that nothing in *Burney* or *Daniel W. E.* precludes a witness from testifying about his or her observations. The trial court agreed with the state that N was not a constancy of accusation witness but, rather, a lay witness who was "entitled to testify to what she observed if it's . . . relevant evidence." The trial court found that N's proffered testimony was "relevant evidence for th[e] jury to consider" and that the probative value of N's testimony outweighed its prejudicial effect. Therefore, the trial court overruled defense counsel's

objection and permitted N to testify as to her observation of S's demeanor, but cautioned that it would not permit N to testify as to her "observations of other people in the room . . . ." Thereafter, the prosecutor asked N in front of the jury: "What did you notice about [S's] emotional state during the [family meeting]?" N responded that "[s]he was crying."

At the defendant's sentencing, defense counsel moved for a new trial, arguing, among other things, that "the court's evidentiary ruling concerning the admission of evidence for [S's] demeanor . . . was an error and warrant[s] a new trial." The trial court denied the motion. On appeal, the defendant renews his claim that the trial court improperly admitted N's testimony regarding S's demeanor at the family meeting, alleging that it was irrelevant and unduly prejudicial.

"We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "The trial court is given broad discretion in determining the relevancy of evidence and . . . in balancing the probative value of proffered evidence against its prejudicial effect." (Citations omitted; internal quotation marks omitted.) *State* v. *Willis*, 221 Conn. 518, 522, 605 A.2d 1359 (1992). "[I]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 243–44, 215 A.3d 116 (2019).

We need not address whether the trial court abused its discretion in admitting N's testimony regarding S's demeanor because, even if we assume, without deciding, that an evidentiary error occurred, the defendant

has failed to fulfill his burden of establishing harm. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id., 231–32.

N's testimony regarding S's demeanor at the family meeting was duplicative of S's testimony, which was admitted into evidence without objection or contradiction. Because N's demeanor testimony was cumulative of other properly admitted evidence, it was unlikely to have substantially swayed the jury's verdict. See, e.g., *State* v. *Bouknight*, 323 Conn. 620, 628, 149 A.3d 975 (2016) (improper admission of evidence was harmless because it was "cumulative of other properly admitted evidence" and "there was no evidence offered to contradict it" (internal quotation marks omitted)); *State* v. *Dehaney*, 261 Conn. 336, 364, 803 A.2d 267 (2002) ("[i]t is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely

cumulative of other validly admitted testimony" (internal quotation marks omitted)), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). Furthermore, although N was an important witness for the state, the specific statement at issue (i.e., "[s]he was crying") did not pertain to the elements of the crimes charged and was of peripheral importance to the state's case. Lastly, N's demeanor testimony was brief and subject to unfettered cross-examination. On this evidentiary record, we conclude that the allegedly improper admission of N's demeanor testimony was harmless.[3]

II

The defendant next claims that the prosecutor violated his sixth amendment right to confrontation and his fourteenth amendment right to a fair trial by making improper remarks during closing argument and rebuttal. Specifically, the defendant contends that the prosecutor violated his sixth amendment right to confrontation by commenting on his "lack of outrage" at trial. The defendant also contends that the prosecutor violated his fourteenth amendment right to a fair trial by (1) appealing to the emotions and passions of the jurors, (2) informing the jury that he had "a big, big interest in the outcome of this case," (3) improperly expressing a personal opinion on the defendant's credibility, (4) misleading the jury on the law and the evidence, (5)

[3] The defendant contends that "[t]he state's case cannot be considered a strong one [because] there was no corroborating physical evidence or witnesses to [S's] claims." See, e.g., *State* v. *Fernando V.*, 331 Conn. 201, 215–16, 202 A.3d 350 (2019) ("the state's case . . . was not an exceedingly strong one in light of the absence of corroborating physical evidence or any witnesses to the alleged sexual assaults" (internal quotation marks omitted)); *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012) (describing sexual assault cases that "[lack] physical evidence" and "[turn] entirely on the credibility of the complainant" as "not automatically . . . weak, [but] also not particularly strong" (internal quotation marks omitted)). We explain in part II C of this opinion why this factor—the strength of the state's case—does not weigh in favor of finding the alleged evidentiary error to be harmful.

vouching for the credibility of the witnesses, (6) misstating the reasonable doubt standard, and (7) shifting or diluting the state's burden of proof.[4] For the reasons that follow, we conclude that two of the prosecutor's statements were improper but that the improprieties did not deprive the defendant of his fourteenth amendment right to a fair trial.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant" of a constitutionally protected right. (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012). The standard governing our review of a prosecutorial impropriety claim depends on the nature of the constitutional right allegedly violated. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." Id., 562–63. "On the other hand . . . if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is

[4] Defense counsel did not object to many of the alleged instances of prosecutorial impropriety, but, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.). *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

then on the state to prove that the impropriety was harmless beyond a reasonable doubt." Id., 563. "Regardless of the type of constitutional right at stake, the burden is always on the defendant to show that the prosecutor's impropriety resulted in the violation of a constitutional right." *State* v. *Jose R.*, 338 Conn. 375, 386–87, 258 A.3d 50 (2021).

In the present case, the alleged prosecutorial improprieties occurred during closing argument and rebuttal. It is well established that "prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest

an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 37–38, 100 A.3d 779 (2014).

A

We first address whether the prosecutor violated the defendant's sixth amendment right to confrontation[5] by commenting on the defendant's "lack of outrage" at trial. The defendant contends that it is unclear whether the prosecutor was referring to his demeanor while testifying as a witness, while observing the testimony of other witnesses, or both, but argues that, regardless of the precise demeanor to which the prosecutor was referring, her remarks improperly infringed on his constitutional right to be present in the courtroom and to confront the witnesses against him. The state responds that the prosecutor's remarks, when construed in context, were not improper because they referred to the defendant's testimonial demeanor, which "is one of the key factors for a jury to evaluate in its credibility determinations." We agree with the state.

The following additional facts are relevant to this claim. The defendant was present in the courtroom throughout the trial and testified on his own behalf. The defendant denied sexually assaulting S or touching her in an inappropriate manner, stating that S's allega-

[5] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The sixth amendment, which is made applicable to the states through the due process clause of the fourteenth amendment; see *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); encompasses a criminal defendant's "right to be present at trial . . . ." *State* v. *Jarzbek*, 204 Conn. 683, 697–98, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); see also *Illinois* v. *Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) ("[o]ne of the most basic of the rights guaranteed by the [c]onfrontation [c]lause is the accused's right to be present in the courtroom at every stage of his trial").

tion of sexual abuse "disgusted me. It made me sick 'cause I never did anything like that." At another point in his testimony, the defendant explained that, when he heard about S's allegation of sexual abuse, he felt "sickened" and "disgusted" because he "raised her since she was four and . . . would never do anything to her."

During closing argument, the prosecutor pointed out that the defendant had "listened to all of the witnesses in this case. He listened to [S], he listened to [T], he listened to [N]. There was a lack of outrage on his part. Sure, he said, oh, it's disgusting, and, oh, whatever else he said, but there was no true, true outrage. Ask yourselves, wouldn't you be outraged? There was also an inability on the defendant's part to cite a motive for [S] to make this up. Remember his cross-examination. I start to question him, and suddenly he's not as sure as he was on direct."

Defense counsel addressed in his closing argument the prosecutor's comments regarding the defendant's lack of outrage, stating: "I want to talk about my client . . . and his testimony. The [prosecutor] said he wasn't outraged enough. If he had been too enraged, she'd say look at his reaction. Look at this angry, big, strong, 240 pound man. What's he supposed to do? They don't like his reaction. What's the—actually, what is the appropriate reaction?" Defense counsel further argued that the defendant "denies these allegations. He took [the] stand. And [the prosecutor] may not like the way he appeared. Maybe [he] wasn't outraged enough."

It is axiomatic that a criminal defendant who exercises "his fifth amendment right to testify on his own behalf . . . opens the door to comment on his veracity." *State* v. *Alexander*, 254 Conn. 290, 297, 755 A.2d 868 (2000). "An accused who testifies subjects himself to the same rules and tests [that] could by law be applied to other witnesses." (Internal quotation marks omitted.) Id., 298. If a defendant chooses to testify, it is the jury's

duty to assess the defendant's "credibility . . . by observing firsthand [his] conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 303, 96 A.3d 1199 (2014). Because a defendant's testimonial demeanor is evidence on which the jury may rely in assessing credibility, a prosecutor permissibly may comment on the defendant's testimonial demeanor in closing argument and rebuttal. See *State* v. *Luster*, 279 Conn. 414, 440, 902 A.2d 636 (2006) (prosecutor's comment that defendant was "coy, evasive, and trying to squirm" was not improper because it was merely descriptive of "the defendant's demeanor during cross-examination, which the jury had observed and could assess independently" (internal quotation marks omitted)); see also *United States* v. *Schuler*, 813 F.2d 978, 981 n.3 (9th Cir. 1987) ("When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration.").

There are limits, however, to this kind of commentary. First, although a prosecutor may invite the jury to draw reasonable inferences from a defendant's testimonial demeanor, "he or she may not invite sheer speculation unconnected to evidence." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 587, 849 A.2d 626 (2004). Second, a defendant's courtroom demeanor "[un]related to a defendant's demeanor while testifying" is "not a part of the evidence in the record and, therefore, [is] not a proper subject of the prosecutor's closing argument." *State* v. *John B.*, 102 Conn. App. 453, 465 and n.5, 925 A.2d 1235, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007);[6] see also *United States* v.

[6] In *State* v. *John B.*, supra, 102 Conn. App. 453, the Appellate Court did not address whether a prosecutor's improper remarks regarding a defendant's nontestimonial courtroom demeanor violate the sixth amendment. In light of our conclusion that the prosecutor's comments were not an improper remark on the defendant's nontestimonial courtroom demeanor, we need not address this issue.

Schuler, supra, 813 F.2d 981 n.3 (distinguishing between prosecutor's permissible statements concerning defendant's testimonial demeanor and impermissible statements concerning defendant's nontestimonial courtroom demeanor). Accordingly, a prosecutor's reliance "in argument on the defendant's courtroom demeanor [off the witness stand is] not proper because it constitute[s] argument on matters extrinsic to the evidence." *State* v. *John B.*, supra, 465; see also *United States* v. *Mendoza*, 522 F.3d 482, 491 (5th Cir.) (agreeing with "other circuits . . . that courtroom demeanor of a [nontestifying] criminal defendant is an improper subject for comment by a prosecuting attorney"), cert. denied, 555 U.S. 915, 129 S. Ct. 269, 172 L. Ed. 2d 200 (2008); *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (holding that "the defendant's behavior off the witness stand" was not evidence before jury about "which the prosecutor was free to comment").

To resolve the defendant's claim on appeal, we must determine whether the prosecutor's references to the defendant's "lack of outrage" were permissible comments on his testimonial demeanor[7] or improper comments on his nontestimonial courtroom demeanor. The parties agree that the prosecutor's comments were ambiguous and that it is unclear whether the prosecutor

[7] The defendant contends that, even if the prosecutor's comments are construed as a reference to his testimonial demeanor, they nonetheless were improper because it would be speculative "to expect the defendant to show outrage or anger . . . while . . . testifying." The state responds that the defendant's claim is inadequately briefed because the defendant failed to provide further analysis beyond this conclusory assertion. The state is correct that the defendant has cited no authority and provided no analysis in support of his claim. This fact might constitute inadequate briefing; see, e.g., *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); but we take it as an indication of the weakness of the claim and choose to reject the claim on its merits. Regardless of whether the prosecutor's remarks regarding the defendant's demeanor while testifying were persuasive to the jury, they were within the permissible bounds of fair comment on witness credibility. Defense counsel responded by offering a different perspective, and it was left to the jury to decide whether the prosecutor or defense counsel, if either, provided a helpful explanation.

was referring to the defendant's testimonial demeanor, nontestimonial courtroom demeanor, or both. We have previously stated that, when assessing the propriety of a prosecutor's statements, "we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). We also do "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Internal quotation marks omitted.) Id.

When the prosecutor's statements regarding the defendant's "lack of outrage" are examined in context, we conclude that the jury reasonably would have construed them as a reference to the defendant's testimonial demeanor. The prosecutor immediately followed her observation regarding the defendant's "lack of outrage" with a description of the defendant's testimony on the witness stand, pointing out: "Sure, he said, oh, it's disgusting, and, oh, whatever else he said, but there was no true, true outrage." The plain inference that the prosecutor was referring to the defendant's testimonial demeanor was reinforced by her subsequent exhortation to the jury to "[r]emember [the defendant's] cross-examination."

Defense counsel did not object to the prosecutor's challenged remarks, which suggests that he "did not believe [them to be improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013). Furthermore, it appears that defense counsel construed the prosecutor's statements regarding the defendant's "lack of outrage" to refer to the defendant's testimonial demeanor on the witness stand. During closing argument, defense counsel stated: "I want to talk

about my client . . . *and his testimony*. The [prosecutor] said he wasn't outraged enough." (Emphasis added.) Defense counsel reminded the jury that the defendant had "denie[d] these allegations. *He took* [*the*] *stand.* And [the prosecutor] may not like the way he appeared. Maybe [he] wasn't outraged enough." (Emphasis added.) Under these circumstances, we conclude that the prosecutor's challenged comments were not improper references to the defendant's nontestimonial courtroom demeanor but, instead, were permissible references to the defendant's testimonial demeanor. We therefore reject the defendant's sixth amendment claim.

B

We next address whether the prosecutor made improper remarks during closing argument and rebuttal in violation of the defendant's due process right to a fair trial under the fourteenth amendment to the United States constitution.[8] We begin our analysis with the defendant's due process challenge to the prosecutor's remarks regarding his "lack of outrage" at trial. In addition to claiming that the prosecutor's statements violated the defendant's sixth amendment right to confrontation; see part II A of this opinion; the defendant claims that they also improperly appealed to the emotions and passions of the jurors in violation of the defendant's general due process right to a fair trial. We disagree.

Although "[a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors"; (internal quotation marks omitted) *State* v. *Ciullo*, supra, 314 Conn. 56; he or she may "argue about the credibility of witnesses" and "appeal to [the jurors'] common sense in closing remarks," so long as the prosecutor's arguments

[8] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

"are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015). The defendant's demeanor "while . . . testifying [is] not only visible to the jurors but [is] properly before them as evidence of [his] credibility." *State* v. *Gilberto L.*, 292 Conn. 226, 247, 972 A.2d 205 (2009). The prosecutor did not disparage the defendant or appeal to the jurors' emotions by commenting inappropriately on his testimonial demeanor but, instead, asked "the jurors to draw inferences from the evidence that had been presented at trial regarding the actions of the defendant . . . based on the jurors' judgment of how a reasonable person would act under the specified circumstances." *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007). Specifically, the prosecutor asked the jurors to assess the defendant's credibility in light of his demeanor on the witness stand and implicitly urged the jurors to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying. Because the prosecutor's argument was rooted in the evidence, we perceive no impropriety. See *State* v. *Long*, 293 Conn. 31, 60, 975 A.2d 660 (2009) ("[t]he prosecutor's remark that it would be '[q]uite the feat, perhaps, for somebody of [the victim's] age' to concoct such a detailed and specific accusation, and then be able to direct a demonstration of it in court, was not [an] improper" appeal to jurors' emotions because it "neither disparaged the defendant nor painted [the victim] as particularly vulnerable or deserving of sympathy"); *State* v. *Warholic*, 278 Conn. 354, 377–78, 897 A.2d 569 (2006) (prosecutor's statements urging jurors to asses victim's "credibility by recognizing the emotional difficulty that [he] subjected himself to by making the allegations of sexual assault" was proper "because

it asked the jurors to assess [the victim's] credibility on the basis of their common sense and life experience").

The defendant next claims that the prosecutor improperly diluted the presumption of innocence and infringed on his right to testify by implying that his testimony was not credible because he had "a big, big interest in the outcome of this case." The following additional facts are relevant to this claim.

The defendant testified at trial, and the prosecutor asked the defendant on cross-examination: "You have an interest in this case [because] [y]ou don't want . . . to go to jail, right?" The defendant responded: "I don't want my kids to be without me. . . . Who—who wants to go to jail? Nobody wants to go to jail." The prosecutor again asked the defendant, "[s]o, you have an interest in this case," to which the defendant replied, "[i]f you want to put it like that, yes."

During closing argument, the prosecutor stated: "Let's talk about the defendant. He has a big, big interest in the outcome of this case. What you have to ask yourself, what interest does [S] have?" The prosecutor reiterated during rebuttal that the defendant "has an interest in this case. He told you that."

As we previously explained, a criminal defendant "who testifies subjects himself to the same rules and tests [that] could by law be applied to other witnesses." (Internal quotation marks omitted.) *State* v. *Alexander*, supra, 254 Conn. 298. One such rule is that a prosecutor permissibly may comment on a witness' motive to lie, "as long as the remarks are based on the ascertainable motives of the witnesses rather than the prosecutor's personal opinion." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 45; see also *State* v. *Warholic*, supra, 278 Conn. 372 ("we have allowed prosecutors to argue that the defendant and his witnesses may have a motive to lie in order to keep either them-

selves, or their friend or loved one, free from punishment"); *State* v. *Stevenson*, supra, 269 Conn. 584–85 ("the [prosecutor's] remark on rebuttal, suggesting that the police and the victims had no reason to lie, while the defendant and his friends and family did," was not improper because it was based "on the ascertainable motives of the witnesses"). Thus, a prosecutor's comment regarding a defendant's motive to lie on the witness stand is not improper if it is "based on the evidence presented to the jury and inferences that reasonably could be drawn from that evidence." *State* v. *Long*, supra, 46.

In the present case, the defendant admitted that he had an interest in the outcome of the case because he did not want to go to jail and did not want his children to be without him. Given that the defendant's interest in the outcome of the case properly was admitted into evidence for the jury's consideration, we conclude that the prosecutor's statement regarding the defendant's interest in the case was not improper.[9]

[9] The defendant contends that the prosecutor's statement was improper under *State* v. *Medrano*, supra, 308 Conn. 604, in which we exercised our supervisory authority over the administration of justice to "direct our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Id., 631. We disagree. In *Medrano*, we held that, although a jury charge regarding a criminal defendant's interest in the outcome of the case does not "[undermine] the presumption of innocence" or a defendant's "rights under the federal and state constitutions to a fair trial and to testify in his own defense"; id., 622; there is "a danger of juror misunderstanding" when the trial court's instruction is "viewed in isolation from the qualifying language concerning evaluating the defendant's credibility in the same manner as the testimony of other witnesses . . . ." Id., 629–30. We therefore "instruct[ed] the trial courts to use the general credibility instruction to apply to a criminal defendant who testifies." Id., 631.

Our holding in *Medrano* was predicated on the trial court's role as a neutral and detached arbiter of justice and its duty to instruct the jurors on the law in a fair, impartial, and dispassionate manner. Although a prosecutor is a minister of justice; see id., 612; she is not neutral, detached, impartial, or dispassionate. Instead, a prosecutor is an advocate with a professional obligation to argue zealously, albeit fairly, on behalf of the state. "The

The defendant also claims that the prosecutor improperly expressed her personal opinion on the defendant's credibility when she made the following statements: (1) "The only thing that the defendant probably said that was true, and obviously credibility is up to you, that was true besides his name, his weight, and his height was it was disgusting." And (2) "Oh, my brother was always there. Every day? Oh, yes, every day. That's not believable." As we previously explained, we do not review the propriety of a prosecutor's statements "in a vacuum but, rather . . . in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, supra, 319 Conn. 9.

As the defendant points out in his brief, "[t]his whole case depended on credibility, as there was no physical or corroborating evidence" confirming or denying the sexual abuse of S. It therefore is not surprising that both the prosecutor and defense counsel focused heavily in their closing arguments on the relative credibility of the defendant and S. The prosecutor's first remark that the defendant's only truthful statement "besides his name, his weight, and his height was it was disgusting" was made at the beginning of her closing argument. The prosecutor continued: "In this closing argument, I will be reminding you of certain things, and I will be asking you certain things. I will also be citing to the evidence and the law. I am a representative of the state of Connecticut. My beliefs—personal beliefs or anything like that as to credibility—do not matter. My job here is to recite the evidence and how it applies to the law. You are the judge of credibility. I will be suggesting

parameters of the term zealous advocacy are . . . well settled," and it "is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 40, 41. Because the defendant's interest in the case was adduced at trial, there was nothing improper about the prosecutor's reference to that evidence in her closing argument.

certain ways that you can judge that credibility, certainly, but it's not any personal belief on behalf of the state or personally myself."

Later in closing argument, the prosecutor pointed out various, specific inconsistencies in the defendant's version of events. The prosecutor mentioned the defendant's testimony that he rarely was home alone with S,[10] stating: "He wants you to believe [that it is] true that he spent no time or very little time with [S]. They lived together from, what, she was four to seventeen. [N] worked nights. Sometimes he worked days, sometimes he worked nights, but he was definitely alone with her. Remember the go around that he and I had about . . . Poplar Street. Oh, my brother was always there. Every day? Oh, yes, every day. That's not believable. He has nothing and no one to corroborate his story. Not his mom, not his brother, not [N], not [S], not [T], no one. [S] has [T] and [N]."

"[A] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses" because "[s]uch expressions of personal

[10] During cross-examination, the following colloquy occurred between the prosecutor and the defendant:

"[The Prosecutor]: And when [N] was working, there were times where you didn't work. Yes, no?

"[The Defendant]: On Poplar Street, yes.

"[The Prosecutor]: Okay. And you were home alone with [S]?

"[The Defendant]: And my brother.

"[The Prosecutor]: Was he there every single time?

"[The Defendant]: He lived four houses away, yes.

"[The Prosecutor]: So, he was there every time you had a day off and you were with [S]?

"[The Defendant]: We used to have video game wars on college football NCAA 2005, yes.

"[The Prosecutor]: Every time?

"[The Defendant]: I didn't have a job at the time. He was always there.

"[The Prosecutor]: So, you were never alone with [S] during that time period?

"[The Defendant]: Occasionally."

opinion are a form of unsworn and unchecked testimony . . . .'' (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583. It is ''particularly difficult for the jury to ignore'' a prosecutor's expression of personal opinion because a ''prosecutor's opinion carries with it the imprimatur of the [state]'' and the inference that it is based on ''matters not in evidence . . . .'' (Internal quotation marks omitted.) Id. ''However, [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like.'' (Internal quotation marks omitted.) Id., 583–84.

We conclude that the prosecutor's challenged comments were not improper expressions of personal opinion but, rather, permissible comments on the evidence presented at trial and the reasonable inferences that may be drawn therefrom. The prosecutor marshaled the evidence in support of her argument that the defendant's testimony was not believable, asking the jurors to consider, on the basis of their own common sense and experiences, whether it was reasonable to believe that the defendant never was alone with S because his brother was ''always there . . . every day.'' The prosecutor pointed out that the defendant's version of events was not corroborated by the witnesses or the evidence adduced at trial, but portions of S's testimony were corroborated by T and N. Additionally, the prosecutor

repeatedly reminded the jury that it was "the judge of credibility" and that her suggestions as to "certain ways that you can judge that credibility" were not to be construed as the expression of "any personal belief on behalf of the state or [herself] personally . . . ." Given the context in which the challenged statements were made, we conclude that they were not improper. See *State* v. *Gibson*, 302 Conn. 653, 661, 31 A.3d 346 (2011) (prosecutor's statement, " '[d]id the defendant wilfully [fail] to appear in court . . . I think he did,' " was not improper expression of personal opinion because prosecutor "was attempting to persuade the jury to draw this inference from the circumstantial evidence of intent that he had just recited"); *State* v. *Stevenson*, supra, 269 Conn. 584 (prosecutor's description of "the defendant's explanation as to how he obtained money to buy drugs as 'totally unbelievable' " was not improper expression of personal opinion but, "[r]ather . . . a comment on the evidence presented at trial, and it posited a reasonable inference that the jury itself could have drawn without access to the [prosecutor's] personal knowledge of the case").

The defendant next claims that the prosecutor improperly misled the jury on the law and the evidence when she stated during rebuttal: "*He* also said that he is an innocent man wrongly accused. You're not to consider that either because that's not evidence, and it's improper. It's not the standard by which you judge the facts of this case." (Emphasis added.) It is clear from the context in which the prosecutor's statement was made that the first "he" to whom she referred was not the defendant but, rather, defense counsel. During his closing argument, defense counsel stated that the defendant was "an innocent man wrongfully accused [of] a crime he did not commit . . . ." The prosecutor responded to this statement during rebuttal, stating: "[Defense counsel] talked about his family, he and his

family. It's not evidence. Who cares? And I don't mean to be flip about it, but, really, that's . . . not an issue here. He is asking you to go outside the evidence and find reasonable doubt outside of what this courtroom holds. You cannot do that. He also said that he is an innocent man wrongly accused. You're not to consider that either because that's not evidence, and it's improper." Thus, the prosecutor was informing the jury that defense counsel's statement that the defendant is "an innocent man wrongly accused" was not evidence on which the jury could rely to reach a verdict. The prosecutor's statement was consistent with the law and the trial court's instruction that "[a]rguments by counsel are not evidence. The law prohibits either the state's attorney or defense counsel from giving personal opinions as to whether the defendant is guilty or not guilty. It is not their assessment of the evidence that matters; it is only yours." See, e.g., *State* v. *Roman*, 224 Conn. 63, 68, 616 A.2d 266 (1992) ("statements of counsel are not evidence"), cert. denied, 507 U.S. 1039, 113 S. Ct. 1868, 123 L. Ed. 2d 488 (1993). We therefore reject the defendant's claim.

The defendant also claims that the prosecutor improperly vouched for S's credibility by commenting on her lack of motive to lie and her demeanor on the witness stand.[11] We disagree. Although a prosecutor may not express a personal opinion as to a witness' credibility, he or she "may argue that a witness has no motive to lie . . . and may ask the jurors to draw inferences that are based on their common sense and life experience." (Citation omitted; internal quotation

[11] Specifically, the defendant challenges the following two statements: (1) "At one point, [S] cried. Let me ask you this. Do you think it's hard to lie—well, let me ask you this. If—do you think or ask yourself how hard it is to fake emotion like you saw on the witness stand. You have to be a darn good actress to do that." And (2) "Well, motive—one of the things about looking at [S's] credibility, you have to look at her motive to lie, and, in this case, the state submits she had none."

marks omitted.) *State* v. *Elmer G.*, 333 Conn. 176, 205, 214 A.3d 852 (2019). Furthermore, as we have discussed, a witness' demeanor while testifying is "visible to the jurors" and "properly before them as evidence of . . . credibility." *State* v. *Gilberto L.*, supra, 292 Conn. 247; see id., 247–48 (holding that prosecutor properly commented on victim's testimonial demeanor and lack of motive to lie); see also *State* v. *Elmer G.*, supra, 205–206 (same). It was not improper for the prosecutor to comment on S's testimonial demeanor and to appeal to the jurors' common sense regarding her credibility.[12]

Unlike those previously addressed, the defendant's final two claims of prosecutorial impropriety have merit. The first involves the defendant's claim that the prosecutor misstated the law governing the state's burden of proving the defendant guilty beyond a reasonable doubt when she stated: "You look at the evidence, and you decide if the state has proven it beyond a reasonable doubt. Proof beyond a reasonable doubt is based on a cumulative totality of the evidence. It's just not one picky little point. It is a doubt based upon common sense, life experience, and it's on credibility." We agree with the defendant that the prosecutor's description of the reasonable doubt standard was improper.

[12] The defendant also claims that the prosecutor improperly vouched for T's credibility when she made the following remark: "Wouldn't it shock you like it shocked [T] that somebody you had grown up around makes that comment to you, and, honestly, [T] was a lovely girl, but did she seem bright enough to be able to craft a lie such as this?" For the reasons explained in this opinion, we reject this claim. See *State* v. *Elmer G.*, supra, 333 Conn. 205–206 (prosecutor's statements that " '[i]f a young girl such as [the victim] wanted to fabricate a lie, is this the lie [she] would fabricate' " and " 'I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude' " were not improper); *State* v. *Felix*, 111 Conn. App. 801, 810, 812, 961 A.2d 458 (2008) (prosecutor's comment that state's witnesses were " 'not smart enough to lie' " was not improper because "[t]he prosecutor was entitled to apply common sense to the facts in evidence and to highlight [the witnesses'] motives to tell the truth").

The reasonable doubt standard plays a fundamental role in our criminal justice system. "The [reasonable doubt concept] provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle [the] enforcement [of which] lies at the foundation of the administration of our criminal law. . . . At the same time, by impressing [on] the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." (Citation omitted; internal quotation marks omitted.) *State* v. *Griffin*, 253 Conn. 195, 205, 749 A.2d 1192 (2000). Therefore, it is imperative that statements describing the reasonable doubt standard be accurate, "clear and unequivocal . . . ." (Internal quotation marks omitted.) Id.

It is axiomatic that "prosecutors are not permitted to misstate the law" or to "distort the government's burden of proof . . . because such statements are likely to improperly mislead the jury." (Citation omitted.) *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012). This court consistently has defined reasonable doubt as "a real doubt, an honest doubt, a doubt [that] has its foundation in the evidence or lack of evidence, as a doubt for which a valid reason can be assigned, and as a doubt [that] in the serious affairs [that] concern you in [everyday] life you would pay heed and attention to . . . ." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 371, 796 A.2d 1118 (2002); see also Connecticut Criminal Jury Instructions 2.2-3, available at https://www.jud.ct.gov/JI/criminal/Criminal.pdf (last visited June 18, 2021). Thus, contrary to the prosecutor's assertion, a reasonable doubt may be based on "one picky little point," so long as the "point" produces in the jurors' minds a real and honest doubt with a foundation in the evidence or lack thereof, and amounts

to an articulable doubt about which the jurors would pay heed in the serious affairs of life. See *State* v. *Ferguson*, supra, 371. Also contrary to the prosecutor's formulation, a reasonable doubt may be based on an evidentiary consideration that does not emanate from the jurors' own "common sense and life experience."[13] We therefore conclude that the prosecutor's description of the reasonable doubt standard was improper.

We take this opportunity to admonish prosecutors and defense counsel alike that they generally should avoid paraphrasing the reasonable doubt standard. The reasonable doubt standard is both critically important and, at the same time, "defies easy explication." *Victor* v. *Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); see also *State* v. *Jackson*, 283 Conn. 111, 117, 925 A.2d 1060 (2007) ("[t]he perfect definition of reasonable doubt . . . is as uncertain as its place in American jurisprudence is certain" (internal quotation marks omitted)), quoting *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1266 (2d Cir.), cert. denied, 519 U.S. 834, 117 S. Ct. 106, 136 L. Ed. 2d 60 (1996). If a prosecutor or defense counsel wishes to describe the reasonable doubt standard for the jury in closing argument, he or she should utilize a previously approved definition or the one set forth in the trial court's jury instructions. Freelance attempts to explain the reasonable doubt standard should be avoided because they run the risk of confusing or misleading the jury. See, e.g., *State* v. *Jackson*, supra, 125 ("[a]ttempts to explain the term

[13] Indeed, in a case such as the present one, in which expert testimony was admitted regarding a victim's delayed disclosure of sexual assault, some of the evidence on which the jury may rely to reach a verdict is, by definition, beyond the common knowledge of the average layperson. See, e.g., *State* v. *Iban C.*, 275 Conn. 624, 639, 881 A.2d 1005 (2005) (Expert testimony is admissible only on "matters [that] are not beyond the ken of the average juror . . . . When inferences or conclusions are so obvious that they could be as easily drawn by the jury as the expert from the evidence, expert testimony regarding such inferences is inadmissible" (Citation omitted.)).

reasonable doubt [will] not usually result in making it any clearer [in] the minds of the [jurors]" (internal quotation marks omitted)); *State* v. *Griffin*, supra, 253 Conn. 209 n.15 ("[A]ttempts to clarify the meaning of the phrase reasonable doubt by explanation, elaboration or illustration . . . more often than not tend to confuse or mislead. . . . Thus, we have repeatedly stated that attempts to clarify reasonable doubt should be avoided because they often tend to obfuscate that concept." (Citations omitted; internal quotation marks omitted.)).

The defendant's second valid claim of impropriety relates to the prosecutor's comment on defense counsel's failure to cross-examine S or to challenge her credibility, which the defendant contends improperly diluted the state's burden of proof.[14] We agree. The following additional facts are relevant to this claim. At trial, defense counsel declined to cross-examine S. During closing argument, the prosecutor stated: "Remember, important, the defendant never once, never once challenged [S's] credibility. He asked her no questions. Her testimony stands practically unchallenged and uncontroverted." Defense counsel responded to this statement during his closing argument, pointing out: "[The defense has] the right not to present any evidence. And we nevertheless did. I didn't cross-examine [S]. I hope you'll think to yourself that there may be some reasons why, but we did present a defense. [The defendant] testified, and he denied the allegations. He wanted you to hear straight from his mouth that he did not do this. He did not do this."

[14] Additionally, the defendant claims that the prosecutor improperly diluted the state's burden of proof by commenting on the defendant's failure to "cite a motive for [S] to make this up." Because a prosecutor permissibly may comment on the weaknesses in the defendant's case; see, e.g., *State* v. *Andrews*, supra, 313 Conn. 308; as well as the lack of evidence indicating that a victim has a motive to lie; see, e.g., *State* v. *Elmer G.*, supra, 333 Conn. 205; we reject this claim.

Following oral argument, defense counsel requested a curative instruction in light of the prosecutor's remark "that defense counsel didn't present any cross or challenge" to S's testimony, arguing that the prosecutor's remark was "improper" and "flip[ped] the . . . burden" of proof. The trial court agreed to issue a curative instruction and subsequently instructed the jury: "If there was any confusion in closing argument raised by [the prosecutor] in . . . closing argument on who has the burden of proof in a criminal matter, it is the state of Connecticut, the prosecutor, [who] has the burden of proving the defendant guilty. As I've indicated to you before, the defendant has no obligation to present any evidence or question any witness. I will charge you on this burden of proof during my charge in a few minutes." Nonetheless, at the defendant's sentencing, defense counsel moved for a new trial, arguing in pertinent part that the prosecutor's statement "constituted improper prosecutorial impropriety, specifically . . . the state's argument switched the burden of proof; it commented on the defense's right not to present a defense or [not] to present any evidence whatsoever." The trial court denied the defendant's motion.

We conclude that the prosecutor committed an impropriety when she informed the jury that S's testimony was "unchallenged and uncontroverted." To begin with, the prosecutor's statement twice mischaracterized the evidence because, contrary to the prosecutor's assertion, S's credibility *was* challenged and controverted. See, e.g., *State* v. *Patterson*, 170 Conn. App. 768, 792–93, 156 A.3d 66 (prosecutorial statements mischaracterizing evidence were improper), cert. denied, 325 Conn. 910, 158 A.3d 320 (2017); *State* v. *Sargent*, 87 Conn. App. 24, 39–40, 864 A.2d 20 (same), cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005). Defense counsel elected not to cross-examine S, but cross-examination is not the only method by which to

challenge a witness' testimony—admission of documentary or physical evidence or the in-court testimony of other witnesses, for example, may be used to contradict a witness' testimony. In this case, the defendant testified that he never sexually assaulted S or touched her in an inappropriate manner, thereby directly challenging and controverting S's testimony. In addition, the prosecutor's statement ran the risk of diluting the state's burden of proving the defendant guilty beyond a reasonable doubt by suggesting that the defendant was required to cross-examine S in order to undermine her credibility and to prove his innocence. See *State* v. *Otto*, supra, 305 Conn. 77 ("prosecutors are not permitted to misstate the law" or to "distort the government's burden of proof"). See generally *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("the [d]ue process [c]lause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). Particularly when we consider the prosecutor's remark in connection with her inaccurate description of the reasonable doubt standard, we conclude that it was improper. But cf. *State* v. *Ciullo*, supra, 314 Conn. 38–39 (prosecutor's statement that "the 'testimony [of the defendant and his son] does nothing at all to create a doubt in this case' " was not improper because both prosecutor and defense counsel "accurately stated the burden of proof in their two hours of closing arguments" and trial court "accurately charged the jury with the correct burden of proof").

C

Having determined that two of the prosecutor's statements were improper; see part II B of this opinion; we next address whether those improprieties deprived the defendant of his due process right to a fair trial. The defendant bears the burden of demonstrating that, when "considered in light of the whole trial, the impro-

prieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, supra, 303 Conn. 563. "[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . Those factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *McCoy*, 331 Conn. 561, 571–72, 206 A.3d 725 (2019). Ultimately, "[t]he issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Internal quotation marks omitted.) Id., 571.

It is undisputed that the prosecutorial improprieties were not invited by the conduct or argument of defense counsel. Turning to the severity of the prosecutorial improprieties, we must consider whether defense counsel objected to the improper remarks, requested curative instructions, or moved for a mistrial. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007). Additionally, "we look to whether the [improprieties were] blatantly egregious or inexcusable." Id. Defense counsel did not object to the prosecutor's misstatement of the reasonable doubt standard, which "demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) Id. Furthermore, the prosecutor's misstatement of the law governing reasonable doubt was isolated, was not blatantly egregious or inex-

cusable, and was counterbalanced by defense counsel's frequent description of the "very high burden" of proof imposed on the state by the reasonable doubt standard.[15] The trial court instructed the jurors that, if counsel's recitation of the law differed from the trial court's jury instructions, they must "dismiss from [their] minds what counsel has said to the extent that it differs from what [the court is] telling [them]." Lastly, the trial court's instructions on the law accurately, clearly, and unequivocally described the reasonable doubt standard to the jury.[16] We therefore conclude that the prosecu-

[15] In closing argument, defense counsel informed the jury that it "simply need[ed] to determine if the state proved all the elements of the charges beyond a reasonable doubt. You don't need to figure out what happened. You are simply determining if the state met its burden. If you have any uncertainty, if you feel like you weren't sure, if you have a moment of hesitation, if you're not confident about the decision, your job is easy and you must find [the defendant] not guilty." At another point in closing argument, defense counsel argued that, "if you think for a moment or have any hesitation that [S] is not telling the truth, then you must return a verdict of not guilty. That is . . . reasonable doubt. If you have a brief hesitation, if you pause, that is exactly what a reasonable doubt is. The evidence does not prove beyond a reasonable doubt that [the defendant] is guilty of these crimes." Finally, defense counsel stated: "[I]f you have a—a moment of hesitation, if you don't know, a feeling in your stomach, if you don't—you are not confident, then that's a reasonable doubt. I'm sure that you will thoughtfully consider all of the evidence of this case. I know you will hold the state to its burden." Defense counsel's description of the reasonable doubt standard as "a moment of hesitation" or "a feeling in your stomach" did not comport with the trial court's reasonable doubt instruction or any previously approved definitions and, therefore, like the prosecutor's description of the reasonable doubt standard, was improper.

[16] The trial court instructed the jury: "The state's obligation is to prove each and every element of the crime charge[d] beyond a reasonable doubt.

"And that brings us to reasonable doubt. Now, what does this mean, beyond a reasonable doubt? The phrase reasonable doubt has no technical or unusual meaning. The meaning of reasonable doubt could be arrived at by emphasizing the word reasonable. It is not a surmise, a guess, or mere conjecture. It is such a doubt as in the serious affairs that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance. It is not hesitation springing from any feelings of pity or sympathy for the accused, or any other person who might be affected by your decision. It is, in other words, a real doubt, an honest doubt, a doubt which has its foundation in the

tor's improper comment on the reasonable doubt standard was not frequent or severe and, although improper, was cured by the trial court's jury instructions. See, e.g., *State* v. *Stevenson*, supra, 269 Conn. 598 ("the [trial] court's instructions, when viewed in light of the other *Williams'* factors, were sufficient to cure any harm to the defendant caused by the [prosecutorial impropriety]").

With respect to the prosecutor's improper statement describing S's testimony as "unchallenged and uncontroverted," we note that defense counsel requested a curative instruction, which the trial court issued. See part II B of this opinion. Given the isolated nature of the prosecutor's comment and the trial court's prompt and effective curative instruction,[17] which specifically targeted the prosecutorial impropriety, we conclude that that this impropriety was not frequent or severe and was cured by the trial court. See, e.g., *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003) ("[A]

evidence or lack of evidence. It is doubt that is honestly entertained and is reasonable in light of the evidence after a fair comparison and careful examination of the entire evidence. Proof beyond a reasonable doubt does not mean proof beyond all doubt. The law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. Absolute certainty in the affairs of life is almost never attainable. The state does not have to prove guilt beyond all doubt or to a mathematical certainty or to an absolute certitude.

"The law requires, after hearing all the evidence, if there is something in that evidence or lack of evidence which leaves in the minds . . . of the jury as reasonable men and women a reasonable doubt about the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted. If there is no reasonable doubt then the accused must be found guilty. Since the burden is [on] the state to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime charged, the defendant has a right to rely [on] a failure of the prosecution to establish such proof. Proof beyond a reasonable doubt is proof that precludes every reasonable hypothesis, except guilt, and is inconsistent with any other rational conclusion."

[17] The jury's verdict of not guilty on two of the six charges "speaks to the strength and efficacy of the curative measures adopted." *State* v. *Ciullo*, supra, 314 Conn. 60.

prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant. . . . Moreover, [i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions." (Citations omitted; internal quotation marks omitted.)).

We next address whether the prosecutorial improprieties were central to the critical issues in the case. In light of the lack of eyewitnesses and physical evidence, the critical issue in the case was the credibility of S's testimony regarding the occurrence of the sexual assaults. One of the two instances of prosecutorial impropriety was central to this critical issue. Nonetheless, when viewed in the context of the entire trial, we conclude that "the impact of these . . . improprieties was minimal"; *State* v. *Ciullo*, supra, 314 Conn. 60; in light of the jury's verdict of not guilty on one count of sexual assault and one count of risk of injury to a child. The record "clearly demonstrat[es] the jurors' ability to filter out the allegedly improper statements and make independent assessments of credibility"; id.; and, therefore, we conclude that the prosecutor's improper statements did not prejudice the defendant. See *State* v. *Long*, supra, 293 Conn. 53 (jury's verdict of not guilty on some charges "is a strong indication that the defendant was not prejudiced by" prosecutorial impropriety).

Lastly, we consider the strength of the state's case. As we explained in *State* v. *Felix R.*, supra, 319 Conn. 1, "[t]he sexual abuse of children is a crime which, by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . ." Id., 18. "[W]e have never

stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 596. In the present case, we conclude that the state's case was "not so weak as to be overshadowed" by the prosecutorial improprieties. *State* v. *Carlos E.*, 158 Conn. App. 646, 669, 120 A.3d 1239, cert. denied, 319 Conn. 909, 125 A.3d 199 (2015). We are confident on this record that the defendant was not deprived of his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other justices concurred.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE *v.* CAROL J. ROTHERMEL (SC 20463)

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

Syllabus

Pursuant to statute (§ 49-15 (a) (1)), "[a]ny judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified . . . provided no such judgment shall be opened after the title has become absolute in any encumbrancer . . . ."

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The trial court rendered a judgment of strict foreclosure, and, while negotiating over the next five years, the parties filed numerous motions to open the judgment, each prior to the passage of the law day. The court thereafter opened the judgment for a final time and set the law day for March 12, 2019. Before that date, the plaintiff's loan servicer, S Co., sent the defendant letters erroneously stating that a "foreclosure sale" of the property would occur on March 13, 2019. On the evening of March 12, the defendant called S Co. and was told that the foreclosure sale was scheduled for the following day. The defendant then contacted a new attorney, who, on March 13, filed a motion to open the judgment, claiming that the defendant's reliance

on S Co.'s misrepresentations caused her not to file the motion before the passage of the law day. The trial court denied the defendant's motion, concluding that it did not have jurisdiction to open the judgment under § 49-15 and that the equities of the case did not warrant granting relief. After the defendant appealed to the Appellate Court, the plaintiff filed a motion to dismiss the appeal on the ground that the appeal was moot because the passage of the law day precluded the defendant from obtaining any practical relief. The Appellate Court dismissed the defendant's appeal, and the defendant, on the granting of certification, appealed to this court, claiming that the Appellate Court had improperly dismissed her appeal because § 49-15 did not render her equitable claims moot and that the trial court had abused its discretion in denying her motion to open. *Held*:

1. The Appellate Court improperly dismissed the defendant's appeal as moot in light of the equitable nature of her claims: although § 49-15 generally precludes a judgment of strict foreclosure from being opened after title vests absolutely in an encumbrancer, which occurs when the law day passes, under the common law of this state, courts may, in rare and exceptional cases, exercise a limited form of continuing jurisdiction over a motion to open a judgment of strict foreclosure after the passage of the law day; in the present case, the defendant's motion to open the judgment raised a colorable claim in equity, namely, that her reliance on S Co.'s erroneous written and oral misrepresentations justified the court's exercise of its inherent, continuing jurisdiction, that claim, if meritorious, could have afforded the practical relief sought, and, accordingly, the defendant's appeal was not moot.
2. The trial court did not abuse its discretion in denying the defendant's motion to open the judgment, as equity did not warrant granting the relief sought: the trial court's conclusion that the expiration of the defendant's right to redemption was caused, at least in part, by her own inaction was supported by the court's factual findings that the defendant was not confused by S Co.'s letters, that she was represented by an attorney who had informed her of the correct law day, that the trial court previously had granted numerous motions to open the judgment during the parties' negotiations, that the defendant had corrected a similar misstatement about the law day made by S Co., and, that even if the defendant was confused about the law day, her counsel was not; moreover, the defendant did not claim that she lacked the ability or resources to unilaterally file her own prevesting motion to open, and this court's review of the record indicated that the trial court's factual findings, including that the defendant's choice not to affirmatively protect her rights by filing a prevesting motion while negotiating with the plaintiff was dilatory and cavalier, were not clearly erroneous.

Argued December 9, 2020—officially released June 23, 2021*

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

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant was defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Genuario*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to the Appellate Court, which dismissed the appeal, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Christopher G. Brown, for the appellant (defendant).

Geraldine A. Cheverko, for the appellee (plaintiff).

Jeffrey Gentes and *J.L. Pottenger*, *Jr.*, filed a brief for the Housing Clinic of the Jerome N. Frank Legal Services Organization as amicus curiae.

Opinion

KAHN, J. The principal issue in this appeal is whether General Statutes § 49-15 (a) (1), which provides in relevant part that no judgment of strict foreclosure "shall be opened after the title has become absolute in any encumbrancer," deprives the trial and appellate courts of subject matter jurisdiction over a motion to open a judgment that, although filed after the law days have passed, invokes the trial court's continuing equitable authority. The defendant, Carol J. Rothermel, appeals from the judgment of the Appellate Court dismissing her appeal from the trial court's denial of such a motion. In the present appeal, the defendant argues that (1) the Appellate Court's dismissal was improper because § 49-15 did not render her equitable claims moot, and (2) the trial court abused its discretion by denying her motion to open the judgment. The plaintiff, U.S. Bank

National Association,[1] argues in response that the prohibition on postvesting motions to open a judgment set forth in § 49-15 implicates the subject matter jurisdiction of our state courts and that, in any event, the defendant is not entitled to equitable relief on the merits. Although we agree with the defendant that the Appellate Court improperly dismissed her appeal in light of the equitable nature of the particular claims at issue, we conclude that the trial court did not abuse its discretion by denying the underlying motion to open the judgment.

The following facts and procedural history are relevant to our resolution of the present appeal. In 2006, the defendant purchased a parcel of real property improved with a single family home in the town of New Canaan. In order to obtain funds for that transaction, the defendant signed a note promising to pay principal and interest on a loan of one million dollars to the plaintiff's predecessor in interest and then secured that note by mortgaging the property. The defendant defaulted on the note in 2012, and the plaintiff commenced the present action approximately ten months later. Although the defendant initially chose to proceed in a self-represented capacity, she subsequently retained the services of an attorney.

The trial court first rendered a judgment of strict foreclosure on January 13, 2014. Over the next five years, the parties filed a total of seventeen motions to open the judgment prior to the passage of the law day. The court granted fifteen of those motions, each of which was filed by the plaintiff with the defendant's consent.[2]

[1] The full name of the plaintiff is U.S. Bank National Association, as Trustee on Behalf of the Holders of the Adjustable Rate Mortgage Trust 2007-1, Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2007-1.

[2] The defendant filed the remaining two motions to open the judgment. The trial court denied one of those motions but, nonetheless, extended the law day sua sponte. The defendant's other motion was rendered moot because the trial court granted a motion to open the judgment filed by the plaintiff that was pending at the same time.

The parties used this additional time to engage in a series of discussions relating to modification of the mortgage, short payoff, and other forms of loss mitigation. After opening its judgment the final time, the trial court set the law day for March 12, 2019.[3]

The equitable claims raised by the defendant stem primarily from a series of communications between her and the plaintiff's loan servicer, Select Portfolio Servicing, Inc. (servicer), that occurred shortly before the passage of the law day and the expiration of her right to redemption. Specifically, a letter from the servicer to the defendant dated February 20, 2019, erroneously stated that a "previously scheduled foreclosure sale" of the property had been postponed until March 13, 2019,[4] and that the plaintiff was "continuing to evaluate [the defendant's] application for foreclosure prevention assistance." The letter then stated: "Please know that if you have submitted a complete application, we will not proceed with a foreclosure sale. If there is a pending foreclosure sale date, we will instruct our attorney to take appropriate steps to postpone such sale [date] including, where necessary, filing a motion with the court." On March 9, 2019, the defendant received a second letter from the servicer stating: "Your request for workout assistance on the above referenced account has expired. This is either because we did not receive the required payment or because we did not receive the signed agreement. We continue to welcome an opportunity to discuss options to resolve this matter so that possible legal action can be avoided." On that same date, the defendant also received an e-mail from her own attorney informing her that the trial court had set the law day for March 12, 2019.

[3] The complaint does not identify any subsequent encumbrancers.

[4] Before the trial court, the plaintiff's attorney conceded that the present case does not involve a foreclosure by sale and that the law day was March 12, 2019. She argued before the trial court that "when [the letter said] sale, [it meant] vesting day," and that the servicer "just [didn't] speak Connecticut."

Three days later, on the evening of the law day itself, the defendant called the servicer and was told once again that the "foreclosure sale" was scheduled for the following day.[5] See footnote 16 of this opinion. Immediately after that call, the defendant contacted a new attorney who filed a motion to open the judgment the next morning, March 13, 2019. That motion claimed that the defendant's reliance on the servicer's misrepresentations had caused her failure to file a motion to open before the passage of the law day. The plaintiff subsequently filed an objection, arguing that, under § 49-15, the trial court was "without jurisdiction to disturb the judgment, but, even if the court did have jurisdiction, it would be inequitable for the court to grant the defendant's motion."

The trial court held an evidentiary hearing on the defendant's motion and requested supplemental briefs from both parties. In a memorandum of decision denying the motion, the trial court concluded that it did not have "jurisdiction or authority" to open the judgment under § 49-15 and that the equities of the case did not warrant granting relief inconsistent with that rule.[6] In reaching this conclusion, the trial court found, as a matter of fact, that the defendant became aware of her law day no later than March 9, 2019, and that she had not been confused by the letters sent by the servicer.[7]

[5] The defendant testified that she had responded to this misstatement in the following manner: "I said, you know, wait a second, I said it's today. They said no it's not, it's tomorrow."

[6] At the hearing on the defendant's motion to open the judgment, trial court made the following statement with respect to its own understanding of the intersection between the limitations imposed by § 49-15 and its own continuing equitable jurisdiction: "[In] most circumstances, the court does not have jurisdiction to open the judgment after the law day has passed and title has vested. There is case law to the extent that, under some rare and unique circumstances . . . [t]here is jurisdiction to open the judgment."

[7] Specifically, the trial court stated: "[I]t is difficult . . . to find that a defendant, who has successfully been able to open judgments of strict foreclosure and extend law days up to sixteen times, would be unaware of the difference between a strict foreclosure, and a foreclosure by sale and

The trial court also found that, even if there had been some level of confusion, the defendant had acted in a "dilatory and cavalier" manner by unnecessarily delaying the filing of her own motion to open the judgment.

The defendant appealed from the trial court's denial of her motion to open the judgment to the Appellate Court. The plaintiff filed a motion to dismiss that appeal, arguing that, under § 49-15, the passage of the law day precluded the defendant from obtaining any practical relief and, as a result, rendered the appeal moot. The defendant filed no objection, and the Appellate Court summarily dismissed the appeal. The defendant's attorney later filed a motion for reconsideration, indicating that electronic service of the plaintiff's motion to dismiss had accidently been routed to the "spam" folder of his e-mail and that, as a result, the motion had escaped his notice until after it had been ruled on. The motion for reconsideration then continued to address the substance of the plaintiff's jurisdictional claim. The Appellate Court ultimately granted that motion for reconsideration but denied the defendant further relief.

This court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly dismiss as moot the defendant's appeal from the trial court's denial of a motion to open the judgment of strict foreclosure, raising equitable grounds involving alleged misrepresentations by the plaintiff relating to the strict foreclosure proceedings, when the motion to open was filed by the defendant one day after title vested in the plaintiff?" And (2) "If the answer to the first question is 'no,' did

between a law day and a sale day." Although the defendant is technically correct that the motions to open the judgment actually granted by the trial court in the present case had been filed by the plaintiff, we do not believe that this fact negates the trial court's general observation that the repetitious opening of judgment and setting of law days over a period of five years would have afforded the defendant with some level of familiarity with the process.

the trial court properly deny the defendant's motion to open the judgment of strict foreclosure . . . ?" *U.S. Bank National Assn.* v. *Rothermel*, 335 Conn. 910, 228 A.3d 95 (2020). We address these certified questions in turn.

I

We begin by addressing the defendant's contention that the Appellate Court improperly dismissed her appeal as moot. The defendant, citing *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 85 A.3d 1 (2014), argues that practical relief remained available to her because, notwithstanding the restrictions imposed by § 49-15, courts of this state continue to possess an inherent, equitable authority to open a judgment of strict foreclosure in certain cases after the passage of the law days. For the reasons that follow, we agree with the defendant that the common law of this state does, in fact, support a limited exercise of jurisdiction over a narrow class of equitable claims raised in postvesting motions to open and that, as a result, her appeal was not moot.

We begin by setting forth the standard of review and general principles of law relevant to our discussion of this issue. "Whether an action is moot implicates a court's subject matter jurisdiction and is therefore a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 332, 21 A.3d 737 (2011); accord *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 750, 219 A.3d 744 (2019). Our case law firmly establishes that "[a] case is considered moot if [a] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 6, 127 A.3d 994 (2015).

"The law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature. . . . Because foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . In exercising its equitable discretion, however, the court must comply with mandatory statutory provisions that limit the remedies available . . . . It is our adjudicatory responsibility to find the appropriate accommodation between applicable judicial and statutory principles. Just as the legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent . . . [so] courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law—both common and statutory—remains coherent and consistent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256–57, 708 A.2d 1378 (1998).

Our discussion of the jurisdictional issue in the present case, therefore, must be framed by the text of § 49-15 (a) (1), which provides in relevant part: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, *provided no such judgment shall be opened after the title has become absolute in any encumbrancer* . . . ."[8] (Emphasis added.)

[8] General Statutes § 49-15 (a) (2) sets forth the following exception: "Any judgment foreclosing the title to real estate by strict foreclosure may be opened after title has become absolute in any encumbrancer upon agreement of each party to the foreclosure action who filed an appearance in the action and any person who acquired an interest in the real estate after title became

In Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests absolute title in the encumbrancer. See, e.g., *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 256 n.11. The Appellate Court has previously read § 49-15 (a) (1) in a manner that generally prohibits mortgagors from obtaining practical relief after the passage of the law days and, as a result, has concluded that both postvesting motions to open a judgment and subsequent appeals related to them are moot.[9] See *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360–61, 194 A.3d 1262, cert. denied, 330 Conn. 950, 197 A.3d 390 (2018); *Citigroup Global Markets Realty Corp.* v. *Christiansen*,

absolute in any encumbrancer, provided (A) such judgment may not be opened more than four months after the date such judgment was entered or more than thirty days after title became absolute in any encumbrancer, whichever is later, and (B) the rights and interests of each party, regardless of whether the party filed an appearance in the action, and any person who acquired an interest in the real estate after title became absolute in any encumbrancer, are restored to the status that existed on the date the judgment was entered."

[9] Questions related to a trial court's jurisdiction over a case normally can, and should, be treated as analytically distinct from questions related to appellate jurisdiction. See, e.g., *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 534 n.22, 911 A.2d 712 (2006). They spring from different sources and, in most contexts, are not coterminous. Generally, the Appellate Court has jurisdiction to review final judgments of the Superior Court; see General Statutes § 51-197a (a); even when the question at issue is whether the trial court properly dismissed the case for lack of jurisdiction. See, e.g., *Harvey* v. *Dept. of Correction*, 337 Conn. 291, 303–304, 253 A.3d 931 (2020) (affirming judgment of Appellate Court, which upheld trial court's dismissal of complaint on ground of sovereign immunity); *Lazar* v. *Ganim*, 334 Conn. 73, 77, 220 A.3d 18 (2019) (affirming trial court's judgment of dismissal for lack of standing). The rule that § 49-15 deprives an appellate tribunal of jurisdiction over *an appeal* in an action for strict foreclosure after the passage of the law day; see, e.g., *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 167, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989); is rooted in concerns related to mootness, rather than the existence of a final judgment. Although the Appellate Court has jurisdiction to review a trial court's decision that constitutes a final judgment, it may lack jurisdiction to entertain that decision if it determines that the matter is moot under § 49-15.

163 Conn. App. 635, 640–41, 137 A.3d 76 (2016); *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 324–25, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 210–11, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004); *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 612, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002); *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 167, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989); *Merry-Go-Round Enterprises, Inc.* v. *Molnar*, 10 Conn. App. 160, 161–62, 521 A.2d 1065 (1987). This court has reached the same conclusion. See *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.5, 150 A.3d 675 (2016) ("an appeal from a judgment of strict foreclosure is moot when the law days pass, the rights of redemption are cut off, and title becomes unconditional in the plaintiff" (internal quotation marks omitted)); see also *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 574–75, 953 A.2d 868 (2008).[10]

Both this court and the Appellate Court have, however, also previously recognized that trial courts possess inherent powers that support certain limited forms of continuing equitable authority; see, e.g., *Rocque* v.

[10] The exception set forth in § 49-15 (a) (2), which allows a trial court to open a judgment of strict foreclosure with the consent of interested parties; see footnote 8 of this opinion; and certain cases from this court relating to the predecessor of § 49-15; see, e.g., *Ferguson* v. *Sabo*, 115 Conn. 619, 162 A. 844 (1932), cert. denied, 289 U.S. 734, 53 S. Ct. 595, 77 L. Ed. 1482 (1933); have caused some to question whether the statutory limitation on postvesting motions is properly characterized as one implicating subject matter jurisdiction. See *In re Baby Girl B.*, 224 Conn. 263, 292, 618 A.2d 1 (1992) (citing *Ferguson* as case related to personal jurisdiction); see also *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 8 n.8; see also 1 D. Caron & G. Milne, Connecticut Foreclosures (10th Ed. 2020) § 10-1:1.1, pp. 604–607. Because we conclude that the trial court's inherent equitable authority supported the exercise of jurisdiction in this case, we need not address the precise nature of the limitations otherwise imposed by § 49-15.

Light Sources, *Inc.*, 275 Conn. 420, 433, 881 A.2d 230 (2005); and that these powers can, in certain rare and exceptional cases, be exercised in a manner consistent with § 49-15 after the passage of the law days. This fact is, we believe, clearly demonstrated by both our decision in *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 251, and by the Appellate Court's decision in *Wells Fargo Bank*, *N.A.* v. *Melahn*, supra, 148 Conn. App. 1. A brief review of those two decisions is instructive.

In *Jajer*, this court concluded "that § 49-15 does not deprive the trial court of jurisdiction to open a judgment of foreclosure [after the passage of the law days] to correct an inadvertent omission in a foreclosure complaint." *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 260. The plaintiff in that case had mistakenly omitted from its complaint one of three parcels subject to the mortgage being foreclosed on. Id., 253. The trial court rendered a judgment of strict foreclosure on that complaint, the defendants failed to exercise their right to redemption, and the law day passed. Id. The plaintiff subsequently discovered its mistake and moved to open the trial court's judgment so that the underlying complaint could be amended to include the third parcel. Id., 253–54. The trial court granted that motion, permitted amendment of the complaint, and then rendered a judgment of strict foreclosure thereon. Id., 254. The defendants then appealed to the Appellate Court, which reversed the trial court's judgment on the ground that § 49-15 precluded the trial court from exercising jurisdiction over a motion to open after the law days had passed. Id., 254–55. This court reversed that decision. Id., 268. We began our analysis by reviewing the intersection between the statutory provisions governing the foreclosure process and the underlying equitable nature of such proceedings. Id., 256. In particular, we emphasized that courts adjudicating this type of claim gener-

ally have the authority to "entertain such questions as are necessary to be determined in order that complete justice may be done." (Internal quotation marks omitted.) Id. We then examined the particular facts giving rise to the mortgagee's motion to open in that case and concluded that, because title to the third parcel had not yet become absolute and the clerical error at issue was undisputed, § 49-15 did not preclude the trial court from opening the judgment of strict foreclosure even though the law day had actually passed with respect to two of the three parcels. Id., 260.

The Appellate Court's decision in *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 1, arose from a markedly different set of facts. The plaintiff in that case had falsely certified that it had complied with the terms of a court order requiring it to provide notice to all nonappearing defendants. Id., 4–5. The trial court denied a postvesting motion seeking to open the judgment and to dismiss the underlying action filed by a defendant, who had previously been defaulted for failure to appear, on the ground that the passage of the law day categorically precluded the relief sought. Id., 3, 5–6. Despite the constraints imposed by § 49-15, the Appellate Court reversed, concluding that the trial court possessed an inherent, continuing, and equitable authority to enforce its previous order. See id., 10, 13; see also id., 10 ("'the trial court's continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted, is grounded in its inherent powers, and is not limited to . . . cases wherein the parties have agreed to continuing jurisdiction' "), quoting *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 246, 796 A.2d 1164 (2002). Based on the unique set of facts then before it, the Appellate Court concluded not only that

the trial court had jurisdiction to open the underlying judgment, but also that it had abused its discretion by failing to do so. *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 12–13.

Jajer and *Melahn* establish that courts may, in rare and exceptional cases, exercise a limited form of continuing jurisdiction over motions to open judgments of strict foreclosure after the passage of the law days, notwithstanding the statutory limitation imposed by § 49-15. The defendant's motion to open the judgment in the present case was predicated on a claim that she had relied on errors by the servicer. In support of her motion, the defendant made two related arguments. First, she argued that the factual basis for her claim fell within a category that was legally cognizable in equity. See, e.g., *Cavallo* v. *Derby Savings Bank*, 188 Conn. 281, 285, 449 A.2d 986 (1982) ("[f]raud, accident, mistake, and surprise are recognized grounds for equitable interference" (internal quotation marks omitted)). Second, relying on *Melahn*, she argued that the trial court should exercise its continuing jurisdiction to open the underlying judgment. Once presented with the motion, the trial court held an evidentiary hearing, solicited briefs from the parties, and issued a memorandum of decision addressing the merits of the defendant's equitable claim.[11] Although the trial court concluded

[11] In light of the underdeveloped nature of appellate case law governing forms of continuing jurisdiction in this particular context, we believe that this approach was reasonable. We caution, however, that the jurisdictional conclusion reached in the present appeal should not be taken as an invitation for parties in strict foreclosure proceedings to repackage motions to open the judgment filed after the passage of the law days in a manner that superficially invokes the inherent powers underlying *Jajer* or *Melahn*. Exceptions to the general rule against postvesting motions to open judgments of strict foreclosure are, in fact, rare and exceptional. A bare assertion that equity requires such relief is insufficient; as in the present case, the party seeking to invoke the trial court's continuing jurisdiction must base their motion to open on particularized factual allegations that could support a claim cognizable in equity. Trial courts may, under existing case law, grant motions to dismiss pursuant to § 49-15 in cases in which a claim raised in

that it lacked jurisdiction, it nonetheless went on to consider the equitable claim on the merits.[12] The jurisdictional conclusion reached by both the trial court and the Appellate Court in the present case was, therefore, premised on the conclusion that the defendant's claim in equity lacked colorability. We disagree with that premise because, as stated previously in this opinion, the defendant's motion raised a colorable claim falling within a class generally recognized in equity and sought relief through the court's inherent, continuing jurisdiction as previously established in *Melahn*. Although the claim she presented was not identical to the one raised in *Melahn*,[13] the defendant alleged that the servicer made erroneous written and oral representations that justified the court's exercise of jurisdiction to consider those equitable claims of accident or mistake, which, if meritorious, could have afforded the practical relief sought. See *State* v. *Jerzy G.*, 326 Conn. 206, 221, 162 A.3d 692 (2017) ("[i]t is a settled principle under both federal and Connecticut case law that, if a *favorable decision* necessarily could not afford the practical relief sought, the case is moot" (emphasis added)); *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 626, 822 A.2d 196 (2003) ("[i]n deciding whether the plaintiff's complaint presents a justiciable claim, we

a postvesting motion to open fails to present colorable grounds for equitable relief under these limited exceptions, and appellate courts may continue to summarily dismiss appeals taken from those rulings. We note that such a dismissal in the Appellate Court would occur only after the appellant has been given the opportunity to submit a response to an appellee's motion to dismiss or to present argument giving reasons why the case should not be dismissed in response to the court's own motion.

[12] During the hearing on the motion, the trial court explicitly recognized that it possessed an inherent authority to open judgments of strict foreclosure, even after the passage of the law days, if equity so requires. See footnote 6 of this opinion; see also, e.g., *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 169–70 n.12, 75 A.3d 651 (2013).

[13] The claim that the defendant raised was more akin to that made in *Jajer*, as both involved an error or mistake made by the mortgagee or its representative. See *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 253.

make no determination regarding its merits"); see also *Nielsen* v. *State*, 236 Conn. 1, 6, 670 A.2d 1288 (1996). We therefore conclude that the claim raised in the defendant's motion to open was not moot but, rather, was a recognizable claim in equity and that, as a result, the Appellate Court improperly dismissed the defendant's appeal.

II

Having resolved the jurisdictional issue, we turn to the question of whether the trial court properly denied the defendant's motion to open the judgment on its merits. The defendant's position on the question remains, as it was before the trial court, that the letters she had received from the servicer contained inadvertent errors[14] and that she had relied on those errors to her detriment. In response, the plaintiff argues that the defendant's claim is distinguishable from those raised in *Melahn* and that, in any event, the trial court correctly concluded that the facts contained within the record do not warrant an award of equitable relief. We agree with the plaintiff.

The relevant standard of review is well established. "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Hartford Federal Savings & Loan Assn.* v. *Stage Harbor Corp.*, 181 Conn. 141, 143, 434 A.2d 341 (1980); see also *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 166, 75 A.3d 651 (2013) ("[a] foreclosure action is an equitable proceeding . . . [and]

[14] We note that, during the hearing on the motion to open the judgment, the defendant's attorney expressly disclaimed any allegation of fraud by either the plaintiff or its servicer.

[t]he determination of what equity requires is a matter for the discretion of the trial court" (internal quotation marks omitted)); *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 95, 952 A.2d 1 (2008) ("We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.)). The trial court's findings of fact, by contrast, are subject to the clearly erroneous standard of review. See, e.g., *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, 278 Conn. 92, 107, 897 A.2d 58 (2006).

In her motion to open the judgment, the defendant argued that the underlying merits of her equitable claim warrant the same relief afforded in *Melahn*. We disagree. As discussed previously in this opinion, the plaintiff in *Melahn* falsely certified compliance with a court order relating to the provision of notice. *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 4–5. The appellant in that case was a defendant who previously had been defaulted for failure to appear and who undisputedly should have received such a notice. Id., 3, 5. The force of the Appellate Court's reasoning in that case rested on the fact that opening the underlying judgment of strict foreclosure and compelling proper notice was the only way to effectively enforce the trial court's order. Id., 7–8. The defendant in the present case not only appeared, but was represented by counsel. There is no indication in the record that the plaintiff falsely certified compliance with a court order or, indeed, that it had actually failed to comply with any such order in the first instance. Thus, we agree with the trial court's conclusion that the facts of *Melahn* are distinguishable.

The factual findings made by the trial court sufficiently foreclose any other form of equitable relief.[15] As noted previously in this opinion, the trial court found that the defendant had not, in fact, been confused by the letters she had received from the servicer.[16] The fact that the defendant was represented by an attorney who had informed her of the correct law day, the fact that more than one dozen motions to open the judgment had previously been granted by the court and the fact that the defendant expressly testified to correcting the servicer about a similar misstatement made over the telephone on the evening of the law day itself; see footnote 5 of this opinion; provide more than adequate support for this finding.[17] Even if the defendant had been confused about her law day or the impact of its passage on her legal rights, she was represented by an able attorney who most certainly was not.

[15] This conclusion obviates the need for us to generate a comprehensive list of the various circumstances that may, in other cases, permit a trial court to exercise its equitable jurisdiction to open a judgment of strict foreclosure after the passage of the law day. We continue to believe that the expansion of the common law in this area is best developed through the adjudication of colorable claims; see footnote 11 of this opinion; on a case-by-case basis. *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 257.

[16] The defendant also could not have reasonably relied on any of the statements made by the servicer during the telephone calls that she initiated on the evening of the law day itself because her opportunity to file a prevesting motion to open the judgment had already expired when the courthouse closed earlier that day. See *Real Estate Mortgage Network, Inc.* v. *Squillante*, supra, 184 Conn. App. 362; see also Practice Book § 7-17 (documents received by clerk's office after 5 p.m. deemed filed on following business day).

[17] We agree with the defendant that the wording of the letters she received does tend to suggest that the servicer lacked an accurate understanding of the strict foreclosure process in this state; see footnote 4 of this opinion; but the mere presence of those misstatements in the letters does not provide us with a reason to interfere with the trial court's factual finding that *the defendant* had not been confused as a result. See, e.g., *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, supra, 278 Conn. 107 ("a finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotation marks omitted; emphasis added)).

Although the defendant argues more broadly that the letters, when read in the context of the ongoing negotiations between the parties, contained an implicit promise by the plaintiff to forbear from future action, she does not—and indeed cannot—argue that she lacked the ability or resources to unilaterally file her own prevesting motion to open the judgment pursuant to § 49-15. See *Hoey* v. *Investors' Mortgage & Guaranty Co.*, 118 Conn. 226, 231–32, 171 A. 438 (1934) ("[The] [o]pportunity was open to [the mortgagor] . . . to have the judgment opened and modified for cause shown up to the expiration of the time fixed for redemption, but she failed to avail herself of this remedy. . . . If more favorable terms or a reduction in the judgment debt could have been obtained, loss of the remedy by [a motion to open] is attributable only to the fault of the [mortgagor] in neglecting to resort to it." (Citation omitted.)). On the basis of the record before it, the trial court found that the defendant's choice not to affirmatively protect her own rights while continuing to pursue negotiations with the plaintiff was "dilatory and cavalier . . . ." Having reviewed that same record in its entirety, we conclude that the trial court's factual findings were not clearly erroneous.

Accepting these findings as true, we see no basis to revisit the trial court's conclusion that the expiration of the defendant's right to redemption was caused, at least in part, by her own inaction. See *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 9–10 ("[e]quity will not, save in rare and extreme cases, relieve against a judgment rendered as the result of a mistake on the part of a party or his [or her] counsel, unless the mistake is unmixed with negligence or . . . unconnected with any negligence or inattention on the part of the judgment debtor" (internal quotation marks omitted)). As a result, the defendant's claim that the trial court abused

its discretion by denying her postvesting motion to open the judgment must fail.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's denial of the defendant's motion to open the judgment on the merits.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* VICTOR M. ALICEA (SC 20399)

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

Syllabus

The defendant was convicted of two counts of assault in the first degree in connection with his conduct in cutting the victim's throat with a razor blade. At the time of the incident, the defendant and the victim were engaged in an argument at a fast-food restaurant, where they both were employed. The defendant was subsequently charged with both intentional assault and reckless assault. At trial, after the close of the state's case, the defendant moved for a judgment of acquittal, arguing that the charges were legally inconsistent because each charge required a mutually exclusive mental state. The trial court denied the motion. Subsequently, the jury found the defendant guilty of both of the charged crimes. The defendant then filed another motion for a judgment of acquittal, as well as a motion for a new trial, asserting that the jury's verdict was legally inconsistent. The trial court denied both motions and rendered a judgment of conviction on both counts. The defendant appealed to the Appellate Court, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Held* that, contrary to the defendant's claim, the jury's verdict of guilty of intentional assault and reckless assault was not legally inconsistent: the jury reasonably could have found that the defendant had intended to cause the victim serious physical injury and simultaneously disregarded the risk that his conduct would cause the victim's death, and this court had previously held that convictions involving both intentional and reckless mental states may be legally consistent when each mental state pertains to a different result; moreover, this court rejected the defendant's claim that two different injuries are required for a defendant to be convicted of two different offenses requiring proof of mutually exclusive mental states, as the relevant inquiry is whether

the opposing mental states related to the same result, not whether both convictions related to the same injury, and as such convictions are legally inconsistent only if they require that the defendant possess opposing mental states with respect to the same objective; furthermore, there was no merit to the defendant's claim that the state could not maintain on appeal that his convictions of intentional and reckless assault were consistent on the ground that the state's theory at trial contemplated those charges as alternatives, as there was no suggestion that the state had changed its factual theory of the case on appeal, and, even if the state had presented the charges as alternatives at trial, that would have been the state's legal theory of the case, convictions of intentional and reckless assault are not necessarily legally inconsistent, and the trial court properly instructed the jury on that point.

Argued November 23, 2020—officially released June 23, 2021*

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts of the crime of assault in the first degree, and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the first part of the information was tried to the jury before *Seeley*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of nolo contendere to the second part of the information; judgment of guilty in accordance with the verdict and plea; subsequently, the court denied the defendant's motions for a judgment of acquittal and for a new trial, and the defendant appealed to the Appellate Court, *Prescott*, *Bright* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Jonathan R. Formichella, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

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

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Mark A. Stabile*, former senior assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. In *State* v. *Nash*, 316 Conn. 651, 666, 114 A.3d 128 (2015), we held that convictions of intentional assault in the first degree and reckless assault in the first degree[1] may be legally consistent when each mutually exclusive mental state pertains to a different result. Thereafter, in *State* v. *King*, 321 Conn. 135, 145, 136 A.3d 1210 (2016) (*King 2016*), we applied this rationale to again conclude that convictions of intentional and reckless assault were legally consistent. This certified appeal requires us to determine whether this precedent governs the outcome of the present case. We conclude that it does.

The defendant, Victor M. Alicea, was convicted of one count of intentional assault and one count of reckless assault. On appeal, he contends that his convictions of intentional and reckless assault are legally inconsistent, notwithstanding *Nash* and *King 2016*, because the requisite mental states are mutually exclusive under the particular circumstances of his case, which involved only one act, one victim, and one injury. The defendant claims that his case is instead governed by *State* v. *King*, 216 Conn. 585, 592–94, 583 A.2d 896 (1990) (*King 1990*), and *State* v. *Chyung*, 325 Conn. 236, 247–48, 157 A.3d 628 (2017). Accordingly, we must survey our jurisprudence regarding the legal consistency of multiple verdicts to resolve seemingly disparate language from our cases and to identify a uniform rule. In addition, this appeal requires us to examine the different

[1] Hereinafter, all references to intentional assault and reckless assault are, respectively, to intentional assault in the first degree and reckless assault in the first degree.

circumstances under which a claim of legally inconsistent verdicts implicates our "theory of the case" doctrine. We address these issues in turn.

The Appellate Court's decision sets forth the facts and procedural history; *State* v. *Alicea*, 191 Conn. App. 421, 424–26, 436–37, 215 A.3d 184 (2019); which we summarize in relevant part. The defendant and the victim, Tyrone Holmes, were employees at a Burger King restaurant. In July, 2015, the defendant was working an overnight shift when Holmes, who was not working that night, arrived and entered through the back door of the restaurant. Holmes intended to drop off supplies and "to speak with the defendant, who, he had heard, had been talking about him." Id., 424. At Holmes' request, the defendant stepped outside for a "brief discussion" with Holmes, during which the defendant "denied having talked negatively about Holmes." Id., 424–25. During the conversation, "[e]verything appeared fine to Holmes." Id., 425.

After both men went back inside the restaurant, Holmes overheard the defendant speaking on his cell phone, saying that "the defendant had a problem." Id. "Holmes told the defendant that they did not have a problem, and the defendant walked away . . . ." Id. Holmes followed, at which point they began arguing. "The defendant then pulled Holmes' head toward him and cut his throat with a razor blade." Id. Holmes initially assumed a fighting stance, thinking the defendant had punched him. After noticing that he was bleeding, however, Holmes left the restaurant. Holmes was subsequently taken to a local hospital, where an emergency medicine physician determined that he had "sustained a neck laceration that was approximately seven inches long . . . ." Id. Given the severity of his injury, Holmes was then transferred to another hospital, where he underwent surgery to repair his lacerated neck muscle and left external jugular vein.

The defendant was arrested and charged with both intentional assault and reckless assault. At trial, after the close of the state's case, the defendant moved for a judgment of acquittal. He argued, in part, that the charges were legally inconsistent because each charge required a mutually exclusive mental state. The trial court denied the motion, explaining that this court had held, in *State* v. *Nash*, supra, 316 Conn. 651, that intentional and reckless assault charges are legally consistent. See id., 666–69. Subsequently, the jury found the defendant guilty of both charges. The defendant filed a renewed motion for a judgment of acquittal and a motion for a new trial, asserting that the verdicts were legally inconsistent. The trial court denied both motions and rendered a judgment of conviction on both counts. The court then merged the convictions and sentenced the defendant to an enhanced mandatory minimum term of ten years incarceration, followed by twelve years of special parole on the count of intentional assault as a persistent dangerous felony offender.[2]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, among other things, that the trial court incorrectly had concluded that the verdicts were legally consistent. The Appellate Court subsequently affirmed the judgment of the trial court. *State* v. *Alicea*, supra, 191 Conn. App. 450. Relevant to this appeal, the Appellate Court concluded that the verdicts of guilty for both intentional assault and reckless assault were legally consistent. Id., 434. Relying on *State* v. *Nash*, supra, 316 Conn. 666–69, the court reasoned that, in order to find the defendant guilty of reckless assault, "the jury was required to find that the defendant engaged in conduct that . . . created a

[2] The defendant did not raise a claim, before the trial court or on appeal, that his federal or state constitutional protections against double jeopardy precluded his convictions. Accordingly, we express no opinion on that subject.

grave risk of death to Holmes, ultimately resulting in Holmes' serious physical injury. Such a conclusion is not inconsistent with the [jury's] finding that the defendant also intended to seriously injure Holmes," as it was required to find in order to find the defendant guilty of intentional assault. (Emphasis omitted.) *State* v. *Alicea*, supra, 434.

Thereafter, the defendant filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that the jury's verdicts of guilty of intentional assault and reckless assault were not legally inconsistent?" *State* v. *Alicea*, 333 Conn. 937, 219 A.3d 373 (2019).

On appeal, the defendant contends that the verdicts finding him guilty of intentional assault and reckless assault are legally inconsistent because their requisite mental states—intentional and reckless—are mutually exclusive. Specifically, he argues that the verdicts are inconsistent in this case because it was impossible for the jury to find both mutually exclusive mental states with respect to only one act, one victim, and one injury. In addition, he asserts that his legal inconsistency claim must be viewed in light of the state's theory of the case as presented to the jury at trial—namely, that the charges were brought in the alternative. The state contends that the Appellate Court correctly concluded that the convictions are consistent because each mental state pertains to a different *result*—in other words, the statutory objectives of each mental state are different. The state also asserts that we should not review the defendant's claim about the state's theory of the case because it is outside the scope of the certified question. In the alternative, the state strongly disputes the defendant's characterization of its theory of the case at trial.

The following legal principles guide our analysis of this claim. "A claim of legally inconsistent convictions,

also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Chyung*, supra, 325 Conn. 245–46. "When a jury has returned legally inconsistent verdicts, there is no way for the reviewing court to know which charge the jury found to be supported by the evidence. . . . Accordingly, the court must vacate both convictions and remand the case to the trial court for a new trial." (Citation omitted; footnote omitted.) Id., 247.

In this case, the defendant was convicted of one count each of intentional assault in violation of General Statutes § 53a-59 (a) (1) and reckless assault in violation of § 53a-59 (a) (3). Section 53a-59 (a) (1) provides that an individual commits intentional assault when, "[w]ith *intent to cause serious physical injury* to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . ." (Emphasis added.) Section 53a-59 (a) (3) provides that an individual commits reckless assault when, "under circumstances evincing an extreme indifference to human life he *recklessly engages in conduct which creates a risk of death* to another person, and thereby causes serious physical injury to another person . . . ." (Emphasis added.)

We have previously recognized that "the statutory definitions of 'intentionally' and 'recklessly' are mutu-

ally exclusive and inconsistent." *State* v. *King*, supra, 216 Conn. 593–94. Intentional conduct requires the defendant to possess a "*conscious objective . . . to cause*" the result described in the statute defining the offense. (Emphasis added.) General Statutes § 53a-3 (11). By contrast, reckless conduct requires that the defendant "is aware of and *consciously disregards* a substantial and unjustifiable risk" that the result described in the statute will occur. (Emphasis added.) General Statutes § 53a-3 (13). Thus, a reckless mental state is inconsistent with an intentional mental state because "one who acts recklessly does not have a conscious objective to cause a particular result." (Internal quotation marks omitted.) *State* v. *King*, supra, 594.

We have held, however, that convictions involving both intentional and reckless mental states are legally consistent in certain circumstances. For example, when each mental state pertains to a different act, a different victim, or a different injury, then the convictions are consistent. See, e.g., *State* v. *King*, supra, 321 Conn. 144 (convictions for intentional and reckless assault are legally consistent when "the jury reasonably could have found that the defendant's conduct amounted to two separate acts"); *State* v. *Hinton*, 227 Conn. 301, 315, 630 A.2d 593 (1993) (convictions for intentional and reckless assault are legally consistent when defendant intended to injure one person and recklessly disregarded risk to bystanders because "here we have two different victims and therefore two different results"). Significantly, we have also explained that convictions involving both intentional and reckless mental states may be legally consistent when each mental state pertains to a different *result*. *State* v. *Nash*, supra, 316 Conn. 666 ("there is no reason why a person cannot simultaneously act intentionally and recklessly with respect to the same conduct and the same victim if each of those two mental states pertains to a different

result" (emphasis omitted)). "[M]ental states . . . exist only with reference to particular results . . . . Thus, it is necessary to examine the mental state element as it arises in [the] particular statute defining [the] offense to determine whether actual inconsistency exists." (Internal quotation marks omitted.) Id., 668.

We find our decisions in *Nash* and *King 2016* to be particularly instructive in this case. In *Nash*, the defendant was convicted of, among other crimes, both intentional and reckless assault under § 53a-59 (a) (1) and (3) after he fired several shots into a home, one of which injured the homeowner's sister. Id., 654. We held that the defendant's convictions were not legally inconsistent. Id., 666–69. We reasoned that "the two mental states required to commit the offenses relate to different results" because, "in order to find the defendant guilty of those offenses, the jury was required to find that the defendant intended to injure another person and that, in doing so, he recklessly created a risk of that person's death." Id., 666. We concluded that "the jury reasonably could have found that the defendant simultaneously possessed both mental states . . . ." Id., 667–68. We applied *Nash* to uphold convictions of intentional and reckless assault again in *King 2016*. In that case, the defendant brandished his knife before stabbing the victim several times. *State* v. *King*, supra, 321 Conn. 138–39. We held that the convictions were not legally inconsistent because, under *Nash*, "the jury reasonably could have found that when the defendant stabbed the victim, he intended to cause serious injury to her and that he also recklessly engaged in conduct [that created] a risk of the victim's death. . . . That is, the defendant's act of stabbing the victim is consistent with two different mental states, each related to two different results." (Citation omitted; internal quotation marks omitted.) Id., 145.

In the present case, *Nash* squarely governs our examination of the mental state elements of intentional and reckless assault and demonstrates that the convictions are not legally inconsistent. In order to find the defendant guilty of both charges, the jury was required to find—with respect only to the mental state element of each charge—that the defendant (1) consciously intended to cause Holmes serious physical injury, and (2) consciously disregarded the risk that his conduct would result in Holmes' death. The jury reasonably could have found that the defendant simultaneously possessed both mental states pertaining to his singular action of cutting Holmes' throat. In other words, the jury reasonably could have found that the defendant intended to cause Holmes serious physical injury and simultaneously disregarded the risk that his conduct would cause Holmes' death. Therefore, the convictions are not legally inconsistent.

The defendant nonetheless contends that his convictions are legally inconsistent for two reasons. First, he asserts that we stated in *King 1990* and *Chyung* that the mutually exclusive mental states must pertain to distinct acts or injuries. He argues that these cases can be read consistently with *Nash* and *King 2016* by examining the respective facts of each case. He further contends that the facts of this case are more analogous to *King 1990* and *Chyung* because each of these three cases involved only one act and one injury, whereas *Nash* and *King 2016* involved multiple acts and multiple potential injuries. Second, the defendant argues that the state is bound by the theory of the case it presented at trial, namely, that the charges were alternatives. Specifically, he contends that the state cannot now argue that the convictions are legally consistent because it did not present the charges to the jury as consistent. We address each argument in turn.

First, the defendant asserts that our case law establishes that "two different injuries are required in order for a defendant to be convicted of two different offenses requiring proof of mutually exclusive mental states." (Emphasis omitted.) For this proposition, he relies on *King 1990* and *Chyung*. In *King 1990*, the defendant was convicted of, among other things, attempted murder and reckless assault for lighting a fellow prisoner's cell on fire and rigging the door to trap him inside. *State* v. *King*, supra, 216 Conn. 586–88. In *Chyung*, the defendant was convicted of murder and manslaughter in the first degree with a firearm for placing a gun into a bag, when it suddenly discharged, killing the victim. *State* v. *Chyung*, supra, 325 Conn. 241. In both cases, this court concluded that the convictions were legally inconsistent because, "[t]o return verdicts of guilty for both [charges] . . . the jury would have had to find that the defendant simultaneously acted intentionally and recklessly with regard to the same act and the same result, *i.e.*, *the injury to the victim*." (Emphasis added.) *State* v. *King*, supra, 593; accord *State* v. *Chyung*, supra, 246–48. Specifically, in *King 1990*, we reasoned that the defendant could not have both consciously intended to cause the victim's death, as required by the attempted murder conviction, while also recklessly disregarding the risk of the victim's death, as required by the reckless assault conviction. *State* v. *King*, supra, 593–94; see also *State* v. *Chyung*, supra, 247–48.

In the present case, the defendant contends that our holdings in *King 1990* and *Chyung* establish that mutually exclusive mental states are legally consistent only if they pertain to different acts or injuries because these cases define "result" as "injury to the victim." (Emphasis omitted; internal quotation marks omitted.) In addition, the defendant argues that comparing the facts of these cases with the facts of *Nash* and *King 2016* further delineates this rule. Specifically, *King 1990* and

Chyung each involved only one act—respectively, the single act of trapping the victim in the locked prison cell and the single discharge from the gun—and one injury, and, therefore, the convictions were inconsistent. By contrast, *Nash* and *King 2016* each involved multiple acts or multiple injuries—respectively, multiple shots fired and multiple stab wounds inflicted—and, therefore, the convictions were consistent. The defendant asserts that his legal inconsistency claim hinges on this factual distinction because, "[w]hen there are multiple blows, multiple stabs, multiple shots fired, or more than one victim, it is at least possible for a jury to find a defendant guilty of two conflicting [mental state] crimes, and the verdicts will not be held to be legally inconsistent." The defendant further asserts that the present case is more analogous to *King 1990* and *Chyung* because he engaged in a single act to inflict a single laceration. Therefore, he contends, the mutually exclusive mental states pertain to a single "result" and are legally inconsistent.

We are not persuaded by the defendant's interpretation of our case law. In *Nash*, we rejected the same argument the defendant raises here, reasoning that "[t]he relevant inquiry . . . is whether the opposing mental states relate to the same result, not whether both convictions relate to the same injury." *State* v. *Nash*, supra, 316 Conn. 668. The word "result" in this context referred to the result *of the requisite mental state*, or, in other words, the statutory objective associated with the respective mental state. See id., 669 and n.18. This is "separate and distinct" from the injury-in-fact element required for each conviction. Id., 669. Moreover, we explained that "[n]othing that we said in [*King 1990*] . . . should be read to mean that . . . the relevant inquiry is whether the statutes at issue require findings that the defendant caused the same injury to the victim. Rather . . . [the convictions] are

legally inconsistent only if they require that the defendant possess the opposing mental states with respect to the same *objective* . . . .'' (Emphasis added.) Id., 669 n.18. Therefore, in *Nash*, we considered and expressly rejected the same argument the defendant raises here.[3]

Additionally, the defendant overestimates the degree to which the rationales of all four cases turned on the facts of each case rather than the statutory elements of the respective charges. The defendant relies on language from *King 1990* and *Chyung* that the mental states must pertain to different *injuries*; however, the outcomes of all four cases actually hinged on the *objective* associated with each statutory, mental state element, not the acts performed by the defendants or the injuries suffered by the victims. *Nash* expressly articulated this rule, but all four cases have employed it. For example, in *King 2016*, we noted that ''the jury reasonably could have found that the defendant's conduct amounted to two separate acts''; *State* v. *King*, supra, 321 Conn. 144; but we also applied *Nash* to conclude that the verdicts would be consistent even under the theory that the defendant's conduct amounted to only one act.[4] Id., 144–45.

[3] *Chyung* repeated the same language from *King 1990* identifying the relevant ''result'' as ''the injury to the victim.'' (Internal quotation marks omitted.) *State* v. *Chyung*, supra, 325 Conn. 246, quoting *State* v. *King*, supra, 216 Conn. 593. However, contrary to the defendant's assertion, the inclusion of that quotation by this court in *Chyung* did not alter the relevant inquiry because *Nash* had clarified that language.

[4] The defendant also contends that, to the extent that we disagree with his interpretation of *Nash*, we should overrule *Nash* in favor of the language subsequently articulated in *Chyung*. Specifically, the defendant argues that *Nash* draws a distinction between the result associated with the mental state and the result of the conduct that is artificial because ''an individual who intends to cause serious physical injury . . . will necessarily consciously and intentionally create a risk of death and, therefore, cannot create such a risk unintentionally.'' In addition, the defendant notes that the ''serious physical injury'' objective associated with intentional assault is defined as ''physical injury *which creates a substantial risk of death*''; (emphasis added) General Statutes § 53a-3 (4); which is identical to the ''risk of death'' objective associated with reckless assault. We disagree for two reasons. First, § 53a-

Finally, the defendant claims that the state has impermissibly changed its theory of the case on appeal. The following additional procedural history is relevant to the defendant's argument. During trial, following the state's presentation of its case-in-chief, the defendant orally moved for a judgment of acquittal on the ground that the charges were legally inconsistent. *State* v. *Alicea*, supra, 191 Conn. App. 436. At oral argument on the motion, the prosecutor indicated that he intended to argue to the jurors that, "if they find [the defendant] not guilty [of intentional assault], that they should proceed to determine whether he's reckless . . . ." The trial court, however, concluded that the charges were legally consistent under *Nash*, and it denied the defendant's motion. Subsequently, during closing argument, the prosecutor explained to the jury that, "if you do not agree [that the state has proven intentional assault], you don't believe the evidence supports that, I submit to you that the evidence and the record show, at the very least, that [the defendant] acted recklessly." Consistent with its ruling on the defendant's motion, the trial court instructed the jury to consider each charge separately.

The defendant contends that the state argued to the jury that the charges of intentional and reckless assault were *alternatives*, meaning that the jury could not find the defendant guilty of both counts. The defendant also contends that the state argued "for the first time" in its opposition to the defendant's postverdict, renewed motion for a judgment of acquittal and to his motion

3 (4) does not limit its definition of "serious physical injury" to an injury that creates a substantial risk of death; rather, it continues, "*or* which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." (Emphasis added.) Second, contrary to the defendant's assertion, the rule from *Nash* does not lead to a bizarre result here. The jury reasonably could have found that the defendant intended to cause Holmes serious physical injury and, in doing so, disregarded the risk that such conduct would simultaneously create a risk that Holmes would die.

for a new trial that the verdicts were legally consistent under *Nash*. On appeal, the defendant argues that the state cannot change its theory of the case postverdict to avoid the verdicts' legal inconsistency. The state asserts that this issue is distinct from the legal consistency issue and, therefore, unreviewable as outside the scope of the certified question. Alternatively, the state strongly disputes the defendant's characterization of its presentation of the case to the jury, arguing that it never presented the charges to the jury as alternatives.

The "theory of the case" doctrine is rooted in the due process owed to criminal defendants. See, e.g., *Dunn* v. *United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) ("[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process"); *State* v. *Robert H.*, 273 Conn. 56, 82, 866 A.2d 1255 (2005) ("[t]he 'theory of the case' doctrine is rooted in principles of due process of law"); see also, e.g., *State* v. *Scruggs*, 279 Conn. 698, 718, 905 A.2d 24 (2006) (under claim of insufficient evidence, "in order for any appellate theory to withstand scrutiny . . . it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt" (internal quotation marks omitted)).

We have at least once applied the theory of the case doctrine to a legal inconsistency analysis. In *Chyung*, the state argued on appeal that "the jury reasonably could have found that the defendant engaged in two separate acts," which would have rendered the verdicts consistent. *State* v. *Chyung*, supra, 325 Conn. 255. We reasoned that, because the state "never presented this theory to the jury during trial," it could not rely on this theory to save the otherwise legally inconsistent verdicts. Id., 255–56. This analysis was consistent with the view previously expressed by the dissent in *King*

2016 that "the legal consistency of the verdict must be considered in light of the state's theory of the case at trial." *State* v. *King*, supra, 321 Conn. 159 n.2 (*Robinson*, *J.*, dissenting). Together, these cases establish that the theory of the case doctrine may be defensively incorporated into a legal inconsistency claim; that is, a defendant may preclude the state from relying on a novel factual theory of the case on appeal because a new theory cannot transform inconsistent verdicts into consistent ones if it was not presented to the jury at trial.[5] In other words, the theory of the case doctrine is embedded in the legal inconsistency analysis to the extent necessary to tether the state to the factual theory it presented to the jury.[6]

[5] The state contends that the court in *Chyung* "made a mistake" in "departing from" the majority in *King 2016* when it declined to uphold the convictions under the state's novel factual theory of the case. We disagree with this characterization of our jurisprudence. The majority in *King 2016* avoided binding the state to either of the disputed factual theories of the case by reasoning that, even under the theory of the case that the defendant claimed the state presented to the jury, the convictions were legally consistent pursuant to *Nash*. See *State* v. *King*, supra, 321 Conn. 144–45. The dissent in *King 2016* maintained that the state should have been bound to that theory on appeal, but it agreed with the majority that the convictions were consistent under that theory. Id., 158–59 and n.2 (*Robinson*, *J.*, dissenting). This court in *Chyung* instead concluded that the convictions were legally inconsistent; we were then required to determine whether the state could rely on a novel factual theory on appeal, which was a point of tension between the majority and the dissent in *King 2016*. The court in *Chyung* resolved this tension by concluding that permitting the state to rescue otherwise inconsistent convictions by presenting a novel factual theory on appeal would deprive the defendant of due process. *State* v. *Chyung*, supra, 325 Conn. 255–56. This holding was no mistake; rather, it employed long held and uncontroversial principles of due process jurisprudence.

[6] Our cases establish a second avenue through which the theory of the case doctrine becomes relevant to a legal consistency claim. A defendant may raise an independent claim that he lacked adequate notice that he could be convicted of both charges due to some aspect of the state's legal or factual theory of the case as presented to the jury. See *State* v. *King*, supra, 321 Conn. 145, 148. This avenue is also rooted in the due process concerns that inform the theory of the case doctrine. Unlike the "defensive" posture, however, this posture is "offensive" in the sense that it provides a defendant with another independent avenue to challenge the convictions. In *King*

The defendant in this case argues that, as in *Chyung*, the state cannot maintain that his convictions are consistent on appeal because its theory of the case at trial contemplated the charges as alternatives. We review the defendant's argument to the extent that it is encompassed within his legal consistency claim and is not an attempt to raise a distinct due process claim rooted in notice considerations. See footnote 6 of this opinion. Nevertheless, the defendant's argument is unpersuasive because there is an important distinction between this case and *Chyung*. In *Chyung*, the novel theory on which the state sought to rely was factual, not legal. The state argued to the jury that the defendant's conduct was one act but then sought to avoid legal inconsistency by arguing on appeal that the defendant's conduct could constitute two acts. *State* v. *Chyung*, supra, 325 Conn. 255–56. Here, there is no suggestion that the state has changed its *factual* theory of the case on appeal, for example, to assert that the defendant's conduct constituted multiple acts or encompassed multiple victims. Even if we assume that the defendant is correct that the state presented the charges as alternatives at trial, this would have been the state's *legal* theory of the case. We need not inquire whether this legal theory represented a litigation tactic or a misapprehension of our legal consistency jurisprudence. In this case, the trial court properly instructed the jury to consider each charge separately based on its conclusion that the charges of reckless assault and intentional assault were

2016, we clarified that this due process analysis and the legal consistency analysis "are ultimately separate issues and reviewing courts should evaluate them as such." Id., 148; see also id., 159 n.2 (*Robinson*, *J.*, dissenting) (agreeing with majority that "the legal inconsistency and theory of the case issues in this appeal are doctrinally separate inquiries"). In the present case, although the defendant raised a separate due process claim before the Appellate Court; *State* v. *Alicea*, supra, 191 Conn. App. 435; he makes no such claim before this court; nor did he seek certification on such an issue.

not legally inconsistent.[7] As we have often explained, the jury is bound to apply the law as instructed by the trial court. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 131, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Moreover, as explained, the defendant here does *not* raise a distinct claim that he lacked adequate notice that he could be convicted of both charges in light of the state's legal theory of the case at trial. See footnote 6 of this opinion.

In sum, the state is bound to the factual theory of the case that it presented to the jury at trial. Here, there is no claim that the state changed its factual theory of the case postconviction. Moreover, as the trial court correctly explained, we have repeatedly stated that convictions of intentional and reckless assault are not legally inconsistent, and the court properly instructed the jury on this point. We presume that the jury followed the trial court's instructions.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[7] In addition, we need not consider whether *Chyung* would bar a novel legal theory raised by the state postverdict when the trial court *improperly* instructed the jury on the law. Here, the trial court *properly* instructed the jury to consider the legally consistent charges separately.

ORDERS

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ANTONIO A. *v.* COMMISSIONER OF CORRECTION

The respondent's petition for certification to appeal from the Appellate Court, 205 Conn. App. 46 (AC 42618), is denied.

Rocco A. Chiarenza, assistant state's attorney, in support of the petition.

Michael W. Brown, in opposition.

Decided October 26, 2021

ALFREDO GONZALEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Alfredo Gonzalez' petition for certification to appeal from the Appellate Court, 205 Conn. App. 511 (AC 43815), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

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

Decided October 26, 2021

STATE OF CONNECTICUT *v.* MORLO M.

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 660 (AC 41474), is denied.

Judie Marshall, assigned counsel, in support of the petition.

Linda F. Rubertone, senior assistant state's attorney, in opposition.

Decided October 26, 2021

STATE OF CONNECTICUT *v.* DAYVON WILLIAMS

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 539 (AC 42612), is denied.

Jennifer B. Smith, assistant public defender, in support of the petition.

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

Decided October 26, 2021

WENDALL HASAN *v.* COMMISSIONER OF CORRECTION

The petitioner Wendall Hasan's petition for certification to appeal from the Appellate Court, 206 Conn. App. 695 (AC 43433), is denied.

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

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided October 26, 2021

STATE OF CONNECTICUT *v.* FELIMON C.

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 727 (AC 43686), is denied.

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

Judie Marshall, assigned counsel, in support of the petition.

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

Decided October 26, 2021

STACY HOLLOWAY *v.* LINDA CARVALHO ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 206 Conn. App. 371 (AC 43831), is denied.

Joseph A. Hourihan, in support of the petition.

Linda L. Morkan and *Christopher J. Hug*, in opposition.

Decided October 26, 2021

LILLY M. GIBSON *v.* JEFFERSON WOODS COMMUNITY, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 206 Conn. App. 303 (AC 43849), is denied.

Joseph S. Elder, in support of the petition.

Kristen Schultze Greene, in opposition.

Decided October 26, 2021

STATE OF CONNECTICUT *v.* CHARLES MARSHALL

The defendant's petition for certification to appeal from the Appellate Court, 206 Conn. App. 209 (AC 43866), is denied.

Charles Marshall, self-represented, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided October 26, 2021

IN RE KARTER F.

The petition of the respondent father for certification to appeal from the Appellate Court, 207 Conn. App. 1 (AC 44496), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Elizabeth Bannon, assistant attorney general, in opposition.

Decided October 26, 2021

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* LINDA BOOKER ET AL.

The petition of the defendant Ulish Booker, Jr., for certification to appeal from the Appellate Court (AC 44593) is denied.

Thomas P. Willcutts, in support of the petition.

Adam L. Avallone, in opposition.

Decided October 26, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 208

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* SUZANNE P.*
(AC 43859)

Suarez, Clark and DiPentima, Js.

Syllabus

Convicted on a plea of guilty of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs as a second offender, the defendant appealed to this court following the trial court's denial of her motion to modify a condition of her probation. As part of the plea agreement, the state entered a nolle prosequi as to each of two unrelated charges against the defendant, for breach of the peace in the second degree and criminal trespass in the first degree. The breach of the peace charge arose from an incident between the defendant and her boyfriend, L, and the criminal trespass charge arose from an incident in which the defendant trespassed on the property of her former husband, R, and their two children. As part of the defendant's sentence, the court imposed a special condition of probation, in which it ordered that the defendant have no contact with the "domestic violence complainants." After the commencement of her probationary period, the defendant filed a motion, requesting that the no contact condition be modified to delete the phrase "domestic violence complainants" and to replace it with language that specifically referenced only L and R. After a hearing, the trial court denied the motion and the defendant appealed to this court. *Held*:

1. The trial court's determination that the special condition prohibited the defendant from having any contact with her children was not improper: although the trial court's oral pronouncement that the defendant have no contact with the "domestic violence complainants" was ambiguous, its clarification that the phrase was meant to include the defendant's children was not manifestly unreasonable, because, even though criminal trespass is not a domestic violence crime, it was clear that the court

* In accordance with our policy of protecting the privacy interests of the victims of domestic violence, we decline to identify the defendant, the victims, or others through whom the victims' identity may be ascertained. See General Statutes § 54-86e.

intended the phrase "domestic violence complainants" to include those affected by the defendant's criminal trespass in addition to the victim of the breach of the peace, L, and, although the children were not direct complainants in the criminal trespass charge, the terms "complainant" and "victim" may be used interchangeably in criminal proceedings, the defendant did not challenge the fact that R, who was also the victim of criminal trespass, was included in the no contact order, and, if the trial court had intended the order to apply only to L, it would have used the singular term "complainant" instead of the plural term "complainants"; moreover, the issue of no contact with the children was before the court at the defendant's sentencing hearing, as, during that hearing, R specifically requested that the defendant be prohibited from contacting him and the children and defense counsel argued that, if a no contact order were to be imposed, it should not apply to the children.

2. The trial court did not abuse its discretion in denying the defendant's motion for modification:

a. The defendant could not prevail on her unpreserved claim that her right to procedural due process was violated because she was not provided with notice and an opportunity to be heard with respect to the no contact condition, the defendant having failed to establish a violation of a constitutional right under *State* v. *Golding* (213 Conn. 233): the trial court was not required to canvass the defendant regarding the special condition of probation under the applicable rule of practice (§ 39-19) because the condition was not a direct consequence of the plea; moreover, at the sentencing hearing, R specifically and repeatedly requested that the defendant have no contact with him and the children and the defendant was provided with a meaningful opportunity to address the issue; furthermore, the defendant did not move to withdraw her plea even though she was aware, prior to the imposition of the sentence, that a special condition of probation prohibiting contact with the children was before the trial court.

b. The defendant's constitutional right to substantive due process was not violated because the special condition of probation did not violate her fundamental right to parent her children, as the condition did not reach further than was necessary to protect the children's safety: the no contact condition furthered a valid objective of probation because it sought to protect the safety of the children as members of the public; moreover, under the circumstances of this case, the trial court's taking into consideration the emotional and mental health safety of the defendant's children when fashioning its special conditions of probation was an appropriate extension of *State* v. *Ortiz* (83 Conn. App. 142), in which a no contact order was imposed to protect the physical safety of the defendant's children, as there was ample indication in the record of emotional harm, and the no contact order focused on the emotional well-being of the children.

Argued May 19—officially released November 9, 2021

Procedural History

Information charging the defendant with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and with the infraction of failure to display lights while operating a motor vehicle, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the defendant was presented to the court, *Baio*, *J.*, on a plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor or drugs as a second offender; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the infraction of failure to display lights; subsequently, the court, *Baio*, *J.*, denied the defendant's motion to modify a special condition of her probation, and the defendant appealed to this court. *Affirmed*.

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Kevin M. Black, Jr., former certified legal intern, with whom were *Michele C. Lukban*, senior assistant state's attorney, and, on the brief, *Sharmese A. Walcott*, state's attorney, and *Mark Brodsky*, former senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Suzanne P., appeals from the judgment of the trial court denying her amended motion to modify a special condition of her probation. On appeal, the defendant claims that the court improperly (1) determined that the special condition prohibited her from having any contact with her children, and (2) denied her amended motion for modification despite the fact that the special condition prohibiting contact with her children violates her right to due process. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. On July 6, 2018, the defendant pleaded guilty to operation of a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a as a second offender. As part of the plea agreement, the defendant also admitted to having violated the terms of her probation. Her pleas were part of a global resolution in which the following charges were nolled: breach of the peace in the second degree in violation of General Statutes § 53a-181, criminal trespass in the first degree in violation of General Statutes § 53a-107 and failure to display lights while operating a motor vehicle in violation of General Statutes § 14-96a (a). The breach of the peace charge arose from an incident involving the defendant and her boyfriend, L. The criminal trespass charge involved an incident in which the defendant, after having been warned not to trespass at the residence of her former husband, R, and their two children, left on the front porch of that residence a gift bag containing photographs and a note indicating that she would like to see their children. After canvassing the defendant, the court found that the plea was made knowingly and voluntarily and accepted the plea. The state recommended two years of incarceration, execution suspended after one year, with three years of probation. The state urged the court to order as a special condition of probation that the defendant have no contact with L. The court ordered a presentence investigation report (PSI), continued the matter for sentencing and noted that the defendant had the right to argue for a lesser sentence.

At the August 31, 2018 sentencing hearing, the issue of no contact with the defendant's children was raised. When invited to provide a victim statement to the court, R stated, "[W]ith a long history of [the defendant's]

insobriety, my children and I would just like a no contact."[1] The defendant noted her struggles with sobriety and expressed her desire not to force herself on her children. She explained, "Clearly alcohol has destroyed and taken away a lot of good things in my life. . . . I am a chronic relapser . . . . I just can't lose anymore. The worst of all of it is the time with my children." The court noted the defendant's history of unsuccessful attempts at sobriety and the loss of contact with her children. The court sentenced the defendant to two years of incarceration, execution suspended after one year, and three years of probation. One of the special conditions of probation ordered by the court was that the defendant have "no contact with the domestic violence complainants."[2] The court further stated that, after the defendant had completed four months of probation, she may file a motion to modify and "show that there has been justification to address the issue of no contact . . . ."[3]

Before the defendant began probation, she filed a motion to modify the no contact condition as to L, with whom she planned to reside following her release. At a January 18, 2019 hearing, the court denied the motion and clarified that the no contact order prohibited contact with L and the defendant's family.

The defendant's probationary period began on May 13, 2019. The relevant written special condition of her probation provided that she have "[n]o contact with

[1] L requested that the protective order be removed, which request the state opposed.

[2] Special conditions of probation are conditions aside from the standard conditions of probation that apply to all probationers. See, e.g., *State* v. *Johnson*, 75 Conn. App. 643, 646 n.3, 817 A.2d 708 (2003).

[3] Although the court expressly stated at the sentencing proceeding that the defendant could move to modify the special condition upon a showing of a justification for doing so, the defendant's amended motion to modify alleged no such justification.

victim(s)/complainant(s) [L], [R] or [the] victim's/complainant's family." The defendant filed a motion, dated July 29, 2019, for clarification and modification of the no contact special condition, in which she requested the court to clarify that the no contact condition of her probation did not apply to her children. In the motion, the defendant argued that R had prevented her from having visitation with her children as a result of the no contact special condition, despite the fact that, pursuant to a divorce settlement, the defendant and R shared joint legal custody of the children, aged thirteen and sixteen, who reside with R. The court denied the motion without prejudice because R, who had made it "abundantly clear that he did not want contact for himself or his children," was not provided notice of the hearing. The defendant then filed an "amended motion to modify condition of probation," dated November 13, 2019, in which she sought to "modify the 'no contact' condition of [her] probation by specifically deleting the condition of 'no contact with *the domestic violence complainants*' and substitute [it] with 'no contact with [*L*] and the *defendant's ex-husband* [*R*], *with the exception that* [*she*] *be permitted to have communication with* [*R*] *for the specific purposes of discussing the educational, financial, and health related needs of her minor children.*' " (Emphasis in original.) In her motion, the defendant contended that prohibiting her from contacting her children while on probation conflicted with the court's oral pronouncement of her sentence and violated her constitutional right to due process.

At the November 15, 2019 hearing on the defendant's amended motion to modify, defense counsel stated that the defendant is "minimally . . . seeking clarification . . . ." Counsel representing R and his children stated that they did not want contact with the defendant at this time and elaborated that the children "have suffered deep wounds because of their mother's behavior and

. . . they are going through recovery just as their mother is going through recovery . . . .'' R requested that the court ''uphold the no contact for myself and my children at this time.'' The court stated that, because the therapist of the older child ''is here, essentially, in a representative role for those children, I will allow a brief comment . . . .'' The therapist stated that the child was seeking stability and is not interested in having visitation with the defendant and that it was not in the best interest of the child to force her to have contact with the defendant. The court stated that ''there's a family court matter going on. Clearly there are going to be issues happening over there. . . . If the parties come back and say that there's no opposition to modification, the court will hear the motion.'' The court concluded that the no contact special condition pertained to the children and noted that, ''[i]f we were here today with the domestic violence victim and/or counsel on their behalf saying that there was no opposition and that they wanted contact, the court's order would be very different.'' At the conclusion of the hearing, the court denied the motion. This appeal followed.

On November 19, 2020, the court issued an articulation of its denial of the defendant's amended motion to modify in response to a motion for articulation filed by the defendant.[4] Additional facts will be set forth as necessary.

[4] The defendant filed a motion for articulation on July 17, 2020, seeking an articulation from the trial court of its reasons for denying her amended motion to modify. Following the court's denial of the motion for articulation, the defendant filed in this court a motion for review of the denial of her motion for articulation. This court granted the defendant's motion for review but denied the relief requested therein and further ordered, sua sponte, that the court ''articulate whether it considered the defendant's claim, raised in her November 13, 2019 'amended motion to modify condition of probation' that the no contact order with her children resulted in the termination of her parental rights for three years without due process, in violation of both the Connecticut and United States constitutions, and, if so, to state the factual and legal basis for its decision concerning this claim.'' In its articulation, the court explained the basis for its imposition of a no contact order as to

I

The defendant first claims that the court improperly determined that the special condition prohibited her from having any contact with her children. She argues that the court's oral pronouncement, made at the time of sentencing, that she have "no contact with the domestic violence complainants," is unambiguous and conflicts with the written memorialization of that special condition, which provides that the defendant have "[n]o contact with victim(s)/complainant(s) [L], [R] or [the] victim's/complainant's family." We are not persuaded that the court's determination was improper.

We note, preliminarily, that the court's oral pronouncement of the special condition controls and not the written memorialization of the oral pronouncement. "[B]ecause the sentence in a criminal case generally is imposed orally in open court . . . the written order or judgment memorializing that sentence, including any portion pertaining to probation, must conform to the court's oral pronouncement." (Citation omitted.) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010). "Consequently, as a general matter, any discrepancy between the oral pronouncement of sentence and the written order or judgment will be resolved in favor of the court's oral pronouncement." Id., 531.

Whether the defendant's criminal trespass is an act of family violence under General Statutes § 46b-38a is not the issue presented to us in this appeal. The court apparently considered the trespass to be a domestic violence crime, but the issue in this appeal is whether the court used the term "domestic violence complainants" to include the children.[5] The court's use of the

the children, which included the defendant's multiple violations of protective orders, failure to comply with probation requirements and the protection of those closest to the defendant.

[5] At the August 21, 2019 hearing on the defendant's July 29, 2019 motion for clarification and modification, the court stated that the fact that the criminal trespass charge involving R was part of a global agreement in which

plural term "complainants" indicates that it intended to include more persons than L in the order. It, however, is ambiguous as to whether the term "complainants" includes, in addition to L, only R or R and the children. In light of this ambiguity, we next consider whether the court properly determined that the no contact condition applied to the defendant's children.

"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. . . . In addition . . . because the trial judge who issues the order that is the subject of subsequent clarification is familiar with the entire record and, of course, with the order itself, that judge is in the best position to clarify any ambiguity in the order. For that reason, substantial deference is accorded to a court's interpretation of its own order. . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Citations omitted; internal quotation marks omitted.) *Bauer* v. *Bauer*, 308 Conn. 124, 131–32, 60 A.3d 950 (2013).

that charge was nolled "doesn't diminish [R's] right to be considered as a domestic violence victim."

"[T]he purpose of a clarification is to take a prior statement, decision or order and make it easier to understand. 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." (Internal quotation marks omitted.) *Light* v. *Grimes*, 136 Conn. App. 161, 169, 43 A.3d 808, cert. denied, 305 Conn. 926, 47 A.3d 885 (2012).

At the November 15, 2019 hearing on the defendant's amended motion to modify, the court clarified that "the transcript was clear, that the hearing was clear, and that the sentence was clear that the no contact [condition] with the domestic violence victims and conditions imposed included no contact with the children." In its articulation of the denial of the defendant's amended motion to modify, the court stated: "At the time of sentencing, the defendant's ex-husband, [R], expressed . . . that he and his children wanted no contact with the defendant . . . and not[ed] that they can no longer handle the defendant's ongoing alcohol abuse. The defendant herself acknowledged her issues and that she would not force herself on her children. The court considered the effect on those closest to the defendant of her history of alcohol abuse and noncompliance with court orders."

The defendant disagrees with the court's clarification that the defendant's children are included within the phrase "domestic violence complainants." She argues that R was the sole complainant in the criminal trespass case and, furthermore, that criminal trespass is not a domestic violence crime. In criminal proceedings, "complainant" is often used in place of "victim." See, e.g., *State* v. *Warholic*, 278 Conn. 354, 369–70 and n.7, 897 A.2d 569 (2006). The interchangeable use of these terms does not render the court's clarification manifestly unreasonable simply because the children did not

directly complain of the criminal trespass but did so indirectly through R. We are also not persuaded by the defendant's argument that the children are not included as "domestic violence complainants" because criminal trespass is not a domestic violence crime. If so, then R would be eliminated from the no contact order, and the defendant does not challenge on appeal that the special condition applied to R. It is clear that the court intended the phrase "domestic violence complainants" to include those affected by the criminal trespass in addition to the victim/complainant of the breach of the peace, L. Finally, had the court intended the phrase to apply to L only, then it would have used the singular rather than the plural form of "complainants."[6]

Moreover, the issue of no contact with the children was before the court at the sentencing hearing. Although the state's recommendation at the sentencing hearing that the defendant have no contact with the "domestic violence victims" was unclear, the state, after making that recommendation, directed the court's attention to R, who had requested to be heard. R, who was a direct victim of the criminal trespass charge, stated that "my family and I are done with her not being sober," and requested "no contact with myself and my children and no drive-bys by my house and my street. . . . [M]y children and I are done looking behind our shoulder." Although the driving while intoxicated charge to which the defendant pleaded guilty did not involve the children, the criminal trespass charge, which involved the children, was part of the global plea agreement. Further demonstrating that the issue was before the court at

[6] Moreover, at the August 21, 2019 hearing on the defendant's July 29, 2019 motion for clarification and modification, the court referred to R as a domestic violence victim and stated that "it was expressly noted on the record and the state's attorney noted the docket number in which [R] was a domestic violence victim," which was the docket number for the criminal trespass charge.

the sentencing hearing, defense counsel argued that the no contact order should not apply to the children.

In light of the issues raised at the sentencing hearing, we conclude that the court's November 15, 2019 clarification that the phrase "domestic violence complainants" includes the defendant's children is not manifestly unreasonable.[7] See *Bauer* v. *Bauer*, supra, 308 Conn. 131–32 (" 'we will not disturb a trial court's clarification of an ambiguity . . . unless the court's interpretation . . . is manifestly unreasonable' "). Accordingly, we defer to the court's clarification of the no contact special condition of the defendant's probation.

II

The defendant next claims that the court improperly denied her amended motion to modify because the special condition prohibiting contact with her children violates her rights to (1) procedural due process and (2) substantive due process. We address each claim in turn.

We first set forth the following general principles. "Probation is the product of statute. . . . Statutes authorizing probation, while setting parameters for doing so, have been very often construed to give the court broad discretion in imposing conditions. . . . [General Statutes §] 53a-30 (c) authorizes a court to modify the terms of probation for good cause. . . . It is well settled that the denial of a motion to modify probation will be upheld so long as the trial court did

[7] We reject the defendant's alternative argument that "the court's refusal to modify the written conditions of probation to conform to its actual sentence is plain error." The defendant cannot prevail under this doctrine unless she "demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jackson*, 178 Conn. App. 16, 20, 173 A.3d 974 (2017), cert. denied, 327 Conn. 998, 176 A.3d 557 (2018). Because we conclude that the court's clarification was not manifestly unreasonable, the defendant has not demonstrated any error, much less plain error.

not abuse its discretion. . . . On appeal, a defendant bears a heavy burden because every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . The mere fact that the denial of a motion to modify probation leaves a defendant facing . . . strict conditions is not an abuse of discretion. Rather, [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Baldwin*, 183 Conn. App. 167, 174–75, 191 A.3d 1096, cert. denied, 330 Conn. 922, 194 A.3d 288 (2018). Section 53a-30 (c) provides in relevant part that, "[a]t any time during the period of probation or conditional discharge, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise . . . ."

A

The defendant argues that she "did not have notice that the [special no contact] condition would bar her from contacting her children for three years." She contends that the court failed to canvass her as to the no contact special condition of her probation prior to accepting her guilty plea.[8] The defendant did not raise these specific arguments in her amended motion to modify or at argument on that motion and seeks review to prevail pursuant to *State* v. *Golding*, 213 Conn. 233,

[8] The defendant also argues that she "lacked fair warning that the state could revoke her probation for noncriminal activity." See, e.g., *State* v. *Boseman*, 87 Conn. App. 9, 17, 863 A.2d 704 (2004) ("Where noncriminal activity forms the basis for the revocation of probation, due process requires specific knowledge that the behavior involved is proscribed. [W]here the proscribed acts are not criminal, due process mandates that the [probationer] cannot be subject[ed] to a forfeiture of his liberty for those acts unless he is given prior fair warning." (Internal quotation marks omitted.)), cert. denied, 272 Conn. 923, 867 A.2d 838 (2005). Because the defendant's probation has not been revoked, the requirement of fair warning of the conditions of probation prior to a revocation of probation has no application here.

567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40, as modified by *In re Yasiel R.*, supra, 781. The record is adequate for review and the claim, which alleges a violation of a fundamental right, namely, the right to family integrity, is of constitutional magnitude. See *State* v. *Ortiz*, 83 Conn. App. 142, 162–63, 848 A.2d 1246, cert. denied, 270 Conn. 915, 853 A.2d 530 (2004). Accordingly, we review the claim under the third prong of *Golding* to determine whether the alleged constitutional violation exists.[9]

[9] There has been no challenge on appeal to the trial court's jurisdiction to entertain the procedural due process claim raised by the defendant. We, however, note that "once a defendant's sentence is executed, the trial court lacks jurisdiction to entertain any claims regarding the validity of that plea in the absence of a statute or rule of practice to the contrary." (Internal quotation marks omitted.) *State* v. *Monge*, 165 Conn. App. 36, 42, 138 A.3d 450, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016). Section 53a-30 (c), which grants a trial court postsentencing jurisdiction to modify or enlarge conditions of probation for "good cause," is one such exception. We further note that the trial court, which has broad discretion in administering probation, would have jurisdiction to consider the defendant's unpreserved due process claim, and, therefore, we consider the claim. See *State* v. *Obas*, 320 Conn. 426, 431, 440–48, 130 A.3d 252 (2016) (reviewing state's claim that defendant was precluded from seeking exemption from sex offender registration, which he had raised in motion to modify probation, because he had entered into plea agreement with state); *State* v. *Crouch*, 105 Conn. App. 693, 694, 939 A.2d 632 (2008) (reviewing claim that trial court improperly added condition of probation in violation of terms of plea agreement and in violation of defendant's constitutional right to due process); *State* v. *Thorp*, 57 Conn. App. 112, 114, 747 A.2d 537 (reviewing claim that trial

There is no requirement that a trial court canvass a defendant regarding the consequences of her plea that are not direct consequences, which include the items listed in Practice Book § 39-19.[10] See *State* v. *Faraday*, 268 Conn. 174, 201–202, 842 A.2d 567 (2004) (Practice Book § 39-19 defines scope of constitutional mandate that defendant be advised of all direct consequences of plea). The no contact special condition of probation, which is not listed in § 39-19, is not a direct consequence of the plea. In the unusual circumstances of the present case, however, another set of procedural safeguards is implicated. "[A] parent has a fundamental liberty interest in the companionship, care, custody, and management of his or her children . . . . Therefore, a parent may not be deprived of his or her fundamental liberty interest without being afforded procedural due process. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 333–34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." (Citation omitted; internal quotation marks omitted.) *Garvey* v. *Valencis*, 177 Conn. App. 578, 593 n.5, 173 A.3d 51 (2017). "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are

court improperly imposed more restrictive conditions of probation without permitting defendant to withdraw guilty plea when it granted state's § 53a-30 (c) motion to modify), cert. denied, 253 Conn. 913, 754 A.2d 162 (2000).

[10] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; (3) The fact that the statute for the particular offense does not permit the sentence to be suspended; (4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and (5) The fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Merkel* v. *Hill*, 189 Conn. App. 779, 786, 207 A.3d 1115 (2019). "The due process clause demands that an individual be afforded adequate notice and a reasonable opportunity to be heard when the government deprives her of a protected liberty interest. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Garvey* v. *Valencis*, supra, 593.

The transcript of the sentencing hearing indicates that the defendant had notice that the issue of no contact with her children was before the court and had an opportunity to be heard. To provide context to the court's oral ruling, we note that, at the plea hearing, the court had informed the defendant that "we'll delay the sentencing subject to coming back here to see what the PSI demonstrates and hear[ing] arguments on sentencing." One such argument at the sentencing hearing was made by R, a victim of the criminal trespass charge. Practice Book § 43-10 (2) provides that "[t]he judicial authority shall allow the victim and any other person directly harmed by the commission of the crime a reasonable opportunity to make, orally or in writing, a statement with regard to the sentence to be imposed." In his statement regarding the sentence to be imposed, R specifically and repeatedly requested that the defendant have no contact with him and the children.

After R made these requests at the sentencing hearing, the defendant was provided with a meaningful opportunity to address the issue. The defendant addressed the issue of contact with her children and

stated that she realizes that her daughter "is very upset about this and I'm not going to push myself on them . . . ." Defense counsel was provided the opportunity to discuss the no contact condition prior to sentencing. He stated that the defendant wants to "live a healthy lifestyle . . . free from drinking where she can serve as a proper parent to her children," and "resume . . . healthy relationships with her family . . . ." He specifically requested that "the court impose a no contact order except as to the children through a third, mutually agreed party for obvious reasons that relate to my client's sincere desire that as soon as she is alcohol free, she has some chance of resuming a proper relationship with her children."

Accordingly, the defendant was aware prior to the imposition of the sentence that the possibility of a special condition of probation prohibiting contact with her children was before the court, and defense counsel had a meaningful opportunity to argue that the no contact special condition should not include the defendant's children. Despite this opportunity, the defendant did not move to withdraw her plea or otherwise challenge the validity of her plea. For the foregoing reasons, we conclude that the defendant's right to notice and an opportunity to be heard was not violated. As a result, the defendant's claim fails under the third prong of *Golding* because the defendant failed to establish a violation of a constitutional right.

B

The defendant next argues that her right to substantive due process was violated when the court denied her amended motion to modify because the no contact special condition prohibiting her "from contacting her children for three years violates her 'fundamental liberty interest' as a parent."[11] We are not persuaded.

[11] This substantive due process claim concerns the ongoing conditions of supervision of the defendant while she is on probation. The trial court has jurisdiction to entertain such a claim in the context of a motion for

"The standard of review for the denial of a motion to modify probation is well established. . . . Section 53a-30 (c) authorizes a court to modify the terms of probation for good cause. . . . It is well settled that the denial of a motion to modify probation will be upheld so long as the trial court did not abuse its discretion. . . . On appeal, a defendant bears a heavy burden because every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . The mere fact that the denial of a motion to modify probation leaves a defendant facing a lengthy probationary period with strict conditions is not an abuse of discretion. Rather, [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Njoku*, 202 Conn. App. 491, 496–97, 246 A.3d 33 (2021). "In view of the nature and goals of probation, however, and because any number of probationary conditions or combinations thereof are likely to be suitable in any particular case, the trial court has an exceptional degree of flexibility in determining [the] terms [of probation] . . . and we therefore review those terms for abuse of discretion only." (Citation omitted; internal quotation marks omitted.) *State* v. *Imperiale*, 337 Conn. 694, 707, 255 A.3d 825 (2021).

"When sentencing a defendant to probation, a trial court has broad discretion to impose conditions. . . . Nevertheless, this discretion is not unlimited, as statutory and constitutional constraints must be observed." (Citations omitted; footnote omitted.) *State* v. *Graham*, 33 Conn. App. 432, 447, 636 A.2d 852, cert. denied, 229 Conn. 906, 640 A.2d 117 (1994). "[I]n determining whether a condition of probation impinges unduly [on] a constitutional right [in any particular case], a reviewing

modification pursuant to § 53a-30 (c), which encompasses the ongoing supervision of the probationer. See *State* v. *Smith*, 207 Conn. 152, 170, 540 A.2d 679 (1988).

court should evaluate the condition to ensure that it is reasonably related to the purposes of [probation]. . . . Consideration of three factors is required to determine whether [such] a reasonable relationship exists: (1) the purposes sought to be served by [the] probation[ary] [condition]; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." (Citation omitted; internal quotation marks omitted.) *State* v. *Imperiale*, supra, 337 Conn. 708; see also *State* v. *Smith*, 207 Conn. 152, 167–73, 540 A.2d 679 (1988) (court did not abuse its discretion in modifying terms of probation under § 53a-30 to include urinalysis testing, which defendant claimed was unreasonable search and seizure in violation of his fourth and fourteenth amendment rights under federal constitution).

One valid objective of probation is " 'to preserve the public's safety.' " *State* v. *Ortiz*, supra, 83 Conn. App. 164. We conclude that the no contact condition of the defendant's probation furthers that objective because it protects her children as members of the public. See id., 166 (protecting defendant's children as members of public serves goal of probation). In the present case, the court stated in its articulation that "the condition of no contact was warranted and proper based on the danger the defendant posed to those close to her as a consequence of her criminal history, multiple convictions for operating under the influence, her long-standing substance abuse and history of noncompliance with conditions of probation, including those related to substance abuse treatment."

Although no evidentiary hearing was conducted regarding the effect of the defendant's attempt to contact the children by leaving a gift and note on R's front porch after having been warned not to trespass, there were detailed comments from R regarding the effect

that the defendant's history of insobriety and prior unwanted attempts at contact had on the children. "[D]ue process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial. Rather, judges may consider a wide variety of information. . . . [T]he trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 83 Conn. App. 165.

The defendant claims that the condition unconstitutionally infringes on her right to parent her children. The condition of probation restricts parental rights and, thus, interferes with the exercise of a fundamental constitutional right. Therefore, we apply an additional layer of scrutiny to this restriction. "[C]hoices about marriage, family life, and the upbringing of children are among associational rights [the United States Supreme Court] has ranked as of basic importance in our society . . . rights sheltered by the [f]ourteenth [a]mendment against the [s]tate's unwarranted usurpation, disregard, or disrespect. . . . A prohibition on contact with one's children affects the defendant's associational rights." (Citation omitted; internal quotation marks omitted.) Id., 165–66. Even when a court is warranted in severely restricting the defendant's contact with her children in furtherance of the goal of probation to protect them as members of the public, "that restriction should not reach further than is reasonably necessary for the preservation of the children's safety." Id., 166.

In *Ortiz*, the defendant was convicted, inter alia, of kidnapping and assaulting the victim, with whom the defendant had three children. Id., 144–45. At the sentencing hearing, the prosecutor told the court that the victim had provided detailed accounts of the defendant's abuse of the children, including an incident in which he put a sock and tape over the mouth of his one year old child to stop the baby from crying and another occasion on which he allegedly shook another baby, which resulted in brain damage. Id., 164–65. The defendant received a total effective sentence of thirty years of incarceration, execution suspended after twenty years, and five years of probation with one of the conditions of probation being that he have no contact with his three children until they reach eighteen years of age. Id., 144, 161. The defendant claimed on appeal that the condition of no contact with his children was illegal. Id., 161. This court concluded that, "[i]n light of the information the court had before it at sentencing, the court was warranted in its concern of not just protecting the victim, but also her offspring. However, the defendant also attacks the breadth of the order, which proscribes *all* contact with his children. . . . A strict application of the court's order appears to prohibit the defendant from sending even a birthday card to his children. Yet, it is difficult to imagine how such mail contact could jeopardize their safety. We conclude that a blanket prohibition of all such contact with the children is violative of the defendant's constitutional rights." (Citation omitted; emphasis in original.) Id., 165–66. Accordingly, this court reversed the order only insofar as the no contact provision prohibited mail contact. Id., 166.

In the present case, the defendant argues that there was no indication that her misconduct had harmed her children. She contends that her children were not in

the car with her when she was driving under the influence and that the criminal trespass charge simply involves her having left a gift bag on R's porch. The charges and the harm stemmed from the defendant's actions in leaving a note for the children on R's porch, after having been warned not to trespass. *Ortiz* requires that a condition prohibiting contact with a defendant's children be reasonably necessary for the preservation of the children's "safety" but does not indicate whether that is restricted only to physical safety. Id.

We are persuaded that the trial court's taking into consideration the emotional and mental health safety of the children when fashioning its special conditions of probation is, under the circumstances of the present case, an appropriate extension of *Ortiz*. In the present case, it is undisputed that the defendant's criminal conduct, which victimized her children, arose out of and was intertwined with her alcohol abuse. It was reasonable for the court, in imposing its special conditions of probation, to take measures to protect the children from the defendant's intoxicated behavior. Moreover, it was reasonable for the court to infer that intoxicated behavior could cause emotional injury to the children even if did not occur in the children's presence. The notion that the defendant be able to resume contact with her children once she is capable of having a healthy relationship with her family was raised by the defendant herself as well as by her counsel at the sentencing hearing. The defendant, appearing to recognize the harm caused to her children, stated that she was "sick of disappointing everybody including myself," and that she did not want to "push" herself on her children or "bombard" them. Her counsel, also appearing to recognize the role that alcohol abuse had played in damaging the emotional bond between the defendant and her children, stated that it is "my client's sincere desire that as soon as she is alcohol free, she has some chance of resuming

a proper relationship with her children." The court crafted a special condition of probation that took into account the defendant's desire not to "bombard" the children and to have the chance to resume a healthy relationship with her children.

Moreover, there is ample indication in the record of emotional harm. At the sentencing hearing, R stated that he and the children are "done" with the defendant "not being sober . . . ." At the hearing on the defendant's amended motion to modify, counsel for R and the children stated that the children had suffered "deep wounds" and are "going through recovery . . . ." R further explained at that hearing that the last visit the children had with the defendant was in December, 2014, that the children did not want contact with the defendant and that they "feel [as] though . . . they can't really go to places such as the mall or to the center with their friends because they don't want to be looking behind their shoulder." In its articulation, the court noted that R had expressed both directly and through a letter that the children "can no longer handle the defendant's ongoing alcohol abuse." The therapist of the older child stated that "this is an ongoing issue . . . [the child] is at this point not interested in having visitation." These circumstances are significantly distinguishable from the circumstances of *Ortiz*. In *Ortiz*, the condition prohibiting all contact with the defendant's children until they reach the age of eighteen violated his constitutional rights because there was no information before the court that mail contact would jeopardize the safety of the children. *State* v. *Ortiz*, supra, 83 Conn. App. 166. In the present case, based on the information before the court, the no contact order reasonably focused on the emotional well-being of the children. Because the special condition does not reach further than reasonably necessary to protect the children's safety; see id., 163–66; the defendant's constitutional

right to parent was not violated. Accordingly, we conclude that the court did not abuse its discretion in denying the motion for modification.

The judgment is affirmed.

In this opinion the other judges concurred.

VICTOR DIAZ *v.* CITY OF BRIDGEPORT ET AL. (AC 44104)

Prescott, Suarez and Vertefeuille, Js.

Syllabus

The defendant employer and its insurer appealed from the decision of the Compensation Review Board affirming the Workers' Compensation Commissioner's decision to grant the plaintiff's request to commute into a lump sum certain disability payments. The defendant had employed the plaintiff as a member of its municipal police department. While employed by the defendant, the plaintiff was diagnosed with hypertension. Subsequently, the commissioner found that the plaintiff's hypertension was a significant, contributing factor in the development of his coronary artery disease and, accordingly, that such disease was compensable under the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff was later diagnosed with chronic kidney disease caused by his hypertension and, in a supplemental finding and award, was awarded 245 weeks of permanent partial impairment disability benefits. The plaintiff thereafter requested that the final 123 weeks of the award period be commuted into a lump sum. After a hearing, the commissioner concluded that the plaintiff had shown good cause for a commutation of his award pursuant to statute (§ 31-302), and, accordingly, granted the plaintiff's request for a commutation of the benefits due to him for weeks 123 through 245 of his award. The defendant appealed to the board, claiming, inter alia, that the commissioner improperly applied § 31-302 by ordering a commutation of the back end of the award without also awarding the defendant a moratorium of payment of benefits for the front end of the award. The board affirmed the order of the commissioner, and this appeal followed. *Held*:

1. The defendant could not prevail on its claim that the board improperly affirmed the commissioner's order granting the plaintiff's request for a commutation of the partial disability payments due to him for weeks 123 through 245 of his award, without instituting a moratorium against payment of the benefits due for the first 122 weeks of his award: although

the defendant argued that a lump-sum payment pursuant to a commutation order should be included in determining whether a payment exceeds the maximum weekly compensation under the applicable statute (§ 31-309) for workers' compensation benefits, this interpretation was inconsistent with the purpose of the commutation statute and, without reference to the lump-sum payment pursuant to the commutation, the plaintiff's award did not exceed the maximum weekly compensation under § 31-309.

2. The defendant's claim that the board erred in not concluding that the commissioner's commutation order violated the cap on heart and hypertension benefits pursuant to statute (§ 7-433b) was unavailing: although the statutory cap applied in the present case because the plaintiff was receiving both a disability benefit pursuant to statute (§ 7-433c) and a retirement pension, the plaintiff's award complied with the statutory cap imposed by § 7-433b because the plaintiff's lump-sum payments pursuant to the commutation award are excluded and the amount of the plaintiff's weekly disability benefit coupled with his pension payment did not exceed the statutory guidelines.

3. The board correctly concluded that the commissioner's commutation order did not violate the principles of equity: contrary to the defendant's claim, there was no double recovery because, although one-half of the award was paid in weekly installments and the other half was paid as a onetime lump sum, the plaintiff did not receive anything in excess of the original award to which he was entitled and, thus, the fact that the plaintiff received the lump sum while simultaneously receiving weekly payments of the award did not constitute a double recovery; moreover, although the commutation order may have presented a budgetary challenge for the defendant, this court was not persuaded that the commissioner's decision to commute the award in the fashion requested by the plaintiff was improper.

Argued April 14—officially released November 9, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District granting the plaintiff's request to commute certain disability benefit payments due to him into a lump sum, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Joseph J. Passaretti, Jr., with whom was *Amanda A. Hakala*, for the appellants (defendants).

David J. Morrissey, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this workers' compensation matter, the defendant employer, the city of Bridgeport,[1] appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner) of the Workers' Compensation Commission to grant the request of the plaintiff, Victor Diaz, to commute into a lump sum the permanent partial disability benefit payments due him for the final 123 weeks of an overall period of 245 weeks. On appeal, the defendant claims that the board improperly (1) affirmed the order of the commissioner granting the plaintiff's request without instituting a moratorium against payment of the plaintiff's first 122 weeks of permanent partial disability benefits, (2) concluded that the commissioner's commutation order does not violate the cap on heart and hypertension benefits pursuant to General Statutes § 7-433b (b), and (3) concluded that the commissioner's commutation order does not violate the principles of equity, including the prohibition against double recovery in the workers' compensation system. We affirm the decision of the board.

The following facts, as found by the commissioner or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. On and for some time prior to January 31, 1989, the defendant employed the plaintiff as a regular member of its municipal police department. Upon his entry into service, the plaintiff submitted to a preemployment physical examination, which failed to reveal evidence of heart disease or hypertension. On or about January 31, 1989, while

[1] PMA Companies, the workers' compensation insurer for the city of Bridgeport, was also a defendant in this case and is a party to this appeal. For convenience, we refer in this opinion to the city of Bridgeport as the defendant.

still employed by the defendant, the plaintiff was diagnosed with hypertension. Pursuant to an initial finding and award dated October 20, 1993, the commissioner awarded the plaintiff a specific award equal to a 10 percent permanent impairment of the heart.

On June 20, 2001, the plaintiff retired as a result of unrelated orthopedic injuries. On May 17, 2007, the plaintiff was diagnosed with coronary artery disease. By a finding and award dated August 9, 2010, the commissioner found that the plaintiff's hypertension was a significant, contributing factor in the development of his coronary artery disease and, accordingly, that such disease also was compensable under the Workers' Compensation Act, General Statutes § 31-275 et. seq. Pursuant to this finding and award, the plaintiff had sustained a 17 percent permanent impairment of the heart due to hypertension and a 14 percent permanent impairment of the heart as a result of coronary artery disease. By March 16, 2018, according to a subsequent finding and award, the plaintiff's permanent impairment of the heart had increased to 47 percent.

On January 19, 2017, Paul Nussbaum, a nephrologist, evaluated the plaintiff and determined that he suffered from chronic kidney disease. Nussbaum examined the plaintiff again on February 5, 2018, and determined that the plaintiff had a 70 percent permanent impairment of the bilateral kidneys caused by his hypertension. On the basis of this determination, on January 30, 2019, in a supplemental finding and award, the plaintiff was awarded 245 weeks of permanent partial impairment disability benefits at the weekly compensation rate of $551.13. The plaintiff's maximum medical improvement date was February 20, 2019. The plaintiff subsequently requested that the partial disability benefit payments due him for the final 123 weeks of the 245 week award period be commuted into a lump sum.

On April 15, 2019, a formal hearing was held to determine whether a portion of the plaintiff's permanent partial disability award was eligible for commutation pursuant to General Statutes § 31-302. The plaintiff indicated that he was seeking a lump-sum payment to pay past due property taxes, to reduce his credit card debt, and to pay a portion of his children's student loans. At the formal hearing, the plaintiff testified that he understood that any commutation of the award would be subject to a 3 percent actuarial reduction and that, once the lump sum was paid, he would be deemed to have been paid his full weekly rate for the weeks covered by the commutation period. The defendant objected to the plaintiff's request.

Following the hearing, the commissioner concluded that the plaintiff had shown "good and sufficient cause" for a commutation of his permanent partial disability award. Accordingly, the commissioner granted the commutation for benefits due the plaintiff for weeks 123 through 245 of his award. The commissioner also ordered the defendant to continue paying the plaintiff's weekly permanent partial disability benefits until the expiration of week 122, at which time the entire award would be satisfied.[2] The defendant could then terminate its weekly payments without filing a notice to discontinue benefits. The commissioner instituted a moratorium against the payment of weekly benefits for the time period covered by the commutation.

The defendant filed an appeal to the board. On appeal, the defendant claimed that the commissioner improperly applied § 31-302 when she ordered a commutation

[2] The plaintiff had been receiving weekly benefits since the commissioner issued the January 30, 2019 finding and award. Several weeks later, on April 15, 2019, when the commissioner granted the plaintiff's request to commute the final 123 weeks of the award, the plaintiff was still entitled to the remaining balance of the first 122 weeks of compensation, to be paid in weekly installments.

of the "back end" of the plaintiff's award without also awarding the defendant a moratorium of payment of benefits for the "front end" of the award. (Internal quotation marks omitted.) The board affirmed the order of the commissioner. In its decision, the board addressed the specific claims that are before us on appeal. These claims include that the plaintiff's total payment exceeded the maximum weekly payment under § 31-302, violated the statutory cap imposed by § 7-433b (b), and breached the principle against double recovery. This appeal from the decision of the board followed.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, 121 Conn. App. 144, 148, 994 A.2d 305 (2010).

To the extent that the claims raised in the present appeal require us to interpret the Workers' Compensation Act, "we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This proposition applies as well to the provisions of [General Statutes] § 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits

that may be awarded to a [claimant] under . . . [the Workers' Compensation Act]." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, 299 Conn. 265, 277–78, 8 A.3d 1093 (2010).

We must also set forth the legal principles common to the defendant's claims. "[Section] 7-433c entitles a qualified, hypertensive or heart-disabled firefighter or police officer to receive compensation and medical care equivalent to that available under . . . the Workers' Compensation Act." *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987). Subsection (a) of § 7-433c provides in relevant part that, "in the event . . . a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under [the Workers' Compensation Act] if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment . . . ." General Statutes § 7-433c (a).

"The benefits provided under § 7-433c are . . . payable and administered under the Workers' Compensation Act, contained in chapter 568 of the General Statutes, and the type and amount of benefits available pursuant to § 7-433c are the same as those under the Workers' Compensation Act . . . . The monetary benefits received under § 7-433c are the same as those available to anyone with similar disabilities who receives workers' compensation benefits under chapter 568; that

is, one would not receive additional compensation simply by receiving benefits under § 7-433c rather than under chapter 568." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, 286 Conn. 732, 752, 945 A.2d 936 (2008).

I

We first address the defendant's claim that the board improperly affirmed the order of the commissioner granting the plaintiff's request for a commutation of partial disability payments due the plaintiff for weeks 123 through 245 of his award, without instituting a moratorium against payment of the benefits due the plaintiff for the first 122 weeks. The defendant argues that the plaintiff's receipt of the lump-sum payment while simultaneously collecting the weekly benefit results in an award that exceeds the maximum weekly compensation under the Workers' Compensation Act. Because the plaintiff's weekly compensation rate does not, in and of itself, exceed the maximum weekly compensation under General Statutes § 31-309 (a), inherent in the defendant's argument is the notion that a lump-sum payment pursuant to a commutation order should be included in determining whether a weekly payment exceeds the maximum weekly compensation under the Workers' Compensation Act. We disagree.

To resolve the defendant's claim, we must interpret the language of § 31-309 (a). Our review, therefore, is plenary, and we apply established principles of statutory construction. See *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020). Under General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual

evidence of the meaning of the statute shall not be considered." "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. . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purpose of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." (Citation omitted; internal quotation marks omitted.) *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 18–19, 151 A.3d 367 (2016).

We interpret § 31-309 (a) to establish a maximum weekly compensation for workers' compensation benefits. That statute provides in relevant part that "the weekly compensation received by an injured employee under the provisions of this chapter shall in no case be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of all workers in the state . . . ."[3] General Statutes § 31-309 (a). Section 31-302, however, expressly authorizes an alternative to weekly compensation, permitting the commutation of weekly compensation into monthly or quarterly payments or into a lump sum. Specifically, § 31-302 provides in relevant part: "Compensation payable under this chapter shall be paid at the particular times in the

[3] The maximum weekly compensation rate for the plaintiff's date of injury is $671.

week and in the manner the commissioner may order . . . except that when the commissioner finds it just or necessary, the commissioner may approve or direct the commutation, in whole or in part, of weekly compensation under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum, which may be paid to the one then entitled to the compensation, and the commutation shall be binding upon all persons entitled to compensation for the injury in question."

Section 31-309 (a) limits a claimant's "weekly compensation . . . ." General Statutes § 31-309 (a). Affording this language its plain and unambiguous meaning, "weekly compensation" refers to compensation that a claimant is entitled to receive on a weekly basis. A lump-sum payment made pursuant to a commutation award, however, is not a weekly payment but, rather, a singular payment consisting of benefits that otherwise would have been paid to a claimant over the course of multiple weeks. Because of the nature of these types of payments, they will almost always exceed the established maximum weekly compensation that may be paid to a claimant. The defendant's interpretation of § 31-309 (a) is inconsistent with and undermines the purpose of the commutation statute and is, therefore, not a reasonable interpretation. Accordingly, we do not interpret § 31-309 (a) to encompass lump-sum payments.

In addition to the text of the statute itself, we must also consider the relationship of § 31-309 (a) to other statutes. See General Statutes § 1-2z. As acknowledged by our Supreme Court, "[an award pursuant to] . . . § 7-433c . . . is a work[ers'] compensation award in the sense that its benefits are payable and procedurally administered under the Work[ers'] Compensation Act . . . ." (Emphasis omitted; internal quotation marks omitted.) *Carriero* v. *Naugatuck*, 243 Conn. 747, 759,

707 A.2d 706 (1998). Further, unless there is a rational justification to do otherwise, courts should construe statutes in such a manner as to "foster harmony" with related statutes, thereby resulting in a consistent body of law. (Internal quotation marks omitted.) *State* v. *Spears*, 234 Conn. 78, 91, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995); see also *Carriero* v. *Naugatuck*, supra, 759.

As we have explained, § 31-302, by its plain language, specifically authorizes lump-sum payments made pursuant to commutation awards. Section 31-302 also provides that an award may be commuted "in whole or in part . . . ." General Statutes § 31-302. The only reasonable way to interpret the statute's authorization of a commutation "in part" is to mean that a portion of an award may be paid as a lump sum. After a partial lump sum has been paid, the portion of the award that has not been commuted remains payable to the claimant in the form of weekly benefits. The fact that the legislature, in § 31-302, prescribed that such awards may represent the whole or part of weekly compensation benefits reflects that the legislature intended to permit an award to be made while a claimant was also receiving weekly benefits. Our interpretation of § 31-309 (a) allows both §§ 31-309 (a) and 31-302 to have effect and fosters harmony between these related statutes.

Our interpretation also aligns with the remedial purpose of the Workers' Compensation Act. The provisions of § 31-302 afford a commissioner significant discretion to decide whether to grant a commutation and to structure a commutation in accordance with the needs or preferences of the party seeking the commutation. See General Statutes § 31-302. Specifically, a commutation may be granted whenever the commissioner "finds it just or necessary . . . ." General Statutes § 31-302. The commissioner also has the discretion to grant a commutation "in whole or in part," which makes possible a

number of award structures. General Statutes § 31-302. Interpreting § 31-309 (a) to include lump-sum payments pursuant to a commutation award in the calculation of the maximum weekly compensation would impede the commissioner's ability to grant a partial commutation of an award when a claimant is still receiving weekly payments to satisfy another portion of the same award. This would, in turn, diminish the commissioner's ability to structure an award to meet the needs and preferences of the claimant. As provided in § 31-302, a commissioner has the flexibility to structure an award in different ways, which reflects the remedial nature of the Workers' Compensation Act.

Without reference to the lump-sum payment pursuant to the commutation, the plaintiff's award does not exceed the maximum weekly compensation under § 31-309 (a). The plaintiff's weekly compensation rate was $551.13. The maximum weekly compensation rate for the plaintiff's date of injury is $671. Because we have determined that the plaintiff's award does not violate § 31-309 (a), we conclude that the board did not err in affirming the order of the commissioner granting the plaintiff's request for a commutation.

II

We next address the defendant's claim that the board erred in not concluding that the commissioner's commutation order violates the cap on heart and hypertension benefits pursuant to § 7-433b (b). The defendant argues that the sum of the plaintiff's commutation award, weekly disability benefit, and weekly pension benefit violates the statutory cap imposed by § 7-433b (b). We disagree.

We begin by setting forth the additional legal principles pertinent to this claim. Section 7-433b (b) imposes a cap on the benefits that employees may collect under § 7-433c, the Heart and Hypertension Act. See General

Statutes § 7-433b (b). Section 7-433b (b) provides in relevant part: "[T]he cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement."

In *Carriero* v. *Naugatuck*, supra, 243 Conn. 753, our Supreme Court held that this statutory cap on benefits is applicable to cumulative payments of disability compensation and retirement pension benefits whenever any portion of those payments is awarded under § 7-433c. If a retired employee receives any benefit under § 7-433c, the calculation of the ceiling on heart and hypertension benefits must take into account that employee's regular pension retirement benefits, not just the employee's disability pension benefits. See id., 750–51.

The statutory cap is applicable in the present case because the plaintiff was receiving both a disability benefit under § 7-433c and a retirement pension based on his years of service in the police department. Here, the plaintiff was receiving a disability benefit under § 7-433c to compensate him for a 70 percent permanent impairment of the bilateral kidneys caused by his hypertension. The award consisted of 245 weeks at the weekly compensation rate of $551.13. As a retired police officer, the plaintiff was also receiving a weekly pension benefit related to his years of service. Because the plaintiff was receiving disability benefits under § 7-433c as well as unrelated retirement pension benefits, the plaintiff's award must comply with the statutory cap imposed by § 7-433b (b).

Although the statutory cap applies, we agree with the board that the plaintiff's award does not violate § 7-433b (b). The defendant argues that the onetime payment to be made to the plaintiff by virtue of the commutation order, together with the weekly disability benefit and pension payment to the plaintiff, violates the cap on heart and hypertension benefits imposed by § 7-433b (b). The defendant does not argue, and there is no evidence before us, that the plaintiff's cumulative weekly payment, without considering the lump-sum payment pursuant to the commutation order, exceeds the statutorily prescribed limit. Accordingly, inherent in the defendant's argument is the idea that a calculation of benefits for the purposes of the cap imposed by § 7-433b (b) should take into account a lump-sum payment made pursuant to a commutation order. We do not agree.

To address the defendant's claim, we must interpret § 7-433b (b) in accordance with the principles of statutory interpretation set forth in part I of this opinion. Section 7-433b (b) provides in relevant part that the "cumulative payments . . . for compensation and retirement . . . benefits under section 7-433c shall be adjusted so that the total of such cumulative payments . . . shall not exceed one hundred per cent of the weekly compensation being paid . . . to members of such department in the same position which was held by such member at the time of his death or retirement." Examining the text's plain meaning, the phrase "cumulative payments" reflects that the legislature intended to put a cap on recurring weekly payments that are comprised of both a disability benefit and a retirement pension benefit. The statute refers to "payments" in the plural, indicating that it applies to multiple payments. When an award is commuted, however, a portion of the award is paid as a *onetime* lump sum, which is a singular payment. The use of the plural suggests that

the legislature did not intend to include a lump-sum payment pursuant to a commutation award in the calculations related to the statutory cap. Additionally, the statute refers to "cumulative payments" of disability and retirement benefits as being measured against and compared to the "weekly compensation" received by working members of the police department. This indicates that the legislature intended to limit the amount of *weekly* compensation benefits that a retired member of the department may receive. Because it is inconsistent with the plain meaning of the statute to treat a lump-sum payment pursuant to a commutation award to be a weekly payment, it should not be considered in calculations concerning the weekly statutory cap. We are persuaded that the statute's plain objective is to limit the cumulative effect of several weekly benefits, not to prohibit a onetime commutation award.

Further, we must consider the relationship of § 7-433b (b) to other statutes. See General Statutes § 1-2z. As we noted in part I of this opinion, courts should construe statutes in such a manner as to "foster harmony" with related statutes in order to create a consistent body of law. (Internal quotation marks omitted.) *State* v. *Spears*, supra, 234 Conn. 91. Our interpretation of § 7-433b (b) permits §§ 7-433b (b) and 31-302 to coexist. If this court were to adopt the defendant's argument, any significant lump-sum payment pursuant to a commutation award under § 31-302 would result in a onetime violation of the statutory ceiling imposed by § 7-433b (b). To interpret the statute as the defendant suggests would thwart the legislature's expressed intent to permit commutation awards "in whole or in part . . . ." General Statutes § 31-302. We agree with the board that there is no "reasonable basis for concluding that the legislature intended to impose a blanket prohibition against commutation orders for this reason."

Our interpretation of the statute is also consistent with the remedial nature of the Workers' Compensation Act. As we noted previously in this opinion, the Workers' Compensation Act is remedial in nature and "should be broadly construed in favor of disabled employees." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, supra, 299 Conn. 277. This principle also applies to the provisions of § 7-433c. Id., 277–78. Interpreting the statutory cap on benefits imposed by § 7-433b (b) to exclude lump-sum payments pursuant to a commutation award is consistent with the remedial purpose of the Workers' Compensation Act. If we interpret the statutory cap in § 7-433b (b) to include commutation awards, these awards would almost always violate § 7-433b (b). Such an interpretation would greatly limit the commissioner's ability to structure an award to meet the needs and preferences of a workers' compensation claimant. For this reason, our interpretation of the statutory cap in § 7-433b (b), namely, that it does not apply to lump-sum payments pursuant to a commutation award, is consistent with the remedial purpose of the Workers' Compensation Act.

We agree with the board that, regardless of whether the commissioner had granted the plaintiff's request for a commutation, § 7-433b (b) would be violated only if the cumulative amount of the plaintiff's weekly disability benefit coupled with his weekly pension payment exceeded the statutory guidelines. They did not. Without reference to the onetime, lump-sum payment, the plaintiff did not collect more than 100 percent of the weekly compensation being paid to others in the same position that the plaintiff held at his retirement. It is true that, during the week that the commutation award was granted, the plaintiff received the lump sum, the weekly disability benefit, and the weekly pension benefit. Although the lump-sum payment resulted in a single week in which the plaintiff received more than he would

have if he had been working, any commutation would have caused the same result. If the commutation had not been granted, however, and the award had been spread out over the 245 week period, the plaintiff's weekly payments would not have exceeded 100 percent of the weekly payment received by others employed in the same position. Accordingly, the plaintiff's award did not violate the statutory cap.

III

Finally, we address the defendant's claim that the board improperly concluded that the commissioner's commutation order does not violate the principles of equity, including the prohibition on double recovery in the workers' compensation system. The defendant argues that the commissioner's approval of the commutation of the "back end" of the plaintiff's award while the "front end" benefits were being paid concurrently constitutes a double recovery. (Internal quotation marks omitted.) We disagree.

This court has long recognized that "[o]ur [Workers' Compensation] Act does not permit double compensation. . . . When an injury entitles a worker to benefits both under the compensation statute and under other legislation, so that a double burden would be imposed on the employer, our courts have held that compensation payments during the period of disability reduce the employer's obligation created by other legislation." (Internal quotation marks omitted.) *McFarland* v. *Dept. of Developmental Services*, 115 Conn. App. 306, 313, 971 A.2d 853, cert. denied, 293 Conn. 919, 979 A.2d 490 (2009). This prohibition on double recovery stems from the rationale that "[t]he law cannot permit [a] claimant to enjoy a windfall, i.e., to be paid twice for his medical expenses." (Internal quotation marks omitted.) *Pokorny* v. *Getta's Garage*, 219 Conn. 439, 444 n.6, 594 A.2d 446 (1991).

Double recovery occurs "[w]hen an injury entitles a worker to benefits both under the compensation statute and under other legislation . . . ." (Internal quotation marks omitted.) *McFarland* v. *Dept. of Developmental Services*, supra, 115 Conn. App. 313. For example, this court has held, and our Supreme Court has affirmed, that an award received pursuant to the federal Longshore and Harbor Workers' Compensation Act must be "wholly credited" against a subsequent award arising out of the same injury under the state Workers' Compensation Act in order to prevent a double recovery by the plaintiff. *McGowan* v. *General Dynamics Corp./Electric Boat Division*, 15 Conn. App. 615, 615–16, 546 A.2d 893 (1988), aff'd, 210 Conn. 580, 566 A.2d 587 (1989). Our Supreme Court also has held that requiring an employer to pay a claimant for medical expenses that already have been paid by the claimant's medical insurance carrier constitutes an impermissible double recovery. See *Pokorny* v. *Getta's Garage*, supra, 219 Conn. 448.

In the present case, there is no double recovery. The plaintiff received a single award of 245 weeks of compensation at a rate of $511.13 per week. Although one-half of the award was paid in weekly installments and the other half was paid as a onetime lump sum, the plaintiff did not receive anything in excess of the *total* original award to which he was entitled. Thus, the fact that the plaintiff received the lump sum while he was simultaneously receiving weekly payments of the same award does not constitute a double recovery. As the board acknowledged in its decision, the plaintiff's "total payout is still predicated on, and limited to, the same number of weeks for which he would have received weekly benefits had he not chosen to convert part of his permanency award into a lump-sum payment."

Conceding that the plaintiff has received only the 245 weeks of compensation to which he is entitled, the defendant argues that the manner in which the payment

was structured, rather than the amount, constitutes a double recovery. This argument, however, also fails. As illuminated by our case law, the principle against double recovery seeks to prevent a claimant from receiving a "windfall" or being "paid twice for his medical expenses." (Internal quotation marks omitted.) *Pokorny* v. *Getta's Garage*, supra, 219 Conn. 444 n.6. The facts in the present case simply do not demonstrate that the commutation order resulted in a windfall or double payment for the plaintiff. As our case law reflects, the principle against double recovery is not violated simply by virtue of when or how benefits are paid but whether a claimant has been "paid twice . . . ." (Internal quotation marks omitted.) Id.

The defendant further argues that the commutation order "is not just to all parties interested in the award." (Emphasis omitted.) Specifically, the defendant argues that, because the plaintiff received the lump-sum payment (due him for weeks 123 through 245) while he was still receiving weekly payments (due him for weeks 1 through 122), the plaintiff is "placed in the best position possible . . . while the [defendant is] being unduly burdened without any consideration." We do not agree.

Our Supreme Court has held that the commutation statute "[confers] upon the commissioner authority to commute a compensation award in those cases only where it is reasonably necessary for the welfare of the claimant and his dependents, and at the same time *is just to all parties interested in the award*." (Emphasis added.) *Reid* v. *Hartford Fuel Supply Co.*, 120 Conn. 541, 546, 182 A. 141 (1935). The defendant argues that this particular commutation award is unjust to the defendant because it "allows a lump-sum payment, but also weekly benefits for that same time period . . . ." According to the defendant, the structure of the commutation award is "an unpredicted loss to the fiscal year

that could not have been budgeted for in advance." Although the structure of the commutation in the present case may present an unanticipated budgetary challenge for the defendant, like the board, "we are not persuaded that the financial difficulties attendant on compliance with the commutation order are such that the commissioner's decision to commute the award in the fashion requested by the claimant was improper." In fact, the initial financial burden on the defendant would have been more substantial had the plaintiff requested a commutation of the entire award at once, which he was entitled to do. It is unclear how the partial commutation of the award, coupled with a concurrent weekly benefit, constitutes an undue burden when the defendant could have been required to pay out the entire award up front had the plaintiff requested a full commutation. Further, the defendant is entitled to the usual actuarial discount in payment for the weeks covered by the commutation.[4] See General Statutes § 31-302. The actuarial discount contained in the commutation statute ensures that a "true equivalence of value [is] maintained" and that an employer is not made worse off due to a commutation. General Statutes § 31-302. We agree with the board's assessment that the actuarial reduction compensates the defendant for the prejudice associated with the contraction of the period of time over which the award must be paid. For these reasons, the plaintiff's award does not offend the principles of equity in our workers' compensation system.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[4] General Statutes § 31-302 provides in relevant part that "[i]n any case of commutation, a true equivalence of value shall be maintained, with due discount of sums payable in the future . . . ."

KYLE FREITAG *v.* COMMISSIONER OF CORRECTION (AC 42818)

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

Syllabus

The petitioner, who had been convicted, on pleas of guilty, of the crimes of murder and assault in the first degree, appealed to this court from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claimed that O, the attorney who represented him during the plea proceeding, rendered ineffective assistance, as did P, the attorney who represented him during the sentencing proceeding. The petitioner alleged that O failed to properly advise him regarding potential defenses and made misrepresentations to him about the willingness of a codefendant, B, to testify at the petitioner's criminal trial. The petitioner further alleged that P failed to present adequate mitigation evidence at the sentencing proceeding and failed to file a motion to withdraw the guilty pleas, pursuant to the applicable rule of practice (§ 39-27 (4)), on the basis of O's ineffective assistance. The petitioner testified at the habeas trial that O had met with and told him and his parents on the day of the plea proceeding that he had been informed by B's counsel that B was not willing to testify at the petitioner's criminal trial. The petitioner further testified that, until that meeting, he was under the impression that B was going to testify. The petitioner then appeared before the trial court for the plea proceeding and initially rejected a plea offer. The petitioner then changed his mind during the court's canvass of him and entered his guilty pleas, as it was his understanding that this was his final opportunity to accept the plea offer. Prior to the sentencing proceeding, however, the petitioner learned from his family that B was willing to testify. The habeas court, in determining that O did not render deficient performance, rejected the petitioner's claim that O incorrectly advised him about whether B was willing to testify. The court made an implicit factual finding that O had told the petitioner it was not likely that B would testify and an express finding that O's assessment was reasonable. The habeas court further determined that its conclusion as to the petitioner's claims against O foreclosed the petitioner's claim that P improperly failed to file a motion to withdraw the guilty pleas. The court reasoned that the petitioner failed to present credible evidence that his pleas were made unwillingly or involuntarily and determined that P made a reasonable decision not to file a motion to withdraw the guilty pleas because the state had insisted that the petitioner plead guilty to the murder charge. The habeas court thereafter granted the petitioner certification to appeal. *Held*:

1. The habeas court's implicit finding that O told the petitioner during their meeting on the day of the plea proceeding that it was not likely B would testify at the criminal trial was clearly erroneous, and, thus, the judgment had to be reversed and the case remanded for a new trial as to the claim that O rendered ineffective assistance in connection with his purported misrepresentation about B:

   a. There was no evidence to support the habeas court's finding, the petitioner and his father having testified that O, in absolute terms, told them B would not testify, and O having testified that he did not recall any discussion during the meeting about B's willingness to testify and that he did not recall ever having told the petitioner that B would not testify created a dispute as to that factual issue, and this court could not discern whether the habeas court would have credited the testimony of the petitioner and his father in the absence of the habeas court's clearly erroneous finding; moreover, contrary to the request by the respondent Commissioner of Correction, because this court made no conclusion as to whether O rendered deficient performance, a remand for further proceedings to address the issue of prejudice was not proper.

   b. Because the habeas court committed error with respect to the petitioner's principal claim that O made misrepresentations to him as to B's willingness to testify, the judgment also had to be reversed as to the petitioner's intertwined claim that O rendered ineffective assistance in failing to properly advise him as to potential defenses.

2. The habeas court's judgment as to the petitioner's claims of ineffective assistance of counsel as to P had to be reversed in part and the case remanded for a new trial on the claim that P was ineffective in failing to file a motion to withdraw the guilty pleas pursuant to § 37-27 (4):

   a. Because this court reversed the habeas court's judgment as to certain of the petitioner's ineffective assistance of counsel claims against O, the habeas court's denial of the petitioner's claim that P rendered ineffective assistance in failing to file a motion to withdraw the guilty pleas could not stand; certain of the habeas court's determinations in rejecting the claim as to P were untenable, and its reasoning that P made a strategic decision not to seek withdrawal of the pleas was irrelevant, as the purpose of seeking withdrawal of the guilty pleas was not to negotiate a better plea deal but to insist on going to trial.

   b. The habeas court properly concluded that the petitioner did not demonstrate that P rendered ineffective assistance as a result of his failure to present adequate mitigation evidence at sentencing; the record reflected that P submitted ample mitigation evidence, which the sentencing court took into consideration, and the petitioner did not identify any information P failed to present that would have made it reasonably probable that the sentencing court would have imposed a lesser sentence.

Argued October 19, 2020—officially released November 9, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Deren Manasevit, assigned counsel, with whom, on the brief, was *Peter Tsimbidaros*, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Joseph Valdes*, senior assistant state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Kyle Freitag, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court erred in denying (1) count one of the amended petition claiming ineffective assistance of counsel against Attorney Francis O'Reilly, his trial counsel at the time of his guilty pleas, and (2) count two of the amended petition claiming ineffective assistance of counsel against Attorney Norman A. Pattis, his trial counsel at the time of sentencing. We reverse, in part, the judgment of the habeas court and remand the case for a new habeas trial as to certain claims raised in counts one and two of the amended petition.

The following facts and procedural history, as set forth in the habeas court's corrected memorandum of decision or as undisputed in the record, are relevant to our resolution of this appeal. "The petitioner was the defendant in three matters pending in the judicial district of [Stamford-Norwalk] under docket numbers CR-12-0132590,

where he was charged with various drug charges, criminal possession of a handgun, and possession of a weapon in a motor vehicle; CR-12-0133383, the subject of the [underlying amended petition for a writ of habeas corpus], where he was charged with murder, attempted murder, two counts of assault [in the] first degree, criminal possession of a handgun, possession of a pistol without a permit, weapon in a motor vehicle, and others; and CR-12-0133384, where he faced a relatively minor possession charge. . . . The allegations in docket ending #383 were that the petitioner and [his] codefendant, [Terrance] Baxter, were driving in the petitioner's minivan on Fort Point Road in Norwalk on October 30, 2012. . . . Baxter was driving, and the petitioner was in the front passenger seat. At some point, the van came upon a scooter being driven in the same direction along the right-hand side of Fort Point Road by a Dajon Johnson, with a Bancroft Daley riding behind him as a passenger. The petitioner did not know the driver but was familiar with . . . Daley from prior interactions on the street. The two vehicles rode in the same direction relatively near each other for some period of time, when, according to one independent witness, the van suddenly accelerated to pull up alongside of the scooter. The petitioner's claim as to this portion of the incident is that the scooter was behind his vehicle and sped up alongside. In any event, when the van and the scooter were beside each other, the petitioner claims to have seen [Daley] reaching toward his waist area. The petitioner pulled out a .32 caliber pistol, reached out of the passenger window, and shot both parties. . . . Baxter immediately sped off, but the two were captured when the van was stopped about ten minutes later on the highway. According to [the] police, the petitioner made several rather unrepentant statements while in custody about shooting the victims because 'it was me or them.' . . . Johnson died as a result of his gunshot wounds, and . . . Daley was left

paralyzed from the mid-back down. The only weapon found in the possession of either victim was a three inch folding knife that was apparently found inside . . . Daley's pocket."

Attorney Howard Ehring, a public defender, initially appeared as the petitioner's criminal defense counsel. In November, 2014, O'Reilly, appointed as assigned counsel, filed an appearance in lieu of Ehring.

"All three [of the petitioner's criminal] matters were on the 'firm jury' list, and the [matter at issue] was scheduled to begin trial, when the cases were called on the docket [on] January 14, 2015. Following some discussions, an offer involving guilty pleas to the murder and assault [in the] first degree charges in exchange for a judicially indicated sentence of a minimum of [twenty-five] years to a maximum of [thirty years], followed by [ten] years of special parole, with a right to argue, was conveyed to the petitioner. That offer was initially rejected by the petitioner, through [Attorney O'Reilly], on the record. While the [trial] court was explaining the withdrawal of the offer and its impact on future negotiations, the petitioner changed his mind and agreed to enter pleas of guilty to one count of murder in violation of General Statutes § 53a-54a (a), and one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Following the canvass, [the court accepted the pleas, and] the matter was continued to March 11, 2015, for sentencing. On February [17, 2015], however, Attorney . . . Pattis filed an appearance in lieu of Attorney O'Reilly. On April 7, 2015, the petitioner appeared for sentencing represented by Attorney Pattis, where, after hearing from all parties, the court imposed a sentence of [thirty] years to serve, followed by [ten] years of special parole on the murder charge, and [twenty] years concurrent on the assault charge, for a

total effective sentence of [thirty] years, followed by [ten] years of special parole."[1] (Footnotes omitted.)

On September 15, 2015, the petitioner, representing himself, filed a petition for a writ of habeas corpus. On April 9, 2018, after assigned habeas counsel had appeared on his behalf, the petitioner filed his operative, two count amended petition for a writ of habeas corpus (amended petition). In count one of the amended petition, the petitioner asserted a claim of ineffective assistance of counsel against O'Reilly, alleging, inter alia, that O'Reilly had (1) incorrectly advised the petitioner that his codefendant, Baxter, had refused, or would refuse, to testify at his criminal trial, and (2) failed to properly advise the petitioner regarding potential defenses available to him.[2] The petitioner further alleged that, but for O'Reilly's deficient performance, he would not have pleaded guilty but, rather, would have asserted his right to a trial. In count two of the amended petition, the petitioner asserted a claim of ineffective assistance of counsel against Pattis, alleging, inter alia, that Pattis had failed (1) to present adequate mitigation evidence at sentencing, and (2) to file a motion to withdraw his guilty pleas predicated on the ineffective assistance of counsel rendered by O'Reilly.[3] The petitioner further alleged that, but for Pattis' deficient performance, it was reasonably

[1] After the sentencing court had announced the petitioner's sentence, the state entered a nolle as to the charges pending in docket number CR-12-0132590. The disposition of docket number CR-12-0133384 is unclear; however, in its decision, the habeas court noted that the plea deal agreed to by the petitioner "resolved all outstanding files and charges pending against the petitioner."

[2] In support of count one of the amended petition, the petitioner alleged additional deficiencies on the part of O'Reilly, which the habeas court rejected in its corrected memorandum of decision. The petitioner has not raised any claims on appeal concerning those additional alleged deficiencies.

[3] In support of count two of the amended petition, the petitioner alleged additional deficiencies on the part of Pattis, which the habeas court rejected in its corrected memorandum of decision. The petitioner has not raised any claims on appeal concerning those additional alleged deficiencies.

probable that he would have received a lesser sentence. On April 30, 2018, the respondent, the Commissioner of Correction, filed a return, leaving the petitioner to his proof as to his material allegations.

The matter was tried to the habeas court, *Newson, J.*, over the course of three days in July, August and November, 2018.[4] On February 26, 2019, the court issued a corrected memorandum of decision[5] denying both counts of the amended petition. Thereafter, the petitioner filed a petition for certification to appeal from the judgment, which the court granted.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner's first claim is that the habeas court improperly denied count one of the amended petition, in which he claimed that O'Reilly had rendered ineffective assistance of counsel. Specifically, the petitioner asserts that the court incorrectly rejected his ineffective assistance of counsel claim predicated on O'Reilly's alleged (1) misrepresentation to him about Baxter's willingness to testify at his criminal trial, and (2) failure to properly advise him about the potential defenses available to him. For the reasons that follow, we conclude that a new habeas trial is necessary as to these claims.

We begin by setting forth the following relevant legal principles and standard of review. "In a habeas appeal,

[4] On August 10, 2018, the parties rested and presented closing arguments. On August 13, 2018, the petitioner filed a motion to open the evidence to present the testimony of an additional witness, Attorney Francis DiScala, which the court granted, without objection, on August 24, 2018. On November 1, 2018, the parties elicited testimony from DiScala and, after resting, presented additional closing arguments.

[5] The court issued an original memorandum of decision on February 22, 2019. On February 26, 2019, the court issued the corrected memorandum of decision, which corrected certain typographical errors.

[6] The petitioner applied for, and was granted, a waiver of fees, costs, and expenses and appointment of counsel on appeal.

this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703–704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"The [long-standing] test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." (Citation omitted; internal quotation marks omitted.) *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 471, 72 A.3d 426 (2013), appeal dismissed, 317 Conn. 594, 119 A.3d 1153 (2015). "[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test enunciated by the United States Supreme Court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was

a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . .

"To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 704–705.

A

We first turn to the petitioner's claim of ineffective assistance of counsel predicated on O'Reilly's purported misrepresentation to him regarding Baxter's willingness to testify at his criminal trial. The petitioner contends that the evidence adduced at the habeas trial established that, almost immediately before the petitioner had entered his guilty pleas, O'Reilly misrepresented to him that Baxter would not testify and that, as a result of that misrepresentation, he entered guilty pleas that

were uninformed. We construe the essence of the petitioner's contention to be that the court, in determining that O'Reilly's performance was not deficient, made a clearly erroneous implicit factual finding that, prior to the petitioner pleading guilty, O'Reilly told him that it was *not likely* that Baxter would testify. We conclude that the court's implicit factual finding is clearly erroneous.

The following additional facts and procedural history are relevant to our resolution of this claim. At the habeas trial, the petitioner called the following witnesses: Baxter; Donald Freitag, the petitioner's father (petitioner's father); Ehring; O'Reilly; and Attorney Francis DiScala, who was Baxter's criminal defense counsel.

Baxter testified in relevant part as follows. On October 30, 2012, Baxter was driving the petitioner to the petitioner's place of employment. Before reaching their destination, the petitioner noticed that Johnson and Daley had started to follow them, at which point the petitioner told Baxter to "get out [of] here" because "[they're] coming . . . ." The petitioner appeared "scared" and "wasn't himself." Immediately before the shooting, Johnson and Daley were positioned on their scooter next to the passenger side of the petitioner's minivan, where the petitioner was seated, at which time Daley pulled a hood over his head and began moving his hand toward his waist. At that time, the petitioner was screaming, "going crazy," and stating that "they're following us, [t]hey're trying to get me . . . ." The petitioner then pulled out a gun and shot Johnson and Daley, after which Baxter sped away from the scene. Afterward, the petitioner conveyed to Baxter that he had observed Daley reaching for a gun in his waistband. The petitioner also expressed to Baxter that "these kids . . . keep coming for me," that he had "to go somewhere, [he had] to move or something," and that he was "tired of these kids [who had] killed his friend . . . ."[7]

[7] See footnote 8 of this opinion.

Sometime before the petitioner had entered his guilty pleas, Baxter, while he was in jail, met with O'Reilly, DiScala, and a private investigator for the purpose of "getting things situated for the trial." At some point in time, DiScala advised Baxter of his fifth amendment right against self-incrimination, but Baxter intended to waive that right and to testify in support of the petitioner.

The petitioner testified in relevant part as follows. On October 30, 2012, while Baxter was driving him to his place of employment, the petitioner noticed Johnson and Daley following them on a scooter. The petitioner believed Johnson and Daley to be members of a local gang that the petitioner had encountered on prior occasions.[8] The petitioner instructed Baxter to drive past his place of employment because he did not want Johnson and Daley to know where he worked. At that time, the petitioner was feeling "all over the place because [he was] wondering if [Johnson and Daley] were following [him] to get [him] . . . ." Johnson and Daley eventually maneuvered their scooter next to the passenger side of the minivan where the petitioner was seated. The petitioner noticed that Daley, who had a hood over his head, was moving his hand toward his waistband for a "metal object." Fearing that Daley was reaching for a gun to shoot him, the petitioner retrieved his gun and shot Johnson and Daley, after which Baxter sped away from the scene.

On January 14, 2015, before appearing in front of the trial court and entering his guilty pleas, the petitioner met with his parents and O'Reilly at the courthouse

[8] The petitioner testified that he was a witness in a criminal trial in which Amos Brown, his friend, was charged with, but later acquitted of, murder. The petitioner further testified that, following Brown's acquittal, Brown was killed by members of the local gang of which, the petitioner believed, Johnson and Daley were members. The petitioner testified that, following Brown's acquittal, he was threatened and attacked by members of the gang.

(January 14, 2015 meeting). During the January 14, 2015 meeting, O'Reilly told the petitioner that DiScala had informed him that Baxter was not willing to testify at the petitioner's criminal trial. Until that disclosure, the petitioner was under the impression that Baxter was going to testify. The petitioner considered Baxter's testimony to be "more than important" and believed that he "needed" Baxter's testimony to support his defense.

Three minutes after being informed by O'Reilly that Baxter would not be testifying, the petitioner appeared before the trial court to either accept or reject the plea offer. The petitioner's understanding was that this proceeding was his final opportunity to accept the plea offer.[9] Prior to January 14, 2015, and at the time he appeared before the court, the petitioner had no intention of pleading guilty. After O'Reilly had informed the court that the petitioner was rejecting the plea offer, and as the petitioner was being canvassed by the court, he changed his mind and decided to accept the offer. As the petitioner explained: "[A]s the judge was [canvassing me], my mind's bouncing all over the place. I got teary eyed. I started to get emotional based off what I just heard about my friend telling, you know, basically, you know, not coming forth for me. And that completely threw me off, and I just, I lost, I lost hope in that moment. And I just—I didn't know what [to] do." After entering his guilty pleas but before being sentenced, the petitioner learned from his family that Baxter was, in fact, willing to testify. Had he known that Baxter was willing to testify, the petitioner would not have pleaded guilty.

The petitioner's father testified in relevant part as follows. Prior to the January 14, 2015 meeting, the petitioner's father believed that Baxter would be a helpful

[9] The transcript of the January 14, 2015 hearing, which was admitted into evidence as a full exhibit during the habeas trial, reflects that the trial court informed the petitioner that any plea accepted by the court after that day would be an open plea exposing the petitioner to the maximum sentence.

witness for the petitioner, that Baxter would testify at the petitioner's criminal trial, and that the petitioner would insist on going to trial. During the January 14, 2015 meeting, however, O'Reilly conveyed that Baxter would not be testifying. According to the petitioner's father, the disclosure by O'Reilly that "[o]ne of the main witnesses [was] not going to testify" shocked and scared the petitioner.

Ehring testified in relevant part as follows. As the petitioner's initial criminal defense counsel, Ehring's defense strategy was to claim either self-defense or extreme emotional disturbance. During the course of his investigation, Ehring met with Baxter and DiScala. Ehring determined that Baxter's testimony would be helpful to the petitioner, as Baxter could bolster the petitioner's defense by testifying that the petitioner had felt terrified and threatened by Johnson and Daley immediately before the shooting. Ehring discussed with the petitioner the import of Baxter's prospective testimony, which, according to Ehring, the petitioner believed to be pivotal to his defense. Ehring also advised the petitioner that, if called as a witness at the petitioner's criminal trial, Baxter could invoke his fifth amendment right against self-incrimination and refuse to testify; however, on the basis of his conversations with DiScala and others, Ehring was "pretty certain" that Baxter would waive his fifth amendment right and elect to testify. After O'Reilly had replaced Ehring as the petitioner's criminal defense counsel, Ehring told O'Reilly that Baxter was willing to testify in support of the petitioner.

O'Reilly testified in relevant part as follows. After replacing Ehring as the petitioner's criminal defense counsel, O'Reilly met with Baxter, DiScala, and a private investigator at the jail where Baxter was being held "to see if [Baxter] might be helpful." O'Reilly did not recall whether there was any discussion during that meeting

regarding Baxter's willingness to testify at the petitioner's criminal trial; however, on the basis of the information that he gathered at the meeting, O'Reilly did not believe that Baxter's testimony would be helpful to the petitioner.

O'Reilly recalled the January 14, 2015 meeting, during which the discussion was focused on "[the petitioner's] future and . . . what [O'Reilly] thought the end result of going to trial would be and what [O'Reilly] thought the best outcome [was] for [the petitioner] to take under the circumstances." O'Reilly did not remember speaking specifically about Baxter during that meeting, and O'Reilly did not recall ever telling the petitioner that Baxter would not testify at his criminal trial. At the end of the meeting, notwithstanding O'Reilly's recommendation that the petitioner accept the plea offer, the petitioner expressed to O'Reilly that he wanted to decline the plea offer and to proceed to trial. O'Reilly did not recall whether the petitioner gave an explanation for his subsequent decision to change his mind and to accept the plea offer.

DiScala testified in relevant part as follows. As Baxter's criminal defense counsel, DiScala advised Baxter that, if called as a witness at the petitioner's criminal trial, he could invoke his fifth amendment right against self-incrimination and decline to testify. DiScala further advised Baxter that the state would potentially withdraw a favorable plea deal that had been offered to him if he elected to testify.[10] Nevertheless, DiScala believed that Baxter was "always willing" to testify at the petitioner's criminal trial.

With regard to his communications with O'Reilly, DiScala remembered meeting with Baxter, O'Reilly, and a

[10] Baxter testified that, on April 15, 2015, pursuant to a plea agreement, he pleaded guilty to several crimes, including hindering prosecution in relation to the events of October 30, 2012, and was subsequently sentenced to six years of incarceration followed by four years of special parole.

private investigator at the jail where Baxter was being held in order for O'Reilly "to get a better understanding of what Baxter would be testifying to." DiScala did not recall there being any discussion during that meeting on the topic of Baxter's willingness to testify at the petitioner's criminal trial. Additionally, DiScala did not recall having a specific conversation with O'Reilly following that meeting regarding Baxter's willingness to testify; however, DiScala was adamant that he never told O'Reilly that Baxter would not testify. DiScala speculated that he may have stated to O'Reilly either that Baxter would "be crazy to testify" or that he would recommend that Baxter invoke his fifth amendment privilege and decline to testify, but he would not have represented to O'Reilly that Baxter was not going to testify.

In its decision, the court found that O'Reilly had made an "assessment that . . . Baxter was not going to be available as [a] witness if the case went to trial." The court determined that there was "nothing unreasonable or deficient in Attorney O'Reilly's assessment . . . . An attorney's job is not to make perfect predictions but to make educated ones based on the reasonable possibilities. . . . All parties admit there was no definitive conversation about whether . . . Baxter would testify if called as a witness. Attorney O'Reilly believed it was unlikely that . . . Baxter would not have asserted his privilege against self-incrimination, given [that] he had an open plea agreement with the state. Even if . . . Baxter had expressed an overt willingness to 'help out,' Attorney O'Reilly made an assessment that his testimony would not have been particularly helpful, so he wasn't going to use him." (Citation omitted.) Subsequently in its decision, the court directly addressed and rejected the petitioner's claim that "Attorney O'Reilly 'incorrectly advised' him about whether . . . Baxter was willing to testify on his behalf if called to testify

for the defense at trial." The court stated that O'Reilly did not need to be " 'correct' in his assessments of potential witnesses" but was "only required to make a reasonable and educated assessment based on the information before him. In the present case, after taking the time to meet with [Baxter], Attorney O'Reilly made an assessment that [Baxter] was not likely to testify for the defense because [Baxter] had an open plea agreement pending with the state. Given that, [Attorney O'Reilly] presumed that . . . Baxter would likely assert his privilege against self-incrimination if [Attorney O'Reilly] attempted to call [Baxter] to testify. Even if [Baxter] did decide to testify, Attorney O'Reilly did not assess that [Baxter's] testimony would have been particularly helpful. In the end, whether Attorney O'Reilly was, in [hindsight], actually correct in his assessment of . . . Baxter's willingness to testify is not the question. . . . [Attorney O'Reilly] made a reasoned assessment, given the factors present before him at the time, and the court finds nothing deficient about his conduct." (Citation omitted.)

The petitioner maintains that O'Reilly performed deficiently during the January 14, 2015 meeting by misrepresenting to him, without reservation, that Baxter would not testify at his criminal trial. The court, however, did not find that O'Reilly conveyed to the petitioner, in absolute terms, that Baxter was not going to testify; rather, we read the court's decision as including an implicit factual finding that O'Reilly told the petitioner that it was *not likely* that Baxter would testify, coupled with an express finding that O'Reilly's assessment was reasonable. Thus, we construe the substance of the petitioner's contention to be that the court clearly erred by implicitly finding that, during the January 14, 2015 meeting, O'Reilly conveyed to the petitioner that it was *not likely* that Baxter would testify. We agree that the court clearly erred in making this implicit finding.

Preliminarily, we make clear that the court's express finding that "[a]ll parties admit there was no definitive conversation about whether . . . Baxter would testify if called as a witness" is not germane to the issue before us. Facially, this finding connotes that it was undisputed that no definitive conversation *ever* occurred between *any* individuals concerning Baxter's willingness to testify. If so broadly construed, this finding would be clearly erroneous in light of the testimony in the record, as summarized previously in this part of the opinion, plainly demonstrating that certain individuals, including the petitioner and the petitioner's father, maintained that discussions regarding Baxter's willingness to testify did occur. In his reply brief, however, the petitioner clarifies that he is not challenging this finding as clearly erroneous because, considered in context, this finding refers only to communications between O'Reilly and DiScala in relation to the meeting that they had with Baxter while he was in jail. In other words, the petitioner contends that this finding reasonably can be interpreted to be that there was no dispute that no definitive conversation happened *between O'Reilly and DiScala at that meeting* regarding Baxter's willingness to testify. We agree. Limited in the manner posited by the petitioner, this finding is supported by the record, as both O'Reilly and DiScala testified that they did not recall the subject of Baxter's willingness to testify being mentioned during that meeting.[11] This finding is separate and distinct from the implicit finding being challenged by the petitioner, that is, that O'Reilly conveyed

[11] The limited scope of this finding is further evinced by comments made by the habeas court and the petitioner's counsel during the closing arguments held following DiScala's testimony. Specifically, the following colloquy occurred:

"The Court: I mean, I'll listen to it back, and, I mean, I thought the testimony that was given here today was, we set a meeting at the jail, and I thought we were there to discuss whether or not Baxter was going to testify; *and I thought the testimony was something to the effect of, but* [*whether or not Baxter was going to testify*] *didn't come up during that meeting between* [*O'Reilly, DiScala and Baxter*].

to the petitioner, during the January 14, 2015 meeting, that Baxter was *not likely* to testify at his criminal trial.

We iterate that the finding at issue is an implicit finding necessarily found by the court. In rejecting the petitioner's claim that O'Reilly performed deficiently by " 'incorrectly advis[ing]' " him during the January 14, 2015 meeting about Baxter's willingness to testify, the court concluded that O'Reilly made a reasonable assessment that Baxter "was *not likely* to testify for the defense" because Baxter had an open plea agreement pending with the state, and, thus, "Baxter would *likely* assert his privilege against self-incrimination if [Attorney O'Reilly] attempted to call [Baxter] to testify." (Emphasis added.) Given that the crux of the petitioner's claim, as identified and rejected by the court, concerned the information conveyed by O'Reilly to the petitioner at the January 14, 2015 meeting, and that the court found that O'Reilly's assessment was that Baxter "was not likely" to testify and that Baxter "would likely" invoke his fifth amendment right against self-incrimination if called to testify, the only reasonable reading of the court's decision is that the court implicitly found that, during the January 14, 2015 meeting, O'Reilly told the petitioner that it was *not likely* that Baxter would testify.

We now turn our attention to the merits of the petitioner's claim. We observe that "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation

"[The Petitioner's Counsel]: That's correct, Your Honor. My recollection of the testimony . . . is that that meeting focused on what . . . Baxter's testimony would be . . . . *So, my understanding of the facts and the testimony is that there was never an in-depth discussion, would . . . Baxter testify at that meeting* . . . ." (Emphasis added.)

marks omitted.) *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 357, A.3d (2021), petition for cert. filed (Conn. September 29, 2021) (No. 210187). In the present case, there is no evidence in the record supporting the court's finding that, during the January 14, 2015 meeting, O'Reilly told the petitioner that it was *not likely* that Baxter would testify. None of the three individuals who attended that meeting and who testified at the habeas trial provided testimony that supports that finding. Both the petitioner and the petitioner's father testified that O'Reilly, in absolute terms, told them that Baxter *would not* testify, whereas O'Reilly testified that he did not recall there being any discussion during that meeting about Baxter's willingness to testify. There is no other evidence in the record that sheds light on any discussions had during the January 14, 2015 meeting relating to Baxter. Accordingly, we conclude that the court's finding is clearly erroneous.

Our conclusion that the court's finding is clearly erroneous does not mean that the petitioner has satisfied his burden to prove that O'Reilly rendered deficient performance. The petitioner asserts that he established that, during the January 14, 2015 meeting, O'Reilly rendered deficient performance by misrepresenting to him that Baxter would not testify at his criminal trial. It is axiomatic, however, that finding facts and resolving questions of credibility are within the sole province of the finder of fact, not this court. See *Brooks* v. *Commissioner of Correction*, 105 Conn. App. 149, 153, 937 A.2d 699, cert. denied, 286 Conn. 904, 943 A.2d 1101 (2008). Although the petitioner and the petitioner's father testified that O'Reilly told them, in absolute terms, that Baxter would not testify, we cannot discern whether the habeas court would have credited this testimony in the absence of the court's clearly erroneous finding. See *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 712, 177 A.3d 566 (2017) (observing that it

was uncertain whether, in absence of habeas court's clearly erroneous factual finding, habeas court would have credited petitioner's testimony to resolve factual issue). Moreover, O'Reilly testified that, although he did not recall Baxter's willingness to testify being discussed during the January 14, 2015 meeting, he also did not recall ever telling the petitioner that Baxter would not testify, thereby creating a dispute as to this factual issue. Under these circumstances, we conclude that the judgment rendered on count one must be reversed and the case must be remanded for a new trial as to the petitioner's claim that O'Reilly rendered ineffective assistance of counsel in connection with his purported misrepresentation about Baxter. See id., 712–13 (reversing judgment and remanding case for new habeas trial when habeas court made clearly erroneous factual finding, leaving unresolved factual issue that presented question of credibility to be addressed by habeas court).[12]

At this juncture, we note that the court disposed of the petitioner's ineffective assistance of counsel claim against O'Reilly on the performance prong of *Strickland-Hill* only without addressing the prejudice prong. See *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 255, 257 A.3d 423 ("[b]ecause both [the performance and the prejudice] prongs . . . must be established for a habeas petitioner to prevail, a court may

[12] We note that clearly erroneous factual findings are deemed harmless when they "do not undermine appellate confidence in the habeas court's fact-finding process . . . ." (Internal quotation marks omitted.) *Charles* v. *Commissioner of Correction*, supra, 206 Conn. App. 358. The record does not reflect that either (1) the court discredited the testimony of the petitioner and the petitioner's father, or (2) assuming that the testimony of the petitioner and the petitioner's father was credible, there was sufficient evidence to uphold the court's determination that the petitioner failed to prove deficient performance by O'Reilly. Cf. id., 358–59 (concluding that habeas court's clearly erroneous findings were harmless). Thus, we cannot conclude that the court's clearly erroneous finding was harmless.

dismiss a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 338 Conn. 909, A.3d (2021). In his appellate brief, the respondent requests that we remand the case to the court to make factual findings as to the prejudice prong in the event that we conclude that the court improperly determined that the petitioner failed to prove deficient performance by O'Reilly. In support of this argument, the respondent cites *Miller* v. *Commissioner of Correction*, 176 Conn. App. 616, 170 A.3d 736 (2017), in which a habeas court denied an ineffective assistance of counsel claim only on the basis of the performance prong. Id., 621. On appeal, this court concluded that (1) counsel's performance was deficient (because counsel's advice regarding immigration consequences was constitutionally insufficient), and (2) the record was inadequate to determine whether counsel's deficient performance prejudiced the petitioner, such that this court remanded the matter to the habeas court for further proceedings to make a determination on the prejudice prong. Id., 635–37. In the present case, unlike in *Miller*, we do not make a conclusion as to whether O'Reilly rendered deficient performance; rather, as a result of the habeas court's clearly erroneous finding, we conclude that a new trial is necessary. Under these circumstances, a remand to the habeas court for further proceedings to address the prejudice prong is not proper. See, e.g., *Salmon* v. *Commissioner of Correction*, supra, 178 Conn. App. 714–15 (reversing habeas court's judgment denying ineffective assistance of counsel claim and remanding case to court for new trial when court made clearly erroneous factual finding as to performance prong and did not address prejudice prong in its decision).

B

We next turn to the petitioner's claim of ineffective assistance of counsel predicated on O'Reilly's purported failure to properly advise him as to the potential

defenses available to him, including self-defense, which requires only a brief discussion. We construe this claim to be intertwined with the petitioner's principal claim predicated on O'Reilly's purported misrepresentation concerning Baxter's willingness to testify. Because we concluded in part I A of this opinion that the court committed error with respect to the principal claim and that a new trial as to that claim is necessary, we further conclude that the judgment rendered on count one must be reversed insofar as the petitioner claimed that O'Reilly rendered ineffective assistance of counsel in connection with his purported failure to properly advise the petitioner as to the potential defenses available to him, and the case must be remanded for a new trial as to that claim.

II

The petitioner's second claim is that the habeas court improperly denied count two of the amended petition, in which he asserted a claim of ineffective assistance of counsel against Pattis. Specifically, the petitioner asserts that the court committed error in rejecting his claim that Pattis rendered ineffective assistance by failing (1) to file a motion to withdraw the petitioner's guilty pleas under Practice Book § 39-27 prior to sentencing, and (2) to present adequate mitigation evidence at sentencing. We address each assertion in turn.

A

First, the petitioner contends that the court improperly concluded that Pattis did not render ineffective assistance of counsel as a result of his failure to file a motion to withdraw the petitioner's guilty pleas under Practice Book § 39-27 (4).[13] For the reasons that follow, we conclude that a new trial is necessary as to this claim.

[13] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows . . .

"(4) [t]he plea resulted from the denial of effective assistance of counsel . . . ."

The following additional facts and procedural history are relevant to our resolution of this claim. In the amended petition, the petitioner asserted that Pattis rendered ineffective assistance of counsel, in part, on the basis of an allegation that Pattis failed "to seek the trial court's permission to withdraw the petitioner's guilty pleas on the basis that they were unknowing, unwilling, and/or involuntary based on [O'Reilly's] deficient performance for the reasons stated in [count one of the amended petition] . . . ." In its decision, the court rejected this claim, stating the following three reasons. First, the court's conclusion that the petitioner failed to demonstrate that O'Reilly rendered ineffective assistance of counsel foreclosed this claim. Second, the petitioner failed to present any credible evidence that his guilty pleas were " 'unwilling or involuntary . . . .' " Third, there was evidence in the record demonstrating that Pattis had considered filing a motion to withdraw the guilty pleas, but he made a reasonable decision against doing so when he discovered that the state would "insist on the murder charge in any plea agreement, which meant that the present plea agreement gave the petitioner the opportunity to argue for the minimum mandatory sentence he was exposed to."

The petitioner asserts that his guilty pleas were not made knowingly, intelligently, or voluntarily in light of O'Reilly's ineffective assistance of counsel, and, thus, it was incumbent on Pattis to move to withdraw his guilty pleas under Practice Book § 39-27 predicated on a claim that he was denied effective assistance of counsel. In light of our conclusion in part I of this opinion that a new trial is necessary, in part, as to the petitioner's ineffective assistance of counsel claim against O'Reilly, we conclude that a new trial is also necessary as to this claim against Pattis. The court's first two reasons for rejecting this claim against Pattis—that the petitioner failed to establish that O'Reilly rendered ineffective assistance of counsel, and that the petitioner failed

to demonstrate that his pleas were unwilling or involuntary—are untenable following our reversal of the denial, in part, of count one of the amended petition and attendant remand for a new trial. As for the court's third reason, whether Pattis made a strategic decision not to seek withdrawal of the petitioner's guilty pleas because of the state's insistence on the petitioner pleading guilty to the murder charge—is irrelevant to the issue here. The petitioner's claim regarding O'Reilly was that, but for O'Reilly's ineffective assistance, the petitioner would have asserted his right to a trial rather than enter the guilty pleas. Thus, the purpose of seeking withdrawal of the guilty pleas was not to negotiate a better plea deal but to insist on going to trial.[14]

Accordingly, under the circumstances of this case, we conclude that the judgment rendered on count two must be reversed insofar as the petitioner claimed that Pattis rendered ineffective assistance of counsel by failing to file a motion to withdraw the petitioner's guilty pleas, and the case must be remanded for a new trial as to that claim.

B

Second, the petitioner contends that the court improperly concluded that Pattis did not render ineffective assistance of counsel as a result of his failure to present adequate mitigation evidence at sentencing. We disagree.

"Criminal defendants have a constitutional right to effective assistance of counsel during the sentencing stage." (Internal quotation marks omitted.) *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 31, 257 A.3d 399 (2021). "A claim of ineffective assistance

[14] At the habeas trial, the petitioner testified that he had discussions with Pattis about withdrawing his guilty pleas on the basis of Baxter's availability to testify at his criminal trial. Pattis was not called as a witness at the habeas trial.

of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . In *Strickland* [v. *Washington*, supra, 466 U.S. 687], the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . With respect to the prejudice component, [i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings." (Citations omitted; internal quotation marks omitted.) *Sotomayor* v. *Commissioner of Correction*, 135 Conn.

App. 15, 21–22, 41 A.3d 333, cert. denied, 305 Conn. 903, 43 A.3d 661 (2012).

The following additional facts and procedural history are relevant to our resolution of this claim. After pleading guilty on January 14, 2015, the petitioner was sentenced on April 7, 2015. During sentencing, Pattis asked the court to impose twenty-five years of incarceration, which was the mandatory minimum sentence for a murder conviction. See General Statutes § 53a-35a (2). Pattis offered mitigation evidence in support of the petitioner, including telling the court that (1) two people whom the petitioner knew were killed by local gang members after being "green-lighted," a term described by Pattis as "a signal sent to gang members in the [local] community that they could be killed with impunity," (2) the petitioner "struggled against things that, frankly, made his life a nightmare while he was a teenager," including attending a party where he witnessed his friend, Amos Brown, "involved in a lethal struggle," testifying as a witness at Brown's criminal trial, and "then believ[ing] he was put on a hit list and marked for death,"[15] (3) for the petitioner's safety, the petitioner's family sent him to school in New York for a few years before he returned to Connecticut to work with his family, (4) the petitioner was "not . . . proud of what he did," "made a mistake in shooting to kill," and "[understood] that he erred," and (5) the petitioner was not the "legal fiction that the state has tried to create" of "some irresponsible gangbanger carrying guns for anything other than self-protection." Pattis further brought in the petitioner's father and Brown's father to address the court, each of whom made positive remarks about the petitioner and discussed the violence that the petitioner had experienced in his life. The petitioner also addressed the court.

[15] See footnote 8 of this opinion.

In sentencing the petitioner to a total effective sentence of thirty years of incarceration, followed by ten years of special parole, the sentencing court acknowledged that the petitioner had lived in a violent environment, feared for his life, took full responsibility for his actions, and was "more than the events that occurred on October 30, 2012"; nevertheless, the court determined that the petitioner's conduct was not justified. Specifically, the court stated: "[The petitioner] did not have a right to take . . . Johnson's life. He did not have a right to put . . . Daley in a wheelchair for the rest of his life. . . . Johnson and . . . Daley had families, had friends. They had long lives ahead of them and . . . Johnson's life is obviously over and . . . Daley's life has been severely affected, and everyone, including [the petitioner], has to be accountable for his conduct." The court further observed that "[t]here have been allegations that [Johnson and Daley] were gang members and implications . . . that they were somehow violent or responsible for criminal conduct and, to my knowledge, they weren't. And even if they were—and, again, I'm not saying that they were, that does not justify what [the petitioner] did . . . ."

In its decision, the habeas court stated that the transcript of the petitioner's sentencing, which was admitted into evidence as a full exhibit during the habeas trial, reflected that "Attorney Pattis argued, in direct response to some of the state's comments, about the violence surrounding the petitioner, his attempts to avoid that conflict, and his fear of being targeted, and the court recognized those arguments." Accordingly, the court concluded that the petitioner's claim "fails because it is directly refuted by the evidence, and the petitioner has failed to present any new or additional evidence before this court that he claims would have altered the . . . sentence."

The petitioner claims that Pattis did not adequately advocate for him during sentencing because he "failed to establish critical facts in order to provide a context for the shooting in the most positive, sympathetic light to the petitioner," including that Johnson and Daley were members of the local gang that had threatened him in the past. We are not persuaded. As the habeas court properly determined, the record reflects that Pattis submitted ample mitigation evidence in support of the petitioner at sentencing, which the sentencing court took into consideration. In imposing its sentence, the sentencing court emphasized the serious nature and severe consequences of the petitioner's actions. As the habeas court correctly observed, the petitioner did not identify any information that Pattis failed to present that would have made it reasonably probable that the sentencing court would have imposed a lesser sentence. In particular, with respect to the petitioner's contention that Pattis should have provided information demonstrating that Johnson and Daley were gang members, the sentencing court stated that the petitioner's conduct was not justified *even if* Johnson and Daley were gang members who were "somehow violent or responsible for criminal conduct . . . ." Accordingly, we conclude that the habeas court properly concluded that the petitioner failed to demonstrate that Pattis rendered ineffective assistance of counsel in relation to this claim.

The judgment is reversed as to count one of the amended petition for a writ of habeas corpus only insofar as the petitioner claimed ineffective assistance of counsel against Attorney Francis O'Reilly in connection with the failure to correctly advise the petitioner concerning Terrance Baxter's willingness to testify and the failure to properly advise the petitioner about the potential defenses available to him and the case is remanded to the habeas court for a new trial as to those claims; the judgment is reversed as to count two of the amended

petition only insofar as the petitioner claimed ineffective assistance of counsel against Attorney Norman A. Pattis in connection with the failure to move to withdraw the petitioner's guilty pleas predicated on the ineffective assistance of counsel rendered by O'Reilly and the case is remanded to the habeas court for a new trial as to that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL F.*
(AC 43485)
(AC 43504)

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

Syllabus

The defendant, who had previously been convicted on pleas of guilty of various crimes in three separate cases, filed motions to open each of the disposed criminal cases in 2019. The defendant had been sentenced in 2010 and in 2013 in the underlying criminal cases. The trial court rendered judgments dismissing the motions to open, from which the defendant filed two appeals to this court. *Held*:

1. The trial court correctly determined that it lacked jurisdiction to consider the defendant's motions to open; under the well established common-law rule, the court lost jurisdiction following the imposition of the defendant's sentence in each of the underlying criminal cases.
2. The defendant's claim that the trial court abused its discretion when it failed to retain jurisdiction to determine the motions to open was without merit: insofar as the defendant claimed that the court had discretion to exercise jurisdiction in the present case, a court's subject matter jurisdiction is not a matter of discretion, and, as a matter of law, there simply was no jurisdiction for the court to retain; moreover, insofar as the defendant suggested that an allegation of ineffective assistance of counsel provided a trial court with continuing jurisdiction over a criminal case, this court recently rejected that proposition in *State* v. *Jin* (179 Conn. App. 185).

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

3. The trial court did not violate the defendant's right to due process when it dismissed his motions to open without providing him notice and an opportunity to be heard on the issue of jurisdiction, the procedures used being adequate to prevent the erroneous deprivation of the defendant's private interest in exercising his right to redress his grievances: given the defendant's claims before the trial court, there was no risk of an erroneous deprivation of any liberty interest the defendant possessed by the court proceeding as it did, the court having explained to the defendant that his motions to open had been filed in disposed cases and the court lacked jurisdiction to consider them, and the defendant acknowledged the court's ruling, did not request to be heard further and instead had a discussion with the court about the appointment of appellate counsel; moreover, by exercising his statutory right to appeal from the court's judgments, and because this court's standard of review is plenary, the defendant was afforded a meaningful opportunity to make his assertions and objections to any contrary arguments made by the state regarding the jurisdictional issue.

Argued September 23—officially released November 9, 2021

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of assault in the third degree and reckless endangerment in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Hadden*, *J.*, on a plea of guilty; judgment of guilty; information, in the second case, charging the defendant with the crimes of criminal violation of a protective order and criminal trespass in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Licari*, *J.*, on a plea of guilty to criminal violation of a protective order; judgment of guilty; and substitute information, in the third case, charging the defendant with the crimes of assault in the third degree and conspiracy to commit assault in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Kamp*, *J.*, on a plea of guilty to

assault in the third degree; judgment of guilty; thereafter, the court, *Cradle, J.*, dismissed the defendant's motion to open in each case, and the defendant filed two appeals to this court, which consolidated the appeals. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant in both appeals (defendant).

Sarah Hanna, senior assistant state's attorney, with whom were *Melissa Patterson*, senior assistant state's attorney, and, on the brief, *Patrick Griffin*, state's attorney, and *Alexandra Arroyo*, special deputy assistant state's attorney, for the appellee in both appeals (state).

Opinion

BRIGHT, C. J. In these consolidated appeals, the defendant, Michael F., appeals from the judgments of the trial court dismissing for lack of subject matter jurisdiction his motions to open three disposed criminal cases. On appeal, the defendant claims that the court (1) improperly concluded that it lacked jurisdiction to consider the motions, (2) abused its discretion in failing to retain jurisdiction to rule on the motions, and (3) violated his right to due process when it dismissed the motions without providing him notice and an opportunity to be heard on the issue of jurisdiction. We affirm the judgments of the trial court.

The following procedural history is relevant to the defendant's claims. On April 25, 2008, in Docket No. CR-06-0062422-S (2008 case), the defendant was convicted of two counts of assault in the third degree, and the trial court sentenced him to a total effective sentence of eleven months of imprisonment, execution fully suspended, with two years of conditional discharge. In June, 2009, the defendant was arrested in connection with a physical altercation with the mother of his child and charged with assault in the third degree

and reckless endangerment in the first degree in Docket No. CR-09-0093196-S (2009 case). The trial court, *Damiani*, *J.*, entered a protective order prohibiting the defendant from having any contact with the victim.

On October 16, 2009, pursuant to a plea agreement, the defendant pleaded guilty under the *Alford* doctrine[1] to one count each of assault in the third degree and reckless endangerment in the first degree in the 2009 case. On the same date, the defendant admitted to violating his conditional discharge stemming from the 2008 case, and the court released him on a written promise to appear in each case, conditioned on the defendant entering and completing the Evolve program.[2] The court explained that, if the defendant successfully completed the program, the state would recommend that he receive a fully suspended sentence. If, however, the defendant failed to abide by the conditions of his release or to complete the Evolve program, he would be exposed to a total effective sentence of two years of imprisonment.

Prior to completing the Evolve program, the defendant was arrested and charged with criminal violation of a protective order and criminal trespass in the first degree in Docket No. CR-10-0101345-S (2010 case). Because the new arrest would violate the plea agreement in the 2009 case and expose the defendant to two

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished *as if he were guilty* to avoid the risk of proceeding to trial. . . . The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Emphasis in original; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 824 n.4, 189 A.3d 1215 (2018).

[2] The Evolve program is a behavior modification program for male offenders of domestic violence. See *State* v. *Brown*, 145 Conn. App. 174, 177, 75 A.3d 713, cert. denied, 310 Conn. 936, 79 A.3d 890 (2013).

years of imprisonment, the court held a hearing on March 23, 2010, pursuant to *State* v. *Stevens*, 278 Conn. 1, 11–13, 895 A.2d 771 (2006), to determine whether probable cause existed to support his arrest. At the conclusion of the hearing, the court found that the defendant violated the conditions of his plea agreement and continued the matter for sentencing.

On May 21, 2010, the court, *Licari*, *J.*, terminated the defendant's conditional discharge in the 2008 case and, in the 2009 case, imposed a total effective sentence of two years of imprisonment, execution fully suspended, with two years of conditional discharge. On that same date, in the 2010 case, the defendant pleaded guilty, under the *Alford* doctrine, to criminal violation of a protective order, and the court sentenced him to an unconditional discharge.

In July, 2013, the defendant was arrested and charged with assault in the third degree and conspiracy to commit assault in the second degree in Docket No. CR-13-0139979-S (2013 case). On November 15, 2013, the defendant pleaded guilty under the *Alford* doctrine to assault in the third degree, and the court, *Kamp*, *J.*, sentenced him to one year imprisonment, execution fully suspended, with two years of probation. On December 3, 2014, the court, *Keegan*, *J.*, terminated the defendant's probation early.

In January, 2019, more than five years after his probation was terminated in the 2013 case and more than seven years after his sentences had been served in the 2008, 2009, and 2010 cases, the defendant filed motions to open the 2009, 2010, and 2013 disposed cases, alleging, inter alia, ineffective assistance of counsel in each of those cases due to an alleged conflict of interest. On January 11, 2019, the court, *Cradle*, *J.*, denied the motions on the papers without stating the reasons for its decisions.

The defendant thereafter filed applications for waiver of fees, costs and expenses and appointment of counsel on appeal in each of the three cases. On June 3, 2019, Judge Cradle held a hearing on the applications at which she addressed the defendant as follows: "[Your motions] were motions to open disposed cases. And it looks like on the papers this court denied the motion[s] . . . . The court checked the box that the motion is denied. I just want to note for the record . . . the reason why I denied the motions is because . . . I did not feel that this court had jurisdiction to hear these specific motions, okay. So technically, the matter should have been dismissed by the court, not denied. So I'll vacate my prior order[s] denying [them] and dismiss them for lack of jurisdiction."

The court then asked the defendant questions about his fee waiver application. After granting the fee waiver, the court returned to the motions to open and stated: "The prior orders [are] vacated. The . . . matter should have been dismissed for lack of jurisdiction as opposed to just stating it was denied, okay. That was the basis for the court's denial of the motion. But in retrospect it should have been a dismissal, okay." The defendant responded: "Yes, thank you." The court then had a further discussion with the defendant about the appointment of counsel and granted the defendant's application in the 2013 case only and appointed counsel to represent him on appeal. On June 7, 2019, the court held another hearing to address the two applications filed by the defendant in the 2009 and 2010 cases, which the court had overlooked at the previous hearing. The court granted the applications and appointed counsel to represent him on appeal in those cases as well. These appeals followed.[3]

[3] On October 10, 2019, the defendant filed his first appeal, Docket No. AC 43485, challenging the judgment dismissing his motion to open in the 2013 case. On October 16, 2019, the defendant filed a second appeal, Docket No. AC 43504, challenging the judgments dismissing his motions to open in the

I

We begin by setting forth our standard of review. Although we review a court's ruling on a motion to open a judgment for abuse of discretion; see *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 532, 253 A.3d 1033 (2021); the dispositive issue in this appeal is whether the court properly concluded that it lacked jurisdiction over the defendant's motions to open. The issue of subject matter jurisdiction presents a question of law over which our review is plenary. See *State* v. *Smith*, 150 Conn. App. 623, 634, 92 A.3d 975, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014).

On appeal, the defendant claims that the court improperly determined that it lacked jurisdiction to consider his motions to open. The state argues that the trial court properly determined that it lacked subject matter jurisdiction over the motions because the defendant had been sentenced already in each of the underlying criminal cases and there is no applicable constitutional or statutory grant of jurisdiction that permits the court to retain or exercise jurisdiction over the defendant's judgments of conviction after he has been sentenced. We agree with the state.

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . .

2009 and 2010 cases. Thereafter, this court granted the defendant's motion to consolidate the appeals for briefing and argument.

"[In other words] the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . This principle is memorialized in Practice Book § 39-26, which provides: A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in [Practice Book §] 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed. . . .

"Thus, although this court has recognized the general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases, this principle is considered in light of the common-law rule that, once a defendant's sentence has begun . . . th[e] court may no longer take any action affecting a defendant's sentence unless it *expressly* has been authorized to act." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 133–35, 49 A.3d 197 (2012); cf. *State* v. *Waterman*, 264 Conn. 484, 491, 825 A.2d 63 (2003) ("[i]t is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment *before the sentence has been executed*" (emphasis added; internal quotation marks omitted)).

The defendant attempts to avoid this clear rule of law by arguing that there is a presumption in favor of courts exercising jurisdiction and by analogizing to statutes and rules of practice, including those applying solely to civil proceedings, which are simply inapplicable to the defendant's motions to open in these cases. Recently, in *State* v. *McCoy*, 331 Conn. 561, 578–84, 206 A.3d 725 (2019), our Supreme Court rejected arguments

similar to those raised by the defendant. In particular, the court reviewed the history of the common-law rule limiting the trial court's jurisdiction in criminal cases and noted two anomalies in its previous decisions. Specifically, in *State* v. *Wilson*, 199 Conn. 417, 437, 513 A.2d 620 (1986), our Supreme Court suggested that the civil rule allowing trial courts to open or set aside civil judgments within four months of judgment applies to criminal cases. In addition, in *State* v. *Myers*, 242 Conn. 125, 136, 698 A.2d 823 (1997), the court, citing its decision in *Wilson*, held that "the trial court retained jurisdiction to entertain the motion for a new trial after sentencing because it could have opened the judgment." (Footnote omitted.) See *State* v. *McCoy*, supra, 331 Conn. 583.

In *McCoy*, the court explained that, "given the long and consistent history of our courts applying the traditional rule that jurisdiction is lost upon the execution of a sentence, we cannot conclude that *Myers* reflects a retreat from that common-law rule. Instead, we acknowledge that *Myers* and *Wilson* are anomalies in this court's case law, and we take this opportunity to clarify and reiterate, as we have consistently done since *Myers*, that a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority. . . . Thus, any reliance on *Myers* by the defendant to extend the jurisdiction of the trial court beyond the point at which his sentence was executed is misplaced."[4] (Citation omitted.) *State* v. *McCoy*, supra, 331 Conn. 586–87. The court in *McCoy* reaffirmed in the strongest terms possible that in the absence of a specific constitutional or

[4] Although he acknowledges our Supreme Court's decision in *McCoy*, the defendant nevertheless cites *State* v. *Wilson*, supra, 199 Conn. 417, and holds it out as support for his contention that "in certain circumstances, even after a defendant's sentence begins, or ends, the court does retain jurisdiction." In doing so, the defendant ignores the fact that, in *McCoy*, the Supreme Court labeled *Wilson* an anomaly.

statutory grant of jurisdiction a trial court loses subject matter jurisdiction once a defendant is sentenced. Id.

In the present case, the defendant cannot point to such a specific grant of jurisdiction because none exists. Thus, under the well established common-law rule, the court lost jurisdiction after it sentenced the defendant on May 21, 2010, in the 2009 and 2010 cases, and on November 13, 2013, in the 2013 case. See id., 586–87; see also *State* v. *Jin*, 179 Conn. App. 185, 193–94, 179 A.3d 266 (2018) ("We iterate that following the imposition of the defendant's sentence on January 12, 2016, the court was divested of jurisdiction. Accordingly, it was without the power to consider the defendant's claim of ineffective assistance of counsel that was raised in the . . . motion to open.").

Accordingly, we conclude that the court properly determined that it lacked jurisdiction to consider the defendant's motions to open because the court lost jurisdiction following the imposition of the defendant's sentence in each of the underlying criminal cases.

II

The defendant also claims that the court "abused its discretion when it failed to retain jurisdiction to determine the motions to open . . . on their merits." He argues that "when an action came before the [court] . . . alleging that a just defense existed, in whole or part, that his counsel had a conflict of interest, resulting in the denial of the defendant's constitutional right to counsel, the [court] had the statutory authority not only to retain jurisdiction, but to consider the motions on the merits and to grant a new trial." This claim is without merit.

Insofar as the defendant claims that the court had discretion to exercise jurisdiction in the present case, we note that a court's subject matter jurisdiction is not

a matter of discretion. See *Mirabal* v. *Mirabal*, 30 Conn. App. 821, 825, 622 A.2d 1037 (1993) ("[s]ubject matter jurisdiction . . . cannot be conferred on the court by waiver or consent of the parties, nor can the court confer jurisdiction on itself"). For the reasons set forth in part I of this opinion, as a matter of law, there simply was no jurisdiction for the court to "retain." Similarly, insofar as the defendant suggests that an allegation of ineffective assistance of counsel provides a trial court with continuing jurisdiction over a criminal case, this court recently has rejected this proposition. See *State* v. *Jin*, supra, 179 Conn. App. 192–94 (concluding that trial court lacked jurisdiction to consider defendant's ineffective assistance of counsel claim raised in motion to open because court divested of jurisdiction following imposition of sentence).

III

Finally, we address the defendant's claim that his right to due process was violated when the trial court dismissed his motions to open without providing him notice and an opportunity to be heard on the issue of jurisdiction. The defendant argues that he "has a vested liberty interest in his right to redress his grievances" pursuant to the first amendment to the United States constitution and article first, §§ 10 and 14, of the Connecticut constitution.[5] He argues that "[t]he right to due process encompassed the right to make his assertions

[5] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

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

Article first, § 14, of the Connecticut constitution provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

that the court did have jurisdiction to hear his motions, and to make his objections to any contrary arguments made by the state or by the court" before the court ruled on the motions.

In response, the state argues that the defendant had an opportunity to address the issue of subject matter jurisdiction at the hearing on his fee waiver applications on June 3, 2019, when the court, after noting that his motions were directed to previously disposed cases, vacated its rulings denying the motions to open and dismissed the motions for lack of subject matter jurisdiction. Alternatively, the state argues that the defendant has failed to demonstrate that he was entitled to any further process than that already afforded to him.

In his reply brief, the defendant argues that he was not provided a meaningful opportunity to be heard at the June 3, 2019 hearing because he was not notified that the jurisdictional issue would be addressed at that time and because the hearing occurred only after the court already had rendered its decision on his motions. We conclude that the defendant's right to due process was not violated in the present case.

"We resolve due process claims pursuant to *Mathews* v. *Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). . . . Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the [s]pecific dictates of due process generally require consideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state's] interest, including the function involved and the fiscal and administrative burdens that

the additional or substitute procedural requirement would entail. . . .

"When determining what procedures are constitutionally required, we must bear in mind that [t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice of the case against him and [an] opportunity to meet it. . . . The elements of notice and opportunity, however, do not require a judicial-type hearing in all circumstances. . . . So long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens on the state under the guise of due process." (Citations omitted; internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 134 Conn. App. 405, 411–12, 40 A.3d 336 (2012), appeal dismissed, 312 Conn. 215, 91 A.3d 898 (2014).

In the present case, given the defendant's claims before the trial court, there was no risk of an erroneous deprivation of any liberty interest the defendant possessed by the court proceeding as it did. At the June 3, 2019 hearing, the court explained to the defendant that his motions to open had been filed in disposed cases, the court lacked jurisdiction to consider the motions, and the court therefore was vacating its prior order denying the motions and was dismissing them instead. The defendant acknowledged the court's ruling, did not request to be heard further, and instead had a discussion with the court about the appointment of appellate counsel. Given that the court clearly was without jurisdiction to hear the defendant's motions, we cannot say that the court's interaction with the defendant deprived him of due process. Furthermore, by exercising his statutory right to appeal from the court's judgments, and because our standard of review is plenary, the defendant has been afforded a meaningful opportunity "to make his assertions that the court did

have jurisdiction to hear his motions, and to make his objections to any contrary arguments made by the state" regarding the jurisdictional issue.

Accordingly, we conclude that the procedures used in the present case have been adequate to prevent the erroneous deprivation of the defendant's private interest in exercising his right to redress his grievances.

The judgments are affirmed.

In this opinion the other judges concurred.

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY (AC 43291)

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

Syllabus

The plaintiffs, S and D Co., sought to recover damages for, inter alia, the defendant's alleged breach of contract related to its offer to provide funding for the renovation of real property owned by D Co. The trial court granted the defendant's motions for summary judgment and rendered judgment in favor of the defendant, from which the plaintiffs appealed to this court. *Held* that the judgment of the trial court was affirmed; the trial court, having fully addressed the claims and arguments raised in this appeal, this court adopted the trial court's thorough and well reasoned memoranda of decision as proper statements of the relevant facts, issues and applicable law on those issues.

Argued September 23—officially released November 9, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment; thereafter, the court granted the plaintiffs' motion to reargue and vacated in part the summary judgment entered in favor of the defendant; subsequently, the court granted the defendant's motion

for summary judgment and rendered judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Steven J. Zakrzewski, with whom, on the brief, was *Matthew S. Carlone*, for the appellants (plaintiffs).

Linda L. Morkan, with whom was *Benjamin C. Jensen*, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiffs, David Squillante and DJS45, LLC,[1] appeal from the judgment rendered by the trial court in favor of the defendant, Capital Region Development Authority, following the granting of the defendant's two motions for summary judgment challenging the plaintiffs' right to prevail on all three counts of their operative complaint. On appeal, the plaintiffs claim that the court erred in granting the defendant's motions for summary judgment. We affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiffs for purposes of reviewing the trial court's summary judgment rulings; see *Cefaratti* v. *Aranow*, 321 Conn. 637, 641, 138 A.3d 837 (2016); reveals the following facts. Squillante is the sole member of DJS45, LLC, a limited liability company. The defendant is a quasi-municipal corporation created by statute.[2] In 2011, DJS45, LLC, purchased a five-story commercial building located at 283-291 Asylum Street in Hartford. Squillante then renovated the ground floor of the building and eventually opened a restaurant on the premises.

[1] In this opinion, we refer to Squillante and DJS45, LLC, individually by name where necessary and collectively as the plaintiffs.

[2] General Statutes § 32-602 (a) provides in relevant part: "The purpose of the Capital Region Development Authority shall be (1) to stimulate new investment within the capital region and provide support for multicultural destinations and the creation of a vibrant multidimensional downtown . . . ."

Beginning in early 2013, Squillante engaged in conversations with representatives of the defendant concerning the possibility of procuring financing for the renovation of residential apartment units on the upper floors of the building. These conversations eventually resulted in a letter from the defendant to Squillante dated May 10, 2013, setting out what is described as a "preliminary outline of general business terms of the potential project," which was "expressly subject to the completion of [a] due diligence investigation [by the defendant] including the provisions of necessary documents as outlined [in the letter] and the securing of complete financing for the [p]roject."

Over the next several months, representatives of the defendant and the plaintiffs worked together to finalize the deal. In December, 2013, the defendant's legal counsel sent the plaintiffs a "closing checklist" identifying all outstanding items that required resolution in order to finalize the deal. The following month, however, in an e-mail dated January 7, 2014, a representative of the defendant wrote to Squillante, stating: "[W]e have a variety of issues outstanding. I have attached the closing [checklist] for the project that was sent to your attorney in early December and little has been done to advance the items on the list. . . . [W]e need to hasten the consummation of this deal. The funds are now very 'old' . . . . If we do not bring this to conclusion in the next [forty-five to sixty] days, I will have little choice but to [reallocate] the funds."

In an e-mail dated May 14, 2014, and again in a letter dated July 30, 2014, a representative of the defendant notified Squillante that its offer to provide funding for renovation of the building at 283-291 Asylum Street had expired due to the failure to timely resolve the outstanding requirements but that the plaintiffs could reapply for project funding at a future date.

The plaintiffs commenced the present action on July 26, 2016, by serving the defendant with a three count complaint alleging breach of contract, promissory estoppel, and negligent misrepresentation. On October 23, 2017, the defendant filed its first motion for summary judgment, in which it asserted that it was entitled to judgment as a matter of law on the plaintiffs' claim of breach of contract because the May 10, 2013 letter was merely an agreement to agree, not a legally enforceable contract. The defendant also asserted that it was entitled to judgment as a matter of law on the plaintiffs' claim of promissory estoppel because it had never made a clear and definite promise to the plaintiffs that it would provide funding for the proposed project. Finally, the defendant alleged that the plaintiffs' negligent misrepresentation claim was time barred because it was brought outside of the limitation period proscribed for such claims in General Statutes § 52-584.

On November 14, 2017, prior to filing an objection to the defendant's motion, the plaintiffs amended their complaint, resulting in what became the operative complaint, in order to clarify the allegations of their claims in light of the defendant's motion for summary judgment and to include additional facts they had learned through discovery. On January 2, 2018, the plaintiffs objected to the motion for summary judgment on the grounds that (1) material questions of fact existed as to their breach of contract claim, (2) the May 10, 2013 letter specified that a precondition to finalizing the parties' agreement was the provision of either a personal guarantee " 'or' " a payment and performance bond, (3) their negligent misrepresentation claim was not time barred by § 52-584 because that statute does not apply to claims of negligence not resulting in personal injury, and (4) there was evidence that the defendant had made a misrepresentation concerning what was required to finalize the parties' agreement by stating that the plaintiffs

needed to provide either a guarantee " 'or' " a payment and performance bond. (Emphasis omitted.)

On July 18, 2018, the trial court, *Noble*, *J.*, granted the defendant's motion for summary judgment as to all three counts of the complaint. As for the plaintiffs' breach of contract claim, the court concluded that there was no genuine issue of material fact that the May 10, 2013 letter, on which the plaintiffs relied, in part, to demonstrate the existence of a contractual duty, was not a legally enforceable contract. As for the plaintiffs' claim of promissory estoppel, the court concluded that there was no genuine issue of material fact that the defendant had not made a clear and definite promise to loan the plaintiffs funding for the proposed project. The court initially granted the motion for summary judgment in favor of the defendant as to the negligent misrepresentation claim in count three, but it did so under the general tort statute of limitations, General Statutes § 52-577, not the separate statute applicable to negligence actions resulting in personal injury, § 52-584, which the defendant had invoked. Thereafter, by order dated August 21, 2018, the court vacated the entry of summary judgment on count three because the defendant had not pleaded that the claim was barred under § 52-577, the statute of limitations that was applicable to the plaintiffs' claim. Subsequently, the defendant sought leave to amend its answer to include the special defense that the action was time barred under § 52-577.

On October 11, 2018, the defendant filed its second motion for summary judgment, which was directed only to count three and was accompanied by two affidavits. The defendant asserted in that second motion that the plaintiffs' claim of negligent misrepresentation was time barred by § 52-577, that the continuing course of conduct doctrine did not apply to that claim, and that the plaintiffs could not establish the elements for a claim of negligent misrepresentation. On November 23, 2018,

the plaintiffs filed an objection to the motion, with an affidavit by Squillante attached, asserting that the defendant knew or should have known that it had made false statements pertaining to the bonding requirement and that there were genuine issues of material fact as to whether the continuing course of conduct doctrine applied and, thus, tolled the statute of limitations. On March 15, 2019, the trial court issued a memorandum of decision granting the defendant's second motion for summary judgment on the plaintiffs' claim of negligent misrepresentation. The court concluded that the plaintiffs had failed to establish a genuine issue of material fact with respect to the applicability of the continuing course of conduct doctrine and that the action was time barred under § 52-577.

The plaintiffs appeal from the judgment of the trial court rendered in favor of the defendant, following its granting of summary judgment on all three of the plaintiffs' claims. Specifically, they argue that the court abused its discretion by granting the motions for summary judgment because there are multiple disputes of material fact as to each of the claims.

"Appellate review of the trial court's decision to grant summary judgment is plenary." (Internal quotation marks omitted.) *Chelsea Groton Bank* v. *Belltown Sports, LLC*, 199 Conn. App. 294, 299, 236 A.3d 265, cert. denied, 335 Conn. 960, 239 A.3d 318 (2020). After a careful review of the record, as well as the parties' briefs and relevant law, we are convinced that the plaintiffs' claims on appeal lack merit and, accordingly, that the trial court acted properly when it granted the defendant's two motions for summary judgment disposing of all three counts of the operative complaint. In granting the defendant's two motions for summary judgment, the trial court issued two thorough and well reasoned memoranda of decisions, both of which are proper statements of the facts, issues, and applicable law. See

Squillante v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (July 18, 2018) (reprinted at 208 Conn. App. 682, A.3d), vacated in part by court order, August 21, 2018; *Squillante* v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (March 15, 2019) (reprinted at 208 Conn. App. 699, A.3d). We therefore adopt those memoranda of decision as proper statements of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Ortiz* v. *Torres-Rodriguez*, 205 Conn. App. 129, 132, 255 A.3d 941, cert. denied, 337 Conn. 910, 253 A.3d 43 (2021).

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY*

Superior Court, Judicial District of Hartford
File No. CV-16-6070594-S

Memorandum filed July 18, 2018

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Matthew S. Carlone, for the plaintiffs.

Benjamin C. Jensen, for the defendant.

* Affirmed. 208 Conn. App. 676, A.3d (2021).

Opinion

NOBLE, J.

The question presented by the motion for summary judgment of the defendant, the Capital Region Development Authority (CRDA), is whether, in the absence of disputed material facts, CRDA is entitled to judgment as a matter of law on the breach of contract, promissory estoppel, and negligent misrepresentation claims asserted by the plaintiffs, David Squillante (Squillante) and DJS45, LLC (DJS45). The court finds that no enforceable agreement was created between the parties and holds that judgment should enter on all three claims in favor of CRDA.

FACTS

The following facts and procedural history are relevant to this decision. This action was commenced by service of process on CRDA on July 26, 2016. The operative complaint is the amended complaint dated November 14, 2017 (complaint), which asserts in three counts, respectively, claims of breach of contract, promissory estoppel, and negligent misrepresentation. Squillante is the sole member of DJS45, a limited liability company. CRDA is a quasi-municipal corporation created by statute,[1] whose purpose is to "stimulate new investment within the capital region" and "encourage residential housing development." General Statutes § 32-602 (a) (1) and (3). Squillante formed DJS45, which thereafter purchased a five-story commercial building located at 283-291 Asylum Street in Hartford (property). Squillante opened a restaurant in the ground floor of the property and sought financing for the renovation and conversion of the upper four floors into residential apartments. Beginning in early 2013, Squillante engaged in conversations with representatives of CRDA about potential

[1] See General Statutes § 32-600 et seq.

financing that resulted in the execution of a letter dated May 10, 2013 (letter). CRDA ultimately withdrew the offer to provide financing. The plaintiffs assert that the letter constitutes a binding contract, evinces a promise to provide financing upon which the plaintiffs reasonably relied, and contains misrepresentations upon which the plaintiffs relied to their detriment.

In particular, the letter provides that CRDA was "pleased to provide you with the terms and conditions under which CRDA will extend financial assistance for the conversion of 283-91 Asylum Street (the 'Project') into a mixed use residential project. The terms set forth below are intended to be *a preliminary outline of general business terms of the potential project and are expressly subject to the completion of CRDA due diligence investigation* including the provisions of necessary documents as outlined below and the securing of complete financing for the Project. *This letter is not intended to create any legal liability for CRDA* and is to serve as an explanation of assistance to be provided by CRDA." (Emphasis added.) The letter was signed by Squillante, on behalf of DJS45, and Michael Freimuth, executive director of the CRDA, on its behalf. The letter proposed a construction loan for an unspecified amount not more than $575,000 and then a permanent loan of an also unspecified amount, but no more than $518,000 for a twenty year term at 1.5 percent.

Several terms and various contingencies remained unresolved. Because CRDA was only funding a portion of the project, the amount that it would actually lend depended upon (a) the amount of funding DJS45 was able to secure from private lenders, and (b) the amount of state historic tax credits to be awarded.[2] The letter

[2] The letter provided that "CRDA assistance is contingent on the Sponsor successfully securing permanent financing from other sources [in the amount of $1,055,000] to reduce the CRDA construction loan assistance and to fully fund the Project's costs." It also contemplated the award of a Connecticut Historic Tax credit in the amount of $195,131.

specified that DJS45 "must present a final development budget and project application that will be incorporated into a formal Assistance Agreement between CRDA and Sponsor. Sponsor shall be responsible for the payment of all necessary and appropriate costs associated with this transaction, whether or not a closing takes place . . . ." The formal assistance agreement was never executed. Other terms were not identified by the letter, including dates for completion of any obligations. The letter provided that DJS45 "shall be responsible for any costs above the budget outlined in this letter to complete the Project in accordance with the plans and specifications finally approved by CRDA. [DJS45] will provide a guaranty or payment and performance bonds to the benefit of CRDA by a credit worthy entity approved by CRDA for the completion of the Project in a lien free state." While CRDA's board of directors had approved the terms and conditions of the letter, "such approval [was] contingent on the approval of the State of Connecticut Bond Commission. In the event that such approval is [not] obtained or any time CRDA determines in its discretion that such approval is not likely to be obtained with a reasonable period of time, CRDA may terminate this proposal." Finally, the letter informed DJS45 that, "[a]lthough not an exhaustive list, CRDA may request and [DJS45] shall provide the following: appraisals, title searches, covenants, insurance certificates, plans and specifications, evidence of financing, permits and approvals, contractor agreements, surveys, environmental clearance, final budget and final application."

On June 21, 2013, the state of Connecticut bond commission (commission) voted to approve the allocation of up to $575,000 for the CRDA's proposed loan to DJS45. On September 17, 2013, CRDA sent DJS45 a template of the formal assistance agreement identified in the letter. Section 3.9 of the assistance agreement,

titled "Payment and Performance Bond," provided that "[DJS45] shall provide CRDA with Payment and Performance Bonds with respect to each Contractor that enters into a Major Contract with [DJS45] . . . ." On December 4, 1993, CRDA sent DJS45 a "closing checklist" identifying various items that needed to be provided. Item 33 included bonds from the general contractor and the subcontractors.

Although the plaintiffs now assert that the requirement of performance and payment bonds, rather than simply a personal guarantee, was a material breach of the contract embodied in the letter, this claim is negated by communications between Freimuth and Squillante. On January 7, 2014, Freimuth wrote to Squillante in an e-mail that there were "a variety of issues outstanding. I have attached the closing check list for the project that was sent to your attorney in early December and little has been done to advance the items on the list. I hear that your contractor cannot get bonded which is a non-starter . . . ." The e-mail inquired about the timing-out of an initial lender agreement and the lack of a fully executed commitment from the permanent lender. Freimuth indicated that they needed to consummate the deal because the "funds are now very 'old' and pressure is on to return them for other deals. If we do not bring this to conclusion in the next [forty-five to sixty] days, I will have little choice but to reallocate the funds."

Squillante replied to CRDA on January 7, 2014, representing that "[t]here are no issues with any of your concerns . . . . Also my contractor can get bonding, he was just looking not to incur the expense." DJS45 never obtained the performance or payment bonds. On July 25, 2014, the commission voted to reallocate the proposed funding for the project and CRDA revoked its approval of the application without prejudice. This action followed.

On October 23, 2017, CRDA filed its motion for summary judgment asserting that the letter was not a legally enforceable contract. Rather, in its view, the letter was an agreement to agree. Moreover, even if it was an enforceable agreement, the plaintiffs never performed because they never obtained permanent financing or provided performance bonds. CRDA asserts that it never made a clear and definite promise to the plaintiffs for a loan such that the second count asserting a promissory estoppel claim fails. Finally, the negligent misrepresentation claim fails, in the view of CRDA, because it was commenced outside of the limitation period provided by General Statutes § 52-584 and because CRDA did not make any misrepresentations.

The plaintiffs object on the grounds that material questions of fact exist as to whether the letter was intended to be a binding contract, and whether there was any breach thereof by CRDA. The second count sounding in promissory estoppel survives summary judgment, in the estimation of the plaintiffs, because the letter provided for a personal guarantee "or" a payment and performance bond. As to their negligent misrepresentation claim, the plaintiffs observe that § 52-584 is inapplicable here, and the misrepresentation in the present case is that of providing financing if the plaintiffs provided a guarantee "or" payment and performance bond.

LEGAL STANDARD

The legal standard governing summary judgment motions is well settled. "Summary judgment is a method of resolving litigation when 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 . . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is

no real issue to be tried . . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996).

DISCUSSION

With the governing legal standard in mind, the court now addresses the breach of contract, promissory estoppel, and negligent misrepresentation claims in turn.

I

COUNT ONE: BREACH OF CONTRACT

The court finds that CRDA has established a lack of any genuine issue of material fact as to the absence of an enforceable agreement. Specifically, the letter provided merely the contours of a potential deal that might, when reduced to a subsequent writing, result in a binding contract. "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages . . . . The interpretation of definitive contract language is a question of law . . . ." (Citation omitted; internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017). "A contract is not made so long as, in the contemplation of the parties, something remains to be done . . . ." (Internal quotation marks omitted.) *Santos* v. *Massad-Zion Motor Sales Co.*, 160 Conn. App. 12, 19, 123 A.3d 883, cert. denied, 319 Conn.

959, 125 A.3d 1013 (2015); see id. (lack of precise terms of confidentiality agreement to which parties agreed to integrate into settlement agreement, such as what information was protected, method of enforcement, and to whom settlement details could be disclosed, rendered settlement contract unenforceable). "So long as any essential matters are left open for further consideration, the contract is not complete." (Internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, 53 Conn. App. 524, 535, 732 A.2d 181, (citing 17A Am. Jur. 2d, Contracts § 32 (1991)), cert. denied, 250 Conn. 901, 734 A.2d 984 (1999); see *L & R Realty* v. *Connecticut National Bank*, supra, 538 (agreement to subordinate loan which lacked terms and conditions was unenforceable). Where a writing is "no more than a statement of some of the essential features of a proposed contract and not a complete statement of all the essential terms," which terms require further development in an executed written contract, no enforceable agreement exists. *Westbrook* v. *Times-Star Co.*, 122 Conn. 473, 481, 191 A. 91 (1937). "Whether the parties intended legally to bind themselves prior to the execution of a formal contract is to be determined from (1) the language used, (2) the circumstances surrounding the transaction, and (3) the purpose that they sought to accomplish. . . . A consideration of these factors enables a court to determine if the informal contract . . . is enforceable or merely an intention to negotiate a contract in the future." (Citation omitted.) *Fowler* v. *Weiss*, 15 Conn. App. 690, 693, 546 A.2d 321, cert. denied, 209 Conn. 814, 550 A.2d 1082 (1988).

"Under established principles of contract law, an agreement must be definite and certain as to its terms and requirements." (Internal quotation marks omitted.) *Perricone* v. *Perricone*, 292 Conn. 187, 223, 972 A.2d 666 (2009). "[N]umerous Connecticut cases require definite agreement on the essential terms" in order to render

the agreement enforceable. *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 845, 779 A.2d 174 (2001). Whether a term is essential turns "on the particular circumstances of each case." Id. Clearly, an essential term is one without which a party would not have entered into an agreement. See, e.g., *Hawley Avenue Associates, LLC* v. *Robert D. Russo, M.D. & Associates Radiology, P.C.*, 130 Conn. App. 823, 830-31, 25 A.3d 707 (2011) (no enforceable lease/contract where no agreement on precise location and shape of parking area and party would not have signed lease because dimensions were integral part of decision to enter into agreement). In *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 107, 100 A.3d 450 (2014), an alleged settlement agreement between an internet service provider and its customers resolving a breach of contract action was held unenforceable where a confidentiality provision was an essential component of the agreement and the parties had failed to agree to the terms of the confidentiality provision. Similarly, a promise indicating an intent to make a future employment contract, absent an agreement on the material terms of employment, is not binding as a contract regardless of the promisor's partial performance. *Geary* v. *Wentworth Laboratories, Inc.*, 60 Conn. App. 622, 628, 760 A.2d 969 (2000).

In accordance with these principles, the court considers the first *Fowler* factor and concludes that the letter was in the nature of an "agreement to agree," rather than an enforceable contract, because essential terms had yet to be agreed upon. The letter was self-described as "*a preliminary outline of general business terms of the potential project and are expressly subject to the completion of CRDA due diligence investigation* including the provisions of necessary documents as outlined below and the securing of complete financing for the Project. *This letter is not intended to create*

any legal liability for CRDA and is to serve as an explanation of assistance to be provided by CRDA." (Emphasis added.) By its very language, it identified itself as merely setting out the framework of a future contract, the formal assistance agreement, whose terms were yet to be agreed upon. These terms include the contents of the final development budget and the project application that were to be incorporated in the assistance agreement as well as the unidentified terms of the assistance agreement. Additionally, the letter contemplated final approval by CRDA of as yet undrafted "plans and specifications." Finally, CRDA provided a nonexhaustive list of additional agreements, the terms of which were not specified, that the plaintiffs would be required to provide, including but not limited to "covenants" and "contractor agreements." The dispositive case law compels the conclusion that these yet to be determined agreements and terms renders the letter unenforceable as an "agreement to agree."

The plaintiffs suggest that *Connecticut Parking Services, LLC* v. *Hartford Parking Authority*, Superior Court, judicial district of Hartford, Docket No. CV-11-6018221-S (April 2, 2013), provides the court with an example of contract language that articulated an intent not to create a contractual obligation, which was ultimately found by the court to present questions of fact upon which summary judgment was denied. The reliance on this case is misplaced. In *Connecticut Parking Services, LLC*, language in a request for proposal that the parties would "enter into negotiations, *which may ultimately lead to a contract*" was raised by the defendant as an indication that the request for proposal was not an enforceable contract document. (Emphasis in original; internal quotation marks omitted.) Id. The court denied summary judgment in favor of the defendant on the grounds that the language had to be considered in the context of other language specifying that

the terms in the request for proposal, in combination with other documents, represented the contract documents. Id. This case may be distinguished because a final agreement, to which the request for proposal was attached, was actually reached. In the present case it is undisputed that a formal assistance agreement between CRDA and DJS45 was never consummated.

The court therefore grants summary judgment to CRDA on the first count of the complaint because the defendant has established the absence of material facts relative to the lack of essential terms, making the letter unenforceable.

II

COUNT TWO: PROMISSORY ESTOPPEL

The defendant also claims entitlement to summary judgment on the second count, which asserts liability against the CRDA for promissory estoppel. "[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 415, 168 A.3d 658, cert. denied, 327 Conn. 975, 174 A.3d 195 (2017). "Under our [well established] law, any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. . . . It

is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge." (Internal quotation marks omitted.) *Chotkowski* v. *State*, 240 Conn. 246, 268, 690 A.2d 368 (1997).

The promise which the plaintiffs seek to enforce is none other than the act of extending a loan in an amount in excess of $500,000. The letter, however, premised the financing on a number of contingencies which, in the aggregate, rendered the promise to loan $500,000 or more tentative, rather than definite. These included CRDA's due diligence investigation, agreement of the terms, execution of a formal assistance agreement, the plaintiffs' obtaining permanent financing, and the execution of other unspecified documents. Simply put, there was no definite promise to loan the plaintiffs over $500,000, and, accordingly, summary judgment as to this claim is appropriate.

The plaintiffs assert that the promise upon which they relied was for the extension of the loan upon the provision of either a guarantee or a payment and performance bond. In the plaintiffs' view, the later insistence by CRDA on an onerous payment and performance bond for each of [their] contractors from an insurance company with a Best Rating of A- VII or, alternatively, that each of the plaintiffs' contractors provide the same is different from what was indicated in the letter, which provided for a guarantee preferred by the plaintiffs "or" a performance and payment bond, works an injustice and caused them injury.[3] This ignores that this was only

[3] The plaintiffs' November 14, 2017 amended complaint added the heretofore not included allegations that the defendant failed to provide the plaintiffs with necessary information in a commercially reasonable time including the form agreements until September, 2013, and the closing checklist until December, 2013, including the additional condition of the type of bonding required. These new allegations implicate only the manner in which CRDA's

one of many contingencies that were required to be met before a loan was made. Moreover, the letter employed the disjunctive "or" between the two possibilities of the provision of a guarantee and a payment and performance bond without articulating which of the parties were permitted to elect the manner in which CRDA would be assured of the completion of the project in a lien free state. There is nothing in the record before the court which demonstrates that the plaintiffs exercised any diligence to determine the truth of which or lacked any reasonably available means of acquiring this knowledge. See *Chotkowski* v. *State*, supra, 240 Conn. 268. Summary judgment is therefore granted as to the second count.

III

COUNT THREE: NEGLIGENT MISREPRESENTATION

The last theory of liability upon which summary judgment is sought is that contained in the third count of negligent misrepresentation. The elements of an action for negligent misrepresentation are "(1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351-52, 71 A.3d 480 (2013).

CRDA asserts that the plaintiffs' action is barred by the statute of limitations. The following additional information is required [for a] discussion of this argument. The CRDA's motion for summary judgment was filed on October 23, 2017, and raised the bar of the statute of limitations. On November 14, 2017, the plaintiffs filed

later conduct deviated from the original promise sought to be enforced and do not affect the analysis herein.

a request for leave to amend the complaint pursuant to Practice Book § 10-60(a) (3) and alleged that the plaintiffs would be required to obtain payment and performance bonds for each of [their] contractors from an insurance company licensed to do business in Connecticut with a " 'Best Rating of A- VII' " or, in the alternative, each of the plaintiffs' contract[or]s would be required to obtain similar bonding. The defendant is alleged to have failed to provide the plaintiffs with the necessary information in a commercially reasonable time, including form agreements and closing checklist when it had a duty to disclose the material facts within a commercially reasonable time after the plaintiffs' receipt of the letter. Thereafter, on March 5, 2018, the plaintiffs amended their first special defense to . . . allege that the applicable statute of limitations is tolled by the course of conduct doctrine.

In the plaintiffs' view, the applicable statute is § 52-584, which applies to negligence actions seeking damages for injury to the person or real or personal property.[4] Section 52-584 contains both a discovery and repose limitation wherein applicable actions are barred two years from the date of discovery of injury but in no event more than three years from the act or omission complained of. The [defendant] claim[s], and the court agrees, that, to the contrary, the applicable statute of limitations is that of General Statutes § 52-577, which provides that: "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[4] General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

The court is mindful that, in *Lombard* v. *Edward J. Peters, Jr., P.C.*, 79 Conn. App. 290, 830 A.2d 346 (2003), the Appellate Court held that a claim of negligent misrepresentation was subject to the limitations contained in § 52-584. The dispositive issue for the *Lombard* court, however, was that the "plaintiffs' claim is predicated on injury to their personal property caused by negligence . . . ." Id., 299. In the present case, however, the plaintiffs' negligent misrepresentation claim asserts economic loss rather than injury to person, real property or personal property.

This court aligns itself with that body of case law that holds that the dispositive issue relative to which of the two statutes applies is the nature of the injury claimed. See, e.g., *Teal Associates, LLC* v. *Alfin*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-12-6028814-S (September 5, 2014) (§ 52-584 applies only to actions to recover damages for injury to person or property); *Evans* v. *Province*, Docket No. CV-07-600855, 2008 WL 3916445 (Conn. Super. August 4, 2008) (*Lombard*'s holding is limited to claims of negligent misrepresentation that allege injuries to either person or property). The applicable limitation period is thus the three year period contained in § 52-577.

Section 52-577 is an occurrence statute which runs from the date of the defendant's conduct, not the date that the plaintiff first discovered the injury. See *Watts* v. *Chittenden*, 301 Conn. 575, 583, 22 A.3d 1214 (2011). The date of the defendant's conduct is May 10, 2013, the date of issue of the letter. According to the return of service contained in the court's file the action was commenced on July 26, 2016.[5] The commencement of

[5] An action is commenced when the writ of process is served on the defendant. *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Courts may take judicial notice of the contents of their files. *In re Jeisean M.*, 270 Conn. 382, 402, 852 A.2d 643 (2004).

the action was thus more than three years from the act complained of, to wit, the misrepresentations contained in the letter.

The plaintiffs, however, assert that the limitation period is tolled by the continuing conduct doctrine as alleged in their special defense. Moreover, the plaintiffs remark that "the defendant, which of course has the burden of proving the absence of any issue of material fact, completely fails to address the continuing course of conduct doctrine, and accordingly summary judgment should be denied." Entry No. 147, p. 3. The plaintiffs, who presumably relied on the CRDA's lack of argument as to the continuing course of conduct doctrine, themselves provided no analysis of why the limitations should be extended by the doctrine.

The plaintiffs misapprehend the nature of the shifting burden attendant to the tolling of [a] statute of limitations. "Typically, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . In these circumstances, it is incumbent upon 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 [as to the timeliness of the action] exists." (Citations omitted; internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 192, 177 A.3d 1128 (2018). Thus, the burden to rebut the statutory limitations bar shifts to the plaintiff to demonstrate an issue of fact. This they have declined to do. Although the court need not

consider an argument neither argued nor briefed; see *Hoenig* v. *Lubetkin*, 137 Conn. 516, 524, 79 A.2d 278 (1951); it will address the assertion of tolling by the continuing conduct doctrine.

In evaluating the continuing course of conduct doctrine in the context of a summary judgment motion the court must determine whether there is a genuine issue of material fact with respect to whether "the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 313, 94 A.3d 553 (2014), citing *Witt* v. *St. Vincent's Medical Center*, 252 Conn. 363, 370, 746 A.2d 753 (2000). As the plaintiffs assiduously point out in their briefing, the nature of the third count is a claim for negligent misrepresentation. See Entry No. 147, p. 5. The court notes that a violation of a duty to disclose is not asserted. Moreover, the plaintiffs provide no authority for the proposition that an actor, having made a negligent misrepresentation, has a continuing duty to correct the misrepresentation. There is, for example, no claim of the existence of a special relationship between the plaintiffs and the CRDA such that a fiduciary duty existed. *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 86, 873 A.2d 929 (2005). Moreover, the plaintiffs have not directed the court's attention to any conduct that constituted a continual breach of a duty to make accurate representations of fact—such as repetition over time of the misrepresentation. See *Teal Associates, LLC* v. *Alfin*, supra, Superior Court, Docket No. X04-CV-12-6028814-S (series of misrepresentations tolled statute of limitations). The court concludes that no genuine issue of material fact exists with respect to the bar of the limitations imposed by § 52-577 and grants summary judgment as to the third count.

IV

CONCLUSION

For the foregoing reasons summary judgment is granted in favor of the defendant, CRDA, on all three counts of the plaintiffs' complaint.

APPENDIX

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY*

Superior Court, Judicial District of Hartford
File No. CV-16-6070594-S

Memorandum filed March 15, 2019

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Matthew S. Carlone, for the plaintiffs.

Benjamin C. Jensen, for the defendant.

Opinion

NOBLE, J.

Before the court is the motion of the defendant, Capital Region Development Authority (CRDA), for summary judgment as to the single remaining count for negligent misrepresentation on the grounds that (1) the statute of limitations has expired; and (2) there is no genuine issue of material fact as to the plaintiffs' inability to establish the elements of negligent misrepresentation. For the following reasons the court grants the motion for summary judgment on the former ground.

* Affirmed. 208 Conn. App. 676, A.3d (2021).

FACTS

This action arises out of a series of communications between the plaintiff David Squillante and the defendant, CRDA, regarding potential financing for a housing development project located at 283-291 Asylum Street in Hartford.[1] This action was commenced by service of process on CRDA on July 26, 2016. The operative complaint is the three count amended complaint, dated November 14, 2017. In count three, which is the only count at issue, the plaintiffs allege a negligent misrepresentation claim.[2]

Specifically, the plaintiffs allege that, after several conversations, the parties executed a letter dated May 10, 2013 (letter), in which CRDA agreed to provide financing for the project if the plaintiffs complied with the terms and conditions outlined therein. One such condition allegedly misrepresented that the plaintiffs would be required to provide a guarantee "or" payment and performance bonds, when, at all times, CRDA actually required a guarantee "and" payment and performance bonds. In addition, the plaintiffs allege that, in communications subsequent to the letter, CRDA failed to provide certain necessary information, including form agreements, a closing checklist, and that it required a payment and performance bond for each of the plaintiffs' contractors from an insurance company licensed to do business in Connecticut with a " 'Best Rating of A-, VII.' " According to the plaintiffs: (1) CRDA had a duty to disclose these material facts within a commercially reasonable time after receipt of the letter; (2) they reasonably relied on CRDA's misrepresentation and omissions; (3) CRDA knew its representation was

[1] DSJ45, LLC, a limited liability company of which Mr. Squillante is the sole member, is also a plaintiff in this case. Mr. Squillante and DSJ45, LLC, will be referred to collectively as the plaintiffs.

[2] Counts one and two allege claims of breach of contract and promissory estoppel, respectively.

false and that the plaintiffs were acting in reliance on it; and (4) they suffered financial damages as a result.

On October 23, 2017, CRDA filed a motion for summary judgment. By order dated July 18, 2018, summary judgment was granted as to each count. Familiarity with the facts recited therein and the decision are presumed. See *Squillante* v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (July 18, 2018). With regard to count three, this court determined that the claim was time barred by the applicable statute of limitations, General Statutes § 52-577. By order dated August 21, 2018, the entry of summary judgment as to count three was vacated on the basis that CRDA did not plead that the claim was time barred under § 52-577, but rather pleaded that it was time barred under General Statutes § 52-584. See *Mac's Car City, Inc.* v. *DeNigris*, 18 Conn. App. 525, 529, 559 A.2d 712 (error for court to grant summary judgment based on § 52-577 where statute not raised in pleadings), cert. denied, 212 Conn. 807, 563 A.2d 1356 (1989). CRDA amended its answer to include the defense that the action was time barred under § 52-577.

On October 11, 2018, CRDA filed a second motion for summary judgment as to count three on the grounds that the claim is time barred under § 52-577 and the plaintiffs cannot establish the elements of negligent misrepresentation. CRDA filed a memorandum of law in support of the motion and affidavits by Michael Freimuth, the executive director of CRDA, and Benjamin Jensen, the attorney representing CRDA in this action. On November 23, 2018, the plaintiffs filed an objection to the motion, which incorporated the facts set forth in their memorandum in opposition to CRDA's first motion for summary judgment, along with excerpts from the depositions of Mr. Freimuth, Mr. Squillante,

and Richard Polivy, the plaintiffs' expert. CRDA subsequently filed a reply memorandum on November 30, 2018.

STANDARD

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

"Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996). "Typically, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . In these circumstances, it is incumbent upon 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 [as to the timeliness of the action] exists."

(Citations omitted; internal quotation marks omitted). *Doe* v. *West Hartford*, 328 Conn. 172, 192, 177 A.3d 1128 (2018).

DISCUSSION

CRDA argues that count three is time barred, pursuant to § 52-577, because the sole alleged misrepresentation appeared in a letter dated May 10, 2013, and the plaintiffs commenced the present action on July 26, 2016 (i.e., more than three years later). In response, the plaintiffs argue that the statute of limitations was tolled pursuant to the continuing course of conduct doctrine. Specifically, the plaintiffs claim that, in communications subsequent to the letter, including two e-mails that CRDA sent on June 10, 2013, and September 17, 2013, CRDA misrepresented the requisite conditions of financing and failed to disclose certain material facts, such as that the plaintiffs would need to procure a payment and performance bond for each contractor from an insurance company with a " 'Best Rating of A-, VII.' "

Section 52-577 provides: "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Because this is an occurrence statute, the limitation period runs from the date of the defendant's conduct, not the date when the plaintiff first discovers his injury. See *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 311, 94 A.3d 553 (2014). Moreover, as previously mentioned, "[w]hen the plaintiff asserts that the [limitation] period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014). The continuing course of conduct doctrine is one such equitable exception that, if applicable, will

toll the statute of limitations until the course of conduct is completed. See *Flannery v. Singer Asset Finance Co., LLC*, supra, 311.

In evaluating the continuing course of conduct doctrine in the context of a summary judgment motion, the court must determine whether there is "a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) Id., 313. "Where . . . [the court has] upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) Id., 312.

In the present case, the alleged initial wrong is that the May 10, 2013 letter from CRDA to the plaintiffs contained a misrepresentation and material omission related to the conditions of financing. To wit, it stated that the plaintiffs would be required to provide a guarantee "or" payment and performance bonds, when they would actually be required to provide a guarantee "and" payment and performance bonds for each contractor from an insurance company with a " 'Best Rating of A-, VII.' " As to the continuing duty prong, the plaintiffs argue that: (1) CRDA engaged in later wrongful conduct related to the initial wrong when, in subsequent communications between the parties, it allegedly made material misrepresentations concerning the conditions of financing, and failed to disclose, until December 4, 2013, that the plaintiffs would need to procure a payment and performance bond for each contractor from an insurance company with a " 'Best Rating of A-, VII' ";

and (2) the relationship between the parties, the customs of the trade or other objective circumstances were such that the plaintiffs would reasonably expect CRDA to fully disclose the conditions of financing before December 4, 2013.

A. Later Wrongful Conduct Related to the Prior Act

With regard to the plaintiffs' later wrongful conduct argument, they specifically point to two e-mails that CRDA sent on June 10, 2013, and September 17, 2013. Because the former is still outside of the applicable three year statute of limitations, this court need not address its content. Moreover, the September 17, 2013 e-mail cannot serve as a basis for applying the continuing course of conduct doctrine because it does not reflect any wrongful conduct on the part of CRDA. That is, contrary to the plaintiffs' contention, the e-mail does not contain a material misrepresentation with regard to the financing conditions. In fact, the e-mail explicitly notifies the plaintiffs that it expects that the list of contracts/commitment letters that the plaintiffs identified as necessary to provide to CRDA before closing "will be expanded." Moreover, in another e-mail sent to the plaintiffs on the same day (i.e., September 17, 2013), CRDA attached a template of the formal assistance agreement mentioned in the May 10, 2013 letter. Section 3.9 of that template, titled "Payment and Performance Bond," put the plaintiffs on notice that "[DSJ45] shall provide CRDA with Payment and Performance Bonds with respect to each Contractor that enters into a Major Contract with [DSJ45] . . . ." (Entry No. 172, Freimuth Affidavit at pp. 12, 21).[3]

[3] The fact that the template did not disclose that the requisite payment and performance bonds would need to be from an insurance company with a " 'Best Rating of A-, VII' " does not constitute a fraudulent nondisclosure because there is no indication in the record that CRDA knew of this fact and deliberately withheld it from the plaintiffs, with the intention or expectation to cause a mistake in order to induce the plaintiffs into the transaction. See *Wedig* v. *Brinster*, 1 Conn. App. 123, 130-31, 469 A.2d 783 (1983) ("[O]nce a vendor [assumes] to speak, he must make a full and fair disclosure as to the

In addition, the plaintiffs have failed to demonstrate that CRDA violated a duty to disclose by not notifying the plaintiffs, until December 4, 2013, that the requisite payment and performance bonds for each contractor needed to be from an insurance company with a " 'Best Rating of A-, VII.' " 3 Restatement (Second), Torts, Liability for Nondisclosure § 551 (2) (e), p. 119 (1977) provides: "[o]ne party to a business transaction is under a duty . . . to disclose to the other before the transaction is consummated . . . facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." There are at least three reasons why this section does not apply to the present case and, therefore, cannot satisfy the second prong of the continuing course of conduct doctrine.

First, the rating of the insurance company that was to provide the payment and performance bonds cannot be fairly construed as a fact "basic to the transaction" because it is not a significant enough aspect of the transaction. See 3 Restatement (Second), supra, § 551 (2) (e), comment (j), p. 123 ("A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of . . . what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic.").

matters about which he assumes to speak. He must then avoid a deliberate nondisclosure. . . . [T]he nondisclosure must be by a person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction." (Citations omitted; internal quotation marks omitted.)), cert. denied, 192 Conn. 803, 472 A.2d 1284 (1984).

Second, the plaintiffs have failed to establish that there is a question of material fact that CRDA knew that the plaintiffs were about to enter into the transaction under a mistaken belief as to the bond requirement. As the plaintiffs' own exhibit submitted in opposition to the subject motion for summary judgment reveals, Mr. Freimuth made the assumption that the plaintiffs' construction budget included the price of obtaining an acceptable payment and performance bond. (Entry No. 178, Freimuth Dep. at pp. 67-68). See 3 Restatement (Second), supra, § 551 (2) (e), comment (k), p. 124 ("when the defendant has no reason to think that the plaintiff is acting under a misapprehension, there is no obligation to give aid to a bargaining antagonist . . . and if the plaintiff . . . does not have access to adequate information, the defendant is under no obligation to make good his deficiencies"); see also id., comment (*l*), p. 125 ("[i]n general, the cases in which the rule stated in Clause (e) has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware").

Third, according to the plain language of 3 Restatement (Second), supra, § 551 (2), the time frame for communicating information that requires disclosure under this section is "before the transaction is consummated." Id., 119. Here, as this court previously determined, an enforceable agreement was never consummated. As such, even assuming arguendo that CRDA had a duty to disclose all of the details of the requisite payment and performance bonds, they did so on December 4, 2013, which was before the transaction was consummated. Thus, in the September 17, 2013 e-mail that the plaintiffs point to, CRDA did not engage in any wrongful

conduct related to the initial wrong that would warrant application of the continu[ing] course of conduct doctrine and toll the applicable statute of limitations.

B. Special Relationship

The plaintiffs have also failed to establish that there was a special relationship between the parties that could give rise to a continuing duty on the part of CRDA to tell the plaintiffs, prior to December 4, 2013, that they would be required to provide payment and performance bonds for each contractor from an insurance company with a " 'Best Rating of A-, VII.' " With regard to the meaning of "special relationship" in the context of the continuing course of conduct doctrine, the Appellate Court has analyzed the question in terms of whether a fiduciary or confidential relationship existed between the parties. See *Carson* v. *Allianz Life Ins. Co. of North America*, 184 Conn. App. 318, 331-32, 194 A.3d 1214 (2018), cert. denied, 331 Conn. 924, 207 A.3d 27 (2019). "[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . [N]ot all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Internal quotation marks omitted.) Id., 331, quoting *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 640, 804 A.2d 180 (2002).

In *Carson* v. *Allianz Life Ins. Co. of North America*, supra, 184 Conn. App. 331-32, the court held that the continuing course of conduct doctrine did not apply to toll the applicable statute of limitations because "[t]he plaintiff failed to offer contrary authority that her relationship with the defendant [life insurance company] was anything more than a commercial transaction. Nor

did she proffer evidence of a unique degree of trust and confidence between the plaintiff and the defendant akin to a fiduciary or special relationship." Similarly, here, the facts indicate that the relationship between the parties was commercial in nature, in that they were negotiating a business transaction, at arm's length, whereby CRDA would loan the plaintiffs a portion of the financing necessary for their housing development project. Moreover, the plaintiffs have not provided evidence of a unique degree of trust and confidence between the parties akin to a fiduciary relationship, nor that CRDA was under a duty to represent the plaintiffs' interests.[4]

Furthermore, the Supreme Court in this state has made clear that a buyer-seller relationship is not a "special relationship" that gives rise to a legal duty to disclose any deception related to the transaction. See *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 313 ("the defendant and the plaintiff stood in relation of buyer and seller and, as such, there was no special relationship between them that imposed upon the defendant a duty to disclose to the plaintiff any deception attendant to the transaction"); see also *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 210, 541 A.2d 472 (1988) ("We are aware of no authority holding that the perpetrator of a fraud involving merely a vendor-vendee relationship has a legal duty to disclose his deceit after its occurrence and that the breach of that duty will toll the

[4] To the extent that the plaintiffs argue that the parties' relationship was akin to that of partners, they have not provided authority for the proposition, nor sufficient evidence to conclude that the parties had entered an informal partnership, known as a joint venture. See *Censor* v. *ASC Technologies of Connecticut, LLC*, 900 F. Supp. 2d 181, 201 (D. Conn. 2012) ("[t]o constitute a joint venture, courts in Connecticut prescribe a five part test that requires that (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit, (2) an agreement must evidence their intent to be joint venturers, (3) each must contribute property, financing, skill, knowledge or effort, (4) each must have some degree of joint control over the venture, and (5) there must be a provision for the sharing of both profits and losses").

statute of limitations. Such a [contractual] relationship does not give rise to obligations equivalent to those of a fiduciary."); *Harte Nissan, Inc.* v. *Market Scan Information*, Docket No. CV-99-0268959-S, 2003 WL 352948, *6 (Conn. Super. January 17, 2003) ("the act of entering into an agreement for the purchase of computer equipment and software does not, by itself, create the type of special relationship necessary for the [continuing course of conduct] doctrine to apply"). Likewise, the Supreme Court has held that parties negotiating an acquisition and financing agreement do not have a "special relationship" that would give rise to a fiduciary duty to timely disclose all information regarding the transaction. *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 85-86, 873 A.2d 929 (2005). These precedents further support the conclusion that there was no special relationship between the parties here that could give rise to a continuing duty to disclose all information pertaining to the payment and performance bond prior to December 4, 2013.

Thus, the plaintiffs have failed to establish a genuine issue of material fact with regard to the applicability of the continuing course of conduct doctrine and the court concludes that the action is barred by § 52-577. Consequently, in light of this conclusion, the substantive issues concerning the count need not be addressed by this court.

For the foregoing reasons the court grants the defendant's motion for summary judgment.

STATE OF CONNECTICUT *v.* JERMAINE LEE COWAN
(AC 42450)

Alvord, Clark and Norcott, Js.

Syllabus

Convicted of the crimes of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree in connection with his involvement in a bank robbery, the defendant

appealed to this court. One of the defendant's coconspirators, C, pleaded guilty to conspiracy to commit robbery in the first degree in connection with the incident. C testified for the state at the defendant's trial. She testified that the state had not offered to reduce her sentence in exchange for her testimony nor had she been promised any other benefit. Approximately two months after the defendant's conviction, C's sentence was modified and, approximately nine months later, her sentence was further modified to replace her probation period with a conditional discharge. The defendant appealed and, subsequently, filed a motion for augmentation and rectification, requesting that the trial court review the clerk's files for the cases against C and any relevant transcripts to determine whether her sentence modifications were influenced by her testimony against the defendant and that, if evidence of such influence existed, the court hold a hearing pursuant to *State* v. *Floyd* (253 Conn. 700) to determine whether a nonfrivolous, factual basis for a claim of unlawful withholding of impeachment material under *Brady* v. *Maryland* (373 U.S. 83) existed. The trial court denied the motion and, following this court's order in response to the defendant's motion for review, issued an articulation of its decision. The defendant did not file an additional motion for review requesting that this court order a *Floyd* hearing or seek any other relief in connection with the trial court's ruling on his motion. *Held* that the defendant could not prevail on his claim that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct: because the defendant did not seek further review of the trial court's articulation or make any mention of a *Floyd* hearing in his brief to this court, this court did not review the trial court's decision denying the defendant's request to hold a *Floyd* hearing and reviewed only whether C's testimony was false and whether the state improperly withheld impeachment evidence regarding her credibility; moreover, the defendant did not challenge the trial court's findings that there was no evidence that the state had promised to help C obtain a sentence reduction in exchange for her testimony at the defendant's trial, that C received a sentence modification based on her testimony, or that the state unlawfully withheld impeachment material from the defendant, nor did the evidence in the record indicate that the state sought or advocated for C's sentence to be modified after she testified; accordingly, there was no basis for the defendant's claim.

Argued September 21—officially released November 9, 2021

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the third degree, and conspiracy to commit larceny in the third

degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree, from which the defendant appealed to this court. *Affirmed.*

Jermaine Lee Cowan, self-represented, the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Seth Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Jermaine Lee Cowan,[1] appeals from the judgment of conviction, rendered after a jury trial, of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree. On appeal, the defendant claims that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct. We conclude that this claim lacks merit and, accordingly, affirm the judgment of the trial court.

[1] The defendant was represented by counsel at trial. On March 28, 2019, after this appeal was filed, the defendant's appellate counsel filed with this court a motion for leave to withdraw as appellate counsel "[p]ursuant to Practice Book §§ 43-34, 43-35 and 62-9 (d), *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971) . . . ." Pursuant to Practice Book § 62-9 (d) (3), counsel's motion, his memorandum of law in support thereof, and transcripts from the proceedings were referred to the trial court for decision. The trial court held teleconferences with the defendant and his appellate counsel on September 24 and October 22, 2020. On November 19, 2020, the trial court granted the appellate counsel's motion, and the defendant has since proceeded as a self-represented litigant.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On March 12, 2014, Zakea Crawford-Brooks (Crawford) drove the defendant and Jermaine Brooks[2] to a bank in Woodbridge. The defendant and Jermaine Brooks exited the vehicle and proceeded to rob the bank, and, after they exited the bank with more than $7700, Crawford served as the getaway driver.[3] Crawford and Jermaine Brooks were arrested and later pleaded guilty in connection with their roles in the robbery. The defendant also was arrested and elected a jury trial.

A jury trial for the defendant commenced on February 8, 2016. On February 10, 2016, the state called Crawford as a witness to testify against the defendant. Crawford testified regarding the defendant's role in the robbery and stated that she had been convicted of conspiracy to commit robbery in connection with the March 12, 2014 incident and was serving time in prison for that conviction. Crawford further testified that she had not been promised any benefit in exchange for her testimony and that the state had not offered to reduce her sentence for testifying against the defendant. On February 16, 2016, following the trial, the defendant was found guilty of robbery in the second degree in violation of General Statutes § 53a-135 (a) (2), larceny in the third degree in violation of General Statutes § 53a-124, and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 and 53a-124. This appeal followed.

During the pendency of this appeal, on June 25, 2019, the defendant, "[p]ursuant to Practice Book §§ 60-2 (1)

[2] Crawford is married to Jermaine Brooks. For clarity, we refer to her as Crawford and to Jermaine Brooks by his full name throughout this opinion.

[3] Jermaine Brooks' sister, Mary Brooks, was also in the car at the time of the robbery. She also was arrested in connection with the robbery, but her participation in the crime is not relevant to the present appeal.

and (8), 60-5, 61-10, 66-5, and *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000)," filed a motion for augmentation and rectification of the record. In that motion, he stated that he had learned, through an off-the-record discussion with his trial counsel, that Crawford had received a sentence reduction in exchange for her testimony against him at his trial. He requested that the trial court review the clerk's files in the cases against Crawford and any relevant transcripts to determine if Crawford's sentence reductions were influenced by her testimony against him. The defendant further requested that, if the court determined that there existed prima facie evidence of such influence, it hold a hearing pursuant to *Floyd* "in order to make such findings as may be necessary for [his] counsel to determine whether there exists a nonfrivolous factual basis for an appellate claim of an unlawful withholding of impeachment material under *Brady* v. *Maryland*, 373 U.S. 83, [87,] 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) . . . ." On August 9, 2019, the defendant supplemented the motion by filing a notice with additional information about Crawford's original sentencing and sentence modifications. On August 13, 2019, the trial court summarily denied the motion.

On August 23, 2019, the defendant, "[p]ursuant to Practice Book . . . §§ 60-2, 66-5, 66-6 and 66-7," filed a motion for review with this court requesting that it "direct the trial court to hold an evidentiary hearing to determine whether the state engaged in a *Brady* . . . violation" or, alternatively, "to direct the trial court to articulate its findings of fact and conclusions of law underlying its denial of the defendant's motion for rectification so that the defendant [could] respond in an amended motion for review." On October 16, 2019, this court granted his alternative request and ordered the trial court to articulate the factual and legal basis for its denial of the defendant's motion.

On January 24, 2020, the trial court issued an articulation, which included the following information regarding Crawford's criminal record. On January 26, 2014, Crawford was arrested for the sale of narcotics. On August 17, 2015, she pleaded guilty to that charge. On the same date, pursuant to the *Alford*[4] doctrine, she pleaded guilty to conspiracy to commit robbery in the first degree in connection with her role in the bank robbery. On October 26, 2015, she was sentenced for both crimes, and the sentences were to run concurrently. On April 5, 2016, roughly two months after the jury found the defendant guilty, Crawford's sentence with respect to her conviction of conspiracy to commit robbery was modified. On April 6, 2016, her sentence with respect to her conviction for the sale of narcotics was modified. The state did not oppose either sentence modification. On December 27, 2016, Crawford's conspiracy sentence was modified again, on the record. The state did not object to that modification.[5]

In its articulation, the trial court stated that it had reviewed the clerk's files and transcripts for the robbery and narcotics cases in which Crawford was the named defendant. The court further stated that it had reviewed the application and sentence modification form filed by Crawford, along with a handwritten letter attached to her modification request in which she articulated

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

[5] When Crawford's robbery sentence was first modified on April 5, 2016, her modified sentence included three years of probation. On December 27, 2016, the court held a hearing on the record and, again, modified the sentence by replacing the period of probation with three years of conditional discharge. At the hearing, Senior Assistant State's Attorney Seth Garbarsky, who represented the state, stated: "My understanding is [Crawford] has found employment out of state and [the] probation [office], for whatever reason, was either not willing or not able to transfer the probation down south to where she resides. So I have no objection to converting that to a conditional discharge."

why she was seeking a sentence modification. To support her request, Crawford stated in the handwritten letter, among other things, that she had "[cooperated] with the state on the trial of [the defendant]." The court concluded: "This court's review of the previously mentioned clerk's files and transcripts does not show a promise by the state to . . . Crawford . . . to help her obtain a sentence reduction in exchange for her trial testimony. There is nothing in the review of the record that indicates . . . Crawford . . . received a modification of her sentence based on her testimony at the defendant's trial. A complete review of the record finds no evidence of an unlawful withholding of impeachment material. The defendant has not met his burden for the court to hold a . . . hearing pursuant to *State* v. *Floyd*, [supra, 253 Conn. 700]." (Internal quotation marks omitted.) The defendant did not file with this court a subsequent motion for review requesting that this court order a *Floyd* hearing nor did he seek any other relief in connection with the court's ruling on his motion to augment and rectify the record.

The defendant claims that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct. Specifically, he alleges that Crawford falsely testified that she was not promised a benefit for testifying against him. We conclude that this claim lacks merit.

We begin by setting forth the standard of review and relevant principles of law. Under *Brady* v. *Maryland*, supra, 373 U.S. 87, the state is required to disclose to a defendant any materially exculpatory evidence in its possession. During or after a defendant's trial, "[t]he state has a duty to correct the record if it knows that a witness has testified falsely. . . . [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having

struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . [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." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 754–55, 187 A.3d 1163 (2018).

"As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, [t]o establish a *Brady* violation, the [defendant] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [defendant], and (3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *State* v. *Bryan*, 193 Conn. App. 285, 315, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

"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 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).

"The existence of an undisclosed agreement is an issue of fact to be determined by the trial court, and the defendant has the burden of proving the existence of undisclosed exculpatory evidence." *State* v. *Henderson*,

83 Conn. App. 739, 744, 853 A.2d 115, cert. denied, 271 Conn. 913, 859 A.2d 572 (2004). "A court's factual finding as to whether undisclosed exculpatory evidence exists will not be disturbed on appeal unless it is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *State* v. *Dixon*, 72 Conn. App. 852, 859, 806 A.2d 1153, cert. denied, 262 Conn. 926, 814 A.2d 380 (2002).

In the present case, because the defendant did not seek further review of the trial court's articulation or make any mention of a *Floyd* hearing in his brief to this court, we are not tasked with reviewing the trial court's decision denying the defendant's request to hold a *Floyd* hearing. See *State* v. *Ouellette*, supra, 295 Conn. 183–84. Rather, the question before this court is whether the defendant established, on the basis of the record before the trial court, that Crawford's testimony was false and that the state improperly withheld impeachment evidence regarding her credibility. See id., 185. "[T]his is a fact based claim to be determined by the trial court, subject only to review for clear error." Id., 187.

The trial court stated in its articulation that Crawford testified that no one in the prosecutor's office or law enforcement promised her that she would receive a benefit in exchange for her testimony against the defendant. The court further stated that it found no evidence that the state had promised to help Crawford obtain a sentence reduction in exchange for her testimony at the defendant's trial, that Crawford received a sentence modification based on her testimony at the defendant's trial, or that the state unlawfully withheld impeachment

material from the defendant. Notably, the defendant does not challenge those factual findings on appeal.

The defendant has not produced any evidence that the state made a promise to Crawford in exchange for her testimony against him at his criminal trial. Instead, he merely speculates that such a promise was made. Furthermore, the evidence in the record does not indicate that the state sought or advocated for Crawford's sentence to be modified after she testified at the defendant's trial. Rather, the record indicates only that the state did not oppose Crawford's requests. In light of the court's finding, which is fully supported by the record, that the state did not make a promise to Crawford in exchange for her testimony, there is no basis for the defendant's claim that the state improperly relied on the allegedly false testimony of Crawford that she was not promised a benefit in exchange for her testimony. Accordingly, the defendant cannot prevail on his claim.

The judgment is affirmed.

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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.* RODERICK ROGERS, SC 20469
Judicial District of Fairfield

Criminal; Reviewability; Whether Supreme Court's Decision Reversing Codefendant's Conviction Requires Reversal of Defendant's Conviction; Whether Defendant's Unpreserved Claim That Trial Court Improperly Failed to Hold *Porter* Hearing Regarding Cell Site Location Information Is Reviewable. The defendant was charged with murder, conspiracy to commit murder, and assault in the first degree in connection with a shooting in Bridgeport. On the day of the shooting, the defendant called his cousin, David Anderson, for a ride from the defendant's home. Because Anderson was on probation, he wore a global positioning system (GPS) device that tracked his movements. On their way through Bridgeport, the defendant and Anderson picked up one of the defendant's friends, Raashon Jackson. The three then proceeded to a housing complex where the shooting subsequently occurred. Thereafter, the defendant and Jackson were arrested in connection with the shooting and charged with the same offenses. Over his objection, the trial court consolidated the defendant's case with Jackson's. During jury selection seven days before the trial, the state disclosed to the defense that Sergeant Andrew Weaver of the Hartford Police Department had been retained as an expert witness to analyze GPS and cell site location information pertaining to the defendant, Jackson, and Anderson. On the eve of trial, Jackson moved to preclude Weaver's evidence or, in the alternative, for a continuance in order that a defense expert could be obtained. The court denied Jackson's motions. The defendant did not join in these motions or otherwise object to Weaver's evidence. Nor did the defendant request a hearing pursuant to *State* v. *Porter*, 241 Conn. 57 (1997), to determine whether Weaver's evidence was based on reliable scientific principles. The defendant and Jackson were subsequently convicted on all counts. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court improperly declined to hold a *Porter* hearing with respect to Weaver's evidence. The defendant relied on the then newly released decision in *State* v. *Edwards*, 325 Conn. 97 (2017), which held that a trial court must hold a *Porter* hearing before admitting evidence regarding cell phone location data. The Appellate Court (183 Conn. App. 669) rejected this claim and affirmed the defendant's conviction. The Appellate Court determined

that the defendant had failed to preserve the claim for appeal and that the retroactive applicability of *Edwards* did not render the unpreserved claim reviewable. The court alternatively concluded that the claimed error was harmless. Thereafter, the defendant filed a petition for certification to appeal to the Supreme Court. While the petition was pending, the Supreme Court issued a decision, *State* v. *Jackson*, 334 Conn. 793 (2020), reversing the conviction of the defendant's codefendant. The court held that it was an abuse of discretion for the trial court to allow the state's late disclosed witness to testify without first granting Jackson a reasonable continuance to obtain his own expert and that such error was harmful. The court subsequently granted the defendant's petition for certification to appeal and will now decide (1) whether its decision reversing the conviction of the defendant's codefendant requires that the court also reverse the defendant's conviction; (2) whether the Appellate Court properly determined that the defendant's unpreserved claim regarding the trial court's failure to hold a *Porter* hearing was not reviewable; and (3) whether the Appellate Court properly determined that the trial court's failure to hold a *Porter* hearing was harmless.

DANIEL DIAZ *v.* COMMISSIONER OF CORRECTION, SC 20536
Judicial District of Fairfield

Habeas; Whether Appellate Court Properly Rejected Petitioner's Claim That Habeas Court Abused Its Discretion by Denying His Petition for Certification to Appeal With Respect to His Claim That Defense Counsel Rendered Ineffective Assistance by Failing to Disclose His Role As An Active Police Officer. The petitioner, Daniel Diaz, was convicted of several offenses, including possession of narcotics with intent to sell and criminal possession of a firearm. The Supreme Court, however, reversed the petitioner's convictions and remanded for a new trial. During his second trial, Attorney Frank Canace, who was employed as a police officer by the city of New Haven, represented the petitioner. The petitioner was not aware that Canace was employed as a police officer, and Canace did not inform him of that fact. After his second trial, the petitioner was again convicted of various drug and weapons charges. Thereafter, the petitioner brought this habeas action claiming that Canace had rendered ineffective assistance of counsel. The petitioner alleged that Canace had a conflict of interest as a result of his employment as a police officer while representing the petitioner. He further alleged that Canace's conflict of interest manifested itself when he failed, inter

alia, to adequately cross-examine police officers regarding their prior inconsistent statements. In addition, the petitioner alleged particular instances in which Canace provided deficient performance at his criminal trial. Following a trial, the habeas court rejected the petitioner's claim and denied the petition. Subsequently, the court also denied the petition for certification to appeal. The petitioner appealed, claiming that the habeas court abused its discretion in denying his petition for certification to appeal with respect to his ineffective assistance counsel claim. Specifically, he claimed that Canace maintained a conflict of interest and performed deficiently during his second criminal trial. The Appellate Court (200 Conn. App. 524) concluded that the petitioner could not prevail on his ineffective assistance of counsel claim because he failed to present any law that held that Canace's simultaneous representation of the petitioner and his employment as a police officer established a conflict of interest. Moreover, the court noted that the petitioner had failed to point to any specific instances that suggested that his interests were impaired or compromised for the benefit of a third party or any errors by Canace that were so serious that he did not function as the counsel guaranteed by the sixth amendment. The court also rejected the petitioner's argument that Canace had a conflict of interest because he was required by General Statutes § 54-1f (b) to arrest the petitioner if he had reasonable grounds to suspect that the petitioner had committed a felony crime, noting that the petitioner had failed to cite any specific instance in which § 51-1f (b) or any other legal obligation Canace had as a police officer impaired his ability to provide the petitioner with adequate and uncompromised defense representation. The court dismissed the appeal, concluding that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly rejected the petitioner's claim that the habeas court had abused its discretion by denying his petition for certification to appeal with respect to the claim that defense counsel at his second criminal trial rendered ineffective assistance by failing to disclose his role as an active police officer in the state of Connecticut.

STATE *v.* RAMON LOPEZ, SC 20601
Judicial District of New Britain

Criminal; Violation of Probation; Whether Airsoft Pellet Gun is "Firearm" under General Statutes § 53a-3 (19); Whether General Statutes § 53a-217, Which Proscribes Possession of Firearm

by Felon, is Unconstitutionally Vague. The defendant pleaded guilty to two counts of risk of injury to a minor, and the court imposed a sentence that included a period of probation. The defendant was subsequently released on probation, and he informed his probation officer that he would be living on the first floor of a three-story house in New Britain. After receiving information that the defendant had brought a gun to his workplace, the police executed a search warrant for the defendant's residence, where they found a silver BB gun and a KWC Airsoft pellet gun. The defendant was arrested and charged with two counts of criminal possession of a firearm in violation of General Statutes § 53a-217 (a), which provides that "[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of a felony . . . ." The term "firearm" is defined in General Statutes § 53a-3 (19) as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged." A probation violation warrant was subsequently issued as a result of the defendant's arrest. After a hearing, the trial court found, by a preponderance of the evidence, that the defendant had violated two conditions of his probation, namely, that he not possess any firearms and that he not violate any criminal laws of this state, by possessing the Airsoft pellet gun, which the court determined was a "firearm" under § 53a-3 (19). The court, however, found that the silver BB gun was not a "firearm" under the statute because it "was not capable of firing a shot." The court thereafter revoked the defendant's probation. The defendant appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. The defendant claims on appeal that the trial court improperly found him in violation of his probation because an Airsoft pellet gun is not a "firearm" within the meaning of §§ 53a-217 and 53a-3 (19). He acknowledges that the Supreme Court in *State* v. *Hardy*, 278 Conn. 113 (2006), held that a BB gun – designed to shoot lead pellets propelled with carbon dioxide cylinders – was a "deadly weapon" under General Statutes § 53a-3 (6) for purposes of a first degree robbery charge. He, however, argues that *Hardy* is distinguishable because, unlike the BB gun in that case, an Airsoft pellet gun is "a toy" that shoots plastic pellets and there is no evidence that it was designed for violence or to cause serious injury. He thus maintains that an Airsoft pellet gun is not "a dangerous instrument or deadly weapon, let alone a 'firearm.' " Further, the defendant claims that there was insufficient evidence to establish that he "possessed" the Airsoft pellet gun. Specifically, he claims that the evidence was insufficient to support the inference that he knew of or

exercised dominion and control over the Airsoft pellet gun found inside a twelve-room, six-bedroom house that he shared with several relatives. In addition, he claims that the trial court erred in concluding that he violated his probation on a basis not alleged in the criminal information, which, according to the defendant, limited its probation violation allegation to the possession of the inoperable silver BB gun that he had allegedly brought to his workplace. He also claims that § 53a-217 is unconstitutionally vague because no reasonable person would be on notice that "a toy pellet gun that discharges plastic pellets constitutes a "firearm" under the statute.

IN RE IVORY W. et al., SC 20624
Superior Court for Juvenile Matters at Middletown

Child Protection; Whether Denial of Motion for Continuance of Termination of Parental Rights Trial Violated Respondent's Procedural Due Process Rights; Whether Trial Court Abused Its Discretion in Denying Motion for Continuance; Whether Supreme Court Should Exercise Supervisory Authority and Require Parental Termination Proceedings Be Continued When Related Criminal Charges Are Pending. In October, 2017, the Department of Children and Families (department) received a referral from the Hartford Police Department stating that a man had reported receiving sexually explicit pictures of one of the respondent mother's two minor children. In the course of the department's investigation, the respondent admitted to sending explicit pictures of her daughter to multiple people. She also admitted to having explicit pictures of her son but denied sending those to anyone. The department subsequently filed termination of parental rights petitions with respect to both children, which the respondent contested. On the basis of the same set of underlying facts, the respondent was charged in federal court with distributing child pornography. The trial court initially set an August, 2019 trial date for the termination proceedings. The respondent subsequently filed multiple continuance requests seeking to delay the termination trial until after her criminal trial so as to preserve her fifth amendment right against self-incrimination. The termination trial was eventually scheduled for January, 2021. In December, 2020, the respondent filed her fourth motion for continuance on the same basis as the previous requests. The trial court denied this continuance request and, after a contested trial, rendered judgments terminating the respondent's parental rights. The respondent then filed this appeal in the Appellate Court, which was transferred on party motion to the Supreme Court. On appeal, the respondent claims that the trial court

violated her federal and state constitutional rights to procedural due process by denying her motion for continuance and proceeding with the termination trial when it knew that she would be asserting her fifth amendment right against self-incrimination in light of the pending criminal charges. In conjunction with this claim, she takes the position that the Supreme Court should overrule the Appellate Court's decision in *In re Clark K.*, 70 Conn. App. 665, 674 cert. denied, 261 Conn. 925 (2002), wherein the court held that the respondent mother could not complain on appeal that she did not have a full and fair hearing when she chose to exercise her fifth amendment privilege against self-incrimination and remained silent at the termination proceeding in light of related criminal charges which were pending. The respondent also claims that the denial of her motion for continuance constitutes an abuse of discretion by the trial court and that the Supreme Court should exercise its supervisory authority and require termination proceedings be continued when there are related criminal charges pending.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the above case.

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

NOTICE OF CONNECTICUT STATE AGENCIES

CONNECTICUT RETIREMENT SECURITY AUTHORITY

Notice of Intent to Adopt Procedures

In accordance with Section 1-121(a) of the Connecticut General Statutes, notice is hereby given that the Connecticut Retirement Security Authority (the ''Authority'') is proposing to adopt the operating procedures outlined below for the purpose of operating the Authority pursuant to Section 31-418 of the Connecticut General Statutes. The procedures include: (a) Grievances, Complaints and Appeals-Pilot Program; (b) Employer Registration Deadlines; and (c) Investment Policy Statement.

The proposed procedures are available by sending an email to the Authority at Jessica.Muirhead@ct.gov (please include ''Operating Procedures'' in the subject line and specify which documents you wish to receive).

Interested persons wishing to present their views on these procedures are invited to do so in writing within thirty (30) days following publication of this notice. Comments can be submitted electronically to the Authority at Jessica.Muirhead@ct.gov (please include ''Operating Procedures'' in the subject line). Comments can also be mailed to Ms. Jessica Muirhead, Senior Program Administrator, Office of the State Comptroller, 165 Capitol Avenue, Hartford, CT 06106-1775.

NOTICES

OFFICE OF THE CHIEF PUBLIC DEFENDER

THE OFFICE OF CHIEF PUBLIC DEFENDER IS NOW ACCEPTING APPLICTIONS FOR HANDLING CASE ASSIGNMENTS FOR NEXT FISCAL YEAR July 1, 2022 - June 30th, 2023 IN THE FOLLOWING LOCATIONS ONLY:

CRIMINAL JUDICIAL DISTRICT COURTS:

Danbury JD
Hartford JD
Litchfield (Torrington) JD
Middlesex JD
New Haven JD
Stamford JD
Windham JD

CRIMINAL GEOGRAPHICAL AREA PART B COURTS:

GA 01 — Stamford
GA 02 — Bridgeport
GA 04 — Waterbury
GA 10 — New London
GA 11 — Danielson
GA 12 — Manchester
GA 18 — Litchfield (Torrington)
GA 21 — Norwich
GA 23 — New Haven

JUVENILE DELINQUENCY COURTS:

Hartford
Torrington
Waterbury
Willimantic

CHILD PROTECTION COURTS:

Statewide.
Please note: By advertising statewide we are not indicating there are openings in general, or in any particular court. *Applicants should submit their* ***top 3 choices*** *of court locations.*

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:

Statewide — locations not needed

Annual agreements will cover the period of July 1, 2022 through June 30, 2023. Compensation will be as follows:

FLAT RATE COMPENSATION *hourly billing only as approved*

JUDICIAL DISTRICT CASES	$1000 per case
CRIMINAL GEOGRAPHICAL AREA CASES	$400 per case
JUVENILE DELINQUENCY	$400 per case
CHILD PROTECTION CASES	$500 per case
ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM	$500 per case

HOURLY COMPENSATION

$75 per hour for Felony cases
$50 per hour for Misdemeanor cases
$50 per hour for Child Protection
$50 per hour for AMC/GAL cases

QUALIFICATIONS FOR PRACTICE AREAS

JUDICIAL DISTRICT APPLICANTS:
Attorneys approved to represent clients in JD courts must have at least 2 years of criminal litigation experience and at least 2 felony trials to verdict as lead or sole counsel.

GEOGRAPHICAL AREA APPLICANTS:
Attorneys approved to represent clients in GA courts will handle misdemeanor cases and felony cases. Applicants should possess a working knowledge of the criminal statutes, practice book, diversionary programs, and alternatives to incarceration.

JUVENILE DELIQUENCY APPLICANTS
Attorneys approved to represent client in Juvenile Delinquency courts will handle delinquency matters in closed proceedings. Applicants should have a working knowledge of the statutes that apply to delinquency proceedings, delinquency procedures, practice book, and alternatives to detention.

CHILD PROTECTION APPLICANTS:
Attorneys approved as Assigned Counsel for assignments in child protection matters will represent children and indigent parents in juvenile court matters dealing with abuse, neglect and termination of parental rights. Attorneys may also be appointed as guardian ad litem. The cases may also involve matters transferred from Probate Court and adoptions. Applicants will be required to participate in pre-service training and should possess general knowledge of the child protection statues, the administration and policies of the Department of Children and Families.

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM:
Attorneys approved as Assigned Counsel in state-rate attorney for minor child / guardian ad litem cases in family court will represent children from indigent families in family matters as appointed by the court.

IF INTERESTED: please download the application form from the public defender web site:
https://portal.ct.gov/OCPD/Assigned-Counsel/Assigned-Counsel

APPLICATIONS ARE ACCEPTED FROM: November 2, 2021 through November 16, 2021 at 5:00 pm (***two weeks and 1 day only, firm deadline***).

Send the application, cover letter and resume only via email (***USPS mail or fax not accepted***) to:

OCPD.AC.APPLICATIONS@PDS.CT.GOV

All applications must be received no later than Tuesday, November 16th, 2021 by 5:00 PM.

Appointment of Trustee

Pursuant to Practice Book § 2-64, on October 5, 2021 in docket number HHD-CV12-6034033-S Attorney Bruce Rubenstein (Juris No. 101333) of Hartford, Connecticut is appointed as trustee to take such steps are necessary to protect the interest of the respondent's clients, inventory the client files, receive the business mail, and take control of the Respondent's clients' funds, IOLTA, and all fiduciary accounts.

The Trustee shall not make any disbursements from said accounts without the prior authorization of the Court.

Susan Quinn Cobb
Presiding Judge

Notice of Reprimand of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on December 3, 2019 in Docket Number HHD-CV17-6082453-S, Attorney Joseph Elder, Juris No. 303175, is reprimanded.

Susan Quinn Cobb
Presiding Judge