# CONNECTICUT LAW JOURNAL

*Published in Accordance with General Statutes Section 51-216a*

VOL. LXXXIII No. 23 December 7, 2021 330 Pages

## Table of Contents

### CONNECTICUT REPORTS

Barnes *v.* Greenwich Hospital (Order), 340 C 904. . . . . 124
Doe *v.* Madison, 340 C 1 . . . . . 3
*Negligence; governmental immunity; summary judgment; action against defendant town, defendant board of education, and defendant high school principal alleging negligence insofar as defendants failed to properly supervise teacher who sexually abused plaintiff students during school hours and failed to train school employees to identify and report such abuse or imminent risk of abuse; whether defendants breached ministerial duty to report reasonable suspicion of child abuse, as imposed by mandatory reporting statute (§ 17a-101a) and board of education reporting policy; whether defendants' employees had reasonable cause to suspect that teacher was sexually abusing plaintiffs or exposing plaintiffs to imminent risk of sexual abuse; whether deposition testimony of high school athletic director established ministerial duty of professionalism; whether imminent harm to identifiable persons exception to governmental immunity applied; whether town was liable for failure of its police officer, who was assigned to school as resource officer, to monitor school's security camera footage; whether there was ministerial duty to monitor security camera footage.*
Halladay *v.* Commissioner of Correction, 340 C 52 . . . . . 54
*Habeas corpus; denial of petition for certification to appeal from habeas court's discovery order; certification from Appellate Court; claim that habeas court improperly granted motion filed by respondent, Commissioner of Correction, for production of materials from petitioner's underlying criminal defense and investigative files, which purportedly were relevant to petitioner's ineffective assistance of counsel claim; whether Appellate Court properly granted respondent's motion to dismiss appeal on ground that habeas court's discovery order was not final judgment under* State *v.* Curcio *(191 Conn. 27); whether this court should reach merits of petitioner's appellate claims by treating his appeal as direct appeal from interlocutory order on certification by Chief Justice pursuant to statute (§ 52-265a) allowing Chief Justice to certify appeals involving matters of substantial public interest.*
In re Neveah D. (Order), 340 C 904 . . . . . 124
Jackson *v.* Commissioner of Correction (Order), 340 C 904. . . . . 124
KeyBank, N.A. *v.* Yazar (Order), 340 C 901 . . . . . 121
Leconte *v.* Commissioner of Correction (Order), 340 C 902. . . . . 122
Maghfour *v.* Waterbury, 340 C 41 . . . . . 43
*Lien filed on certain settlement proceeds pursuant to public act (P.A. 17-165, § 1); whether P.A. 17-165, § 1, authorized city to file lien when plaintiff's injuries occurred and his action against third-party tortfeasor was commenced before effective date of public act; whether trial court properly granted plaintiff's motion for summary judgment; claim that allowing city to place lien on plaintiff's settlement proceeds would not present retroactive application of statute because plaintiff settled his action against third-party tortfeasor after effective date of P.A. 17-165, § 1.*
Normandy *v.* American Medical Systems, Inc., 340 C 93 . . . . . 95
*Negligence; recklessness; civil conspiracy; violation of Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); violation of Connecticut Product Liability Act (§ 52-572m et seq.); statutes of limitations; continuing course of conduct doctrine; fraudulent concealment doctrine; summary judgment; claim that defendant was*

*(continued on next page)*

*liable for injuries sustained by named plaintiff in connection with surgical implantation of vaginal mesh sling performed at defendant's hospital by obstetrician and gynecologist who was not hospital employee; whether trial court incorrectly determined that defendant was not "product seller," as that term is defined in § 52-572m (a), for purposes of plaintiffs' product liability claim; whether essence of relationship between plaintiff patient and defendant was for provision of medical services or sale of mesh sling product; whether trial court correctly determined that statutes of limitations and repose period were not tolled by continuing course of conduct or fraudulent concealment doctrine.*

People's United Bank *v.* Brown (Order), 340 C 905 . . . . . 125
Pietraka *v.* Rogowski (Order), 340 C 903 . . . . . 123
Shaheer *v.* Commissioner of Correction (Order), 340 C 903 . . . . . 123
State *v.* Fields (Order), 340 C 901 . . . . . 121
State *v.* Heriberto B. (Order), 340 C 903 . . . . . 123
State *v.* Paschal (Order), 340 C 902 . . . . . 122
State *v.* Robert R., 340 C 69 . . . . . 71

*Sexual assault first degree; whether trial court improperly precluded defense counsel from arguing to jury defendant's theory that victim had planted physical evidence in effort to substantiate her false allegations against defendant, in violation of defendant's constitutional right to assistance of counsel; whether there was sufficient evidence in record to support defendant's theory of case; claim that evidence presented at trial was insufficient to support his conviction of first degree sexual assault; claim that trial court had abused its discretion in admitting testimony of expert in field of child and adolescent sexual abuse when victim was eighteen years old at time of alleged sexual assault.*

Volume 340 Cumulative Table of Cases . . . . . 127

## CONNECTICUT APPELLATE REPORTS

A. D. *v.* B. R. (Memorandum Decision), 209 CA 901 . . . . . 191A
Aguiar *v.* Between-the-Bridges, LLC (Memorandum Decision), 209 CA 902 . . . . . 192A
Anim *v.* DaCosta (Memorandum Decision) MD209.1, 209 CA 901 . . . . . 191A
Austin *v.* Coin Depot Corp., 209 CA 131 . . . . . 133A

*Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner; whether board erred in determining that commissioner properly concluded that defendant had discharged its obligations under applicable statute (§ 31-307a (c)); whether board correctly concluded that commissioner properly declined to apply negotiable instruments provisions of Uniform Commercial Code.*

Cammarato *v.* Sacred Heart University, Inc. (Memorandum Decision), 209 CA 902 . . . . 192A
In re Amanda L., 209 CA 1 . . . . . 3A

*Termination of parental rights; whether trial court made factual findings required under statute (§ 17a-112 (j) (3) (B) and (k)); claim that trial court improperly*

*(continued on next page)*

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

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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.

*terminated respondent parents' parental rights; claim that termination of parental rights was unconstitutional, unlawful, and fraudulent.*
Jones *v.* Law Offices of William S. Palmieri, LLC (Memorandum Decision), 209 CA 901 . 191A
Norwich *v.* Norwich Properties Realty, LLC (Memorandum Decision), 209 CA 902 . . . . 192A
O'Neill *v.* O'Neill, 209 CA 165 . . . . . 167A
*Dissolution of marriage; claim that periodic alimony and child support amounts exceeded defendant's net income; whether trial court's finding of defendant's net earning capacity was clearly erroneous; whether trial court improperly ordered that alimony would increase after plaintiff vacated marital residence; whether trial court had authority to award nonmodifiable alimony; claim that nonmodifiable alimony conflicted with cohabitation statute (§ 46b-86); whether trial court improperly awarded plaintiff marital residence without specifying that she would take property subject to all mortgages and liens of record; whether trial court improperly ordered that plaintiff could relocate with parties' minor children; whether trial court's order was ambiguous as to time period for periodic alimony.*
State *v.* Bouvier, 209 CA 9 . . . . . 11A
*Operating motor vehicle while under influence of intoxicating liquor; reckless driving; whether trial court properly denied defendant's motion to suppress certain statements made during police interrogation; claim that defendant had not been advised of his rights pursuant to* Miranda *v.* Arizona *(384 U.S. 436) before making statements in custodial interview; claim that trial court improperly determined that defendant implicitly had waived his* Miranda *rights; whether trial court abused its discretion in denying defendant's motion in limine to preclude testimony of arresting officers; whether trial court erred in sustaining state's objection to defense counsel's questions to arresting officer regarding finding of no probable cause to arrest made by Department of Motor Vehicles hearing officer; claim that hearing officer's finding of no probable cause to arrest could be introduced to impeach testimony of arresting officer; claim that hearing officer's finding of no probable cause to arrest was relevant and admissible to prove that there was no probable cause to arrest defendant.*
State *v.* Butler, 209 CA 63 . . . . . 65A
*Risk of injury to child; breach of peace in second degree; statutory (§ 54-56l)* supervised diversionary program for persons with psychiatric disabilities; subject matter jurisdiction; whether criminal court had power to open judgment of dismissal rendered by it after concluding that defendant had satisfactorily completed diversionary program; claim that statute (§ 52-212a) permitting opening of civil judgment on filing of motion to open within four months of date on which judgment was rendered also applied to criminal judgments.
United Public Service Employees Union, Cops Local 062 *v.* Hamden, 209 CA 116 . . . . . 118A
*Temporary injunction; whether trial court employed correct legal standard in granting plaintiff's application for temporary injunction.*
White *v.* Commissioner of Correction, 209 CA 144 . . . . . 146A
*Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; claim that habeas counsel failed to procure testimony at habeas trial of witness who allegedly had perjured her testimony against petitioner at his criminal trial; claim that habeas counsel failed to procure testimony at habeas trial of witness whose testimony allegedly supported petitioner's claim that his trial counsel was ineffective and who could have impeached testimony of eyewitnesses at petitioner's criminal trial.*
Wright *v.* Commissioner of Correction, 209 CA 50 . . . . . 52A
*Habeas corpus; ineffective assistance of counsel; whether habeas court correctly determined that petitioner's trial counsel rendered ineffective assistance by failing to present alibi defense.*
Volume 209 Cumulative Table of Cases . . . . . 193A

## NOTICES OF CONNECTICUT STATE AGENCIES

DSS—TANF Caseload Reduction Report . . . . . 1B

## MISCELLANEOUS

Notice of Evaluation of Incumbant Judges Who Seek Reappointment . . . . . 1C
Notice of Authorized House Counsel . . . . . 2C
Notice of Reprimand of Attorney . . . . . 2C

# CONNECTICUT REPORTS

# Vol. 340

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT

OF THE

## STATE OF CONNECTICUT

**CASES ARGUED AND DETERMINED**

IN THE

# SUPREME COURT

OF THE

# STATE OF CONNECTICUT

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## JOHN DOE *v.* TOWN OF MADISON
## (SC 20508)

## JOHN DOE *v.* TOWN OF MADISON ET AL.
## (SC 20509)
## (SC 20510)

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

*Syllabus*

The plaintiffs, X, Y and Z, three former high school students, sought to recover damages from the defendant town, its board of education, and the town high school principal, S, for injuries the plaintiffs allegedly sustained as a result of sexual abuse by A, a teacher at the high school. A was acquainted with the plaintiffs through her roles as an English teacher, faculty yearbook advisor, and conditioning coach for the high school football team, of which the plaintiffs were members. At various points, A started exchanging messages with each of the plaintiffs on a social networking platform. A's messages initially concerned school, athletics, and the yearbook, but the messages progressed to include personal topics, such as A's marital problems with her husband, R, who also was employed as a teacher at the high school, and sexually suggestive photographs and banter containing sexual overtones. A had summoned X to her classroom more than twenty times, and she had called Y and Z to her classroom approximately five times each. To avoid detection, A varied the days and times at which she summoned the plaintiffs and often used an issue related to the yearbook as a pretext for the meetings. On one of those occasions, A performed fellatio on Y. She also touched Z in an inappropriate manner several times. Although A had a good reputation and strong performance evaluations, her attire at summer football practices, specifically, tight fitting shorts and only

a sports bra for a top, attracted the coaches' attention. Additionally, R took issue with A's attire and what he believed to be her flirtatious, attention seeking behavior. R was concerned that a rumor had spread among the teachers that A had been flirting with X, and he confronted A about her social media contact and one-on-one meetings with X, as well as certain flirtatious behavior he witnessed A displaying toward players at a Friday night football game. The plaintiffs alleged, inter alia, that the defendants were negligent in supervising A and in failing to train school employees to identify and report inappropriate relationships between teachers and students. Various teachers and coaches, including C, the high school's athletic director, were deposed during discovery. C testified that he expected his subordinates to enforce certain standards of professionalism, including requiring any coach to cover up if shirtless. The defendants thereafter filed motions for summary judgment, claiming that the plaintiffs could not establish negligence or causation and that the defendants were entitled to governmental immunity. The trial court granted the defendants' motions, concluding that, although the defendants had a ministerial duty to report abuse or an imminent risk of serious harm pursuant to the mandatory reporting statute (§ 17a-101a) and the reporting policy set forth in the board of education policies and bylaws, there was no evidence that any of the school employees had reasonable cause to suspect that A was sexually abusing the plaintiffs. The court also concluded that the identifiable persons subject to imminent harm exception to discretionary act immunity did not apply. The trial court rendered judgments for the defendants, and the plaintiffs appealed. *Held*:

1. The trial court correctly concluded that no genuine issue of material fact existed as to whether the defendants breached their ministerial duty to report a reasonable suspicion of child abuse, as imposed by the mandatory reporting statute and the board of education reporting policy: in view of the totality of the circumstances, the school faculty and the coaching staff did not have reasonable cause to suspect that A was sexually abusing the plaintiffs or exposing them to an imminent risk of sexual abuse, as A had an unblemished personnel record and was held in uniformly high regard by her colleagues and students at the high school, she was known to handle student crushes appropriately by politely rebuffing them, and none of the teachers or coaches who testified ever witnessed A flirting with any of the plaintiffs or any other student; moreover, the plaintiffs' repeated visits to A's classroom did not appear unusual to other faculty members in light of A's role as a yearbook advisor, the measures A took to avoid detection, and the common practice of students visiting other teachers' classrooms; furthermore, even if A's attire during football practices was inappropriate, there was no evidence that A ever exhibited nudity or that her attire indicated that she was inclined to engage in sexual impropriety with students, and any flirtatious behavior A may have displayed at the foot-

ball game was too far removed from any type or instance of sexual abuse to supply reasonable cause to suspect an imminent risk of such abuse.

2. Y could not prevail on his claim that C's testimony established a ministerial duty of professionalism and that there was a genuine issue of material fact with respect to whether the failure of staff members, including coaches, to address the issue of A's attire during football practices constituted a breach of that duty: S testified that the school had no dress code, and there was no evidence that C's views of professionalism as they related to attire ever were communicated to school employees in a manner that clearly established a duty to dress in a prescribed way, without the exercise of judgment or discretion; accordingly, C's testimony concerning his expectations of his subordinates and his opinion of what constituted professionalism, standing alone, was not sufficiently definite to establish an enforceable ministerial duty of professionalism, and the trial court properly granted summary judgment with respect to this issue.

3. There was no merit to Y and Z's claim that the trial court incorrectly determined that the imminent harm to identifiable persons exception to governmental immunity did not apply in the present case, as it would not have been apparent to a reasonable school official that the defendants' acts and omissions were so likely to cause harm that a clear and unequivocal duty to act immediately to prevent such harm was created: the evidence suggested that A's conduct, and particularly her sexual assaults of Y and Z, were the culmination of a generally clandestine pattern of behavior, and, although some might have viewed her attire at football practices as inappropriate for an educational setting, there was nothing to suggest that anyone would reasonably anticipate that a sexual assault of a student would be the immediate result of that attire, especially in light of A's otherwise unblemished record and the uniformly high regard her students and colleagues had for her; moreover, there was no evidence that the plaintiffs' repeated visits to A's classroom were abnormalities that should have been apparent to staff members, as it was undisputed that students routinely visited teachers' classrooms at numerous times for legitimate pedagogical or extracurricular reasons, and A took measures to avoid raising any suspicion; furthermore, R's negative response to A's interaction with the players at the Friday night football game did not evince a belief that A was imminently about to engage in an inappropriate sexual relationship with any student, let alone one of the plaintiffs.

4. The trial court properly granted the town's motion for summary judgment with respect to Z's claim that the town was liable for the failure of its police officer, who was assigned to the high school as a resource officer, to monitor the school's security camera footage, which Z claimed would have shown him entering A's classroom, as Z did not establish that the defendants had a ministerial duty to monitor the security camera footage; S's testimony that, although the police had access to the security footage,

the footage was not regularly monitored and reviewed only when an incident was reported demonstrated that there was no policy governing the manner and frequency with which security cameras and their footage were monitored, and, accordingly, the failure of the school resource officer to monitor the security cameras was a discretionary act subject to governmental immunity.

Argued January 20—officially released July 30, 2021*

*Procedural History*

Three actions to recover damages for, inter alia, the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven, where, in the first case, the court, *Agati*, *J.*, granted the plaintiff's motion to add the named defendant's Board of Education as a defendant; thereafter, the court, *Abrams*, *J.*, granted the motions to consolidate filed by the named defendant et al. and consolidated the three cases; subsequently, the actions in the first and second cases were withdrawn as to the named defendant; thereafter, the court, *Abrams*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgments thereon, from which the plaintiffs filed separate appeals. *Affirmed.*

*James M. Harrington*, for the appellant in Docket No. SC 20508 (plaintiff John Doe I).

*Matthew D. Popilowski*, with whom, on the brief, was *Brendan J. Keefe*, for the appellant in Docket No. SC 20509 (plaintiff John Doe II).

*William B. Bilcheck, Jr.*, for the appellant in Docket No. SC 20510 (plaintiff John Doe III).

*Catherine S. Nietzel*, with whom, on the brief, was *Jonathan C. Zellner*, for the appellees (named defendant et al.).

* July 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

ROBINSON, C. J. These appeals present several issues of governmental immunity under General Statutes § 52-557n arising from the sexual abuse of the plaintiffs, John Doe I, John Doe II and John Doe III,[1] by Allison Marchese (Allison), who was an English teacher at their high school, the Daniel Hand High School (high school) in Madison. The plaintiffs appeal[2] from the judgments of the trial court granting the motions for summary judgment filed by the defendants, the town of Madison (town), the Board of Education of the Town of Madison (board), and Anthony Salutari, Jr., the principal of the high school,[3] on the ground of governmental immunity. On appeal, the plaintiffs claim that the trial court incorrectly concluded that (1) there was no genuine issue of material fact with respect to whether the teachers and football coaching staff at the high school had reasonable cause to believe that Allison was sexually abusing the plaintiffs, which would have triggered their ministerial duty to report suspected child abuse under No. 5120.4.2.5 of the board's policies and bylaws (board reporting policy) and the mandatory reporting statutes, General Statutes §§ 17a-101[4] and 17a-

[1] We refer to the plaintiffs individually where appropriate for purposes of clarity.

[2] The plaintiffs appealed from the judgments of the trial court to the Appellate Court, and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Although the appeals were briefed and argued separately, we resolve them in a single opinion given that they were consolidated in the trial court and present several common factual and legal issues.

[3] John Doe I initially named only the town as a defendant; subsequently, the trial court, *Agati*, *J.*, granted his motion to add the board as a defendant. Thereafter, John Doe I and John Doe II withdrew their claims against the town.

John Doe II and John Doe III also named Allison as a defendant. Allison has not appeared in these appeals. Accordingly, unless otherwise noted, all collective references herein to the defendants are to the board, the town, and Salutari.

[4] General Statutes § 17a-101 provides in relevant part: "(a) The public policy of this state is: To protect children whose health and welfare may

101a,[5] (2) the testimony of Craig Semple, the high school's athletic director, did not establish a ministerial

be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse or neglect, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

"(b) The following persons shall be mandated reporters . . . (9) any school employee, as defined in section 53a-65, (10) any social worker, (11) any person who holds or is issued a coaching permit by the State Board of Education, is a coach of intramural or interscholastic athletics and is eighteen years of age or older, (12) any individual who is employed as a coach or director of youth athletics and is eighteen years of age or older . . . (15) any police officer . . . ."

Like the trial court and the parties, we refer to the current revision of the statute. We note, however, that the legislature has made significant changes to § 17a-101 since the 2013 revision of the statute, which would have governed when the events underlying this appeal began, including in 2014; see Public Acts 2014, No. 14-186, § 6 (effective October 1, 2014); when those events were ongoing. None of those amendments changed the obligations of any of the various actors in these cases.

[5] General Statutes § 17a-101a provides in relevant part: "(a) (1) Any mandated reporter, as described in section 17a-101, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any child under the age of eighteen years (A) has been abused or neglected, as described in section 46b-120, (B) has had nonaccidental physical injury, or injury which is at variance with the history given of such injury, inflicted upon such child, or (C) is placed at imminent risk of serious harm, or (2) any school employee, as defined in section 53a-65, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any person who is being educated by the Technical Education and Career System or a local or regional board of education, other than as part of an adult education program, is a victim under the provisions of section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, and the perpetrator is a school employee shall report or cause a report to be made in accordance with the provisions of sections 17a-101b to 17a-101d, inclusive.

"(b) (1) Any person required to report under the provisions of this section who fails to make such report or fails to make such report within the time period prescribed in sections 17a-101b to 17a-101d, inclusive, and section 17a-103 shall be guilty of a class A misdemeanor, except that such person shall be guilty of a class E felony if (A) such violation is a subsequent violation, (B) such violation was wilful or intentional or due to gross negligence, or (C) such person had actual knowledge that (i) a child was abused or neglected, as described in section 46b-120, or (ii) a person was a victim described in subdivision (2) of subsection (a) of this section.

duty of professionalism, (3) they were not identifiable persons subject to imminent harm for purposes of that exception to discretionary act immunity under § 52-557n (a) (2) (B), and (4) John Doe III did not plead or establish a ministerial duty on the part of the town's police officers, one of whom was assigned as the high school's school resource officer, to monitor the high school's security camera footage. We disagree with the plaintiffs' claims and affirm the judgments of the trial court.

The record reveals the following facts, which we view in the light most favorable to the nonmoving plaintiffs, along with the procedural history of these cases. In the spring of 2014, when the events giving rise to this appeal began, the three plaintiffs were students at the high school, where they were members of the football team. At that time, John Doe I was a fourteen year old freshman, John Doe II was a seventeen year old junior, and John Doe III was a fifteen year old sophomore. In addition to her duties as an English teacher, Allison also served as the high school's faculty yearbook advisor and as a core conditioning coach for the football team. Until the events leading to this appeal, she had an excellent reputation in the school and the community, with strong performance evaluations and "a sterling disci-

"(2) Any person who intentionally and unreasonably interferes with or prevents the making of a report pursuant to this section, or attempts or conspires to do so, shall be guilty of a class D felony. . . .

* * *

"(d) For purposes of this section and section 17a-101b, a mandated reporter's suspicion or belief may be based on factors including, but not limited to, observations, allegations, facts or statements by a child, victim, as described in subdivision (2) of subsection (a) of this section, or third party. Such suspicion or belief does not require certainty or probable cause."

Section 17a-101a, like § 17a-101, has undergone significant revisions since 2013. See, e.g., Public Acts 2017, No. 17-237, §§ 95 and 96; Public Acts 2015, No. 15-205, § 2; see also footnote 4 of this opinion. Those revisions do not have any effect on this appeal, and, like the trial court and the parties, we refer to the current revision of the statute.

plinary record . . . .” Allison’s husband, Robert Marchese (Robert), was also employed at the high school as an English teacher and the head of the English department.

Allison first met John Doe I in the spring of 2014, when he was a student in her freshman literature class. John Doe I, who had a reputation for being unusually bold and mature for a freshman,[6] bantered with Allison during class. Although she did not banter or flirt back with John Doe I publicly, they later developed a relationship through one-on-one meetings in school and messaging through various social media platforms, including Instagram. The messaging began when John Doe I messaged Allison through Instagram, initially about a book; the correspondence then progressed to more private and sexual topics. The messaging continued into the summer until John Doe I left for a family vacation to Africa; he asked her not to contact him during the summer. Over the rest of that summer and into the fall of 2014, however, Allison pursued John Doe I by paying special attention to him at football practices, summoning him to her classroom approximately twenty to thirty times, sending him a bagel with a note while he was in another class, and sending him dozens of sexually explicit online messages and photographs through social media platforms, including Instagram. Around this time, Robert learned that Allison and John Doe I had connected on Instagram when John Doe I began to follow her profile; he confronted Allison multiple times about this connection and their one-on-one meet-

[6] Andrea Donovan, a paraprofessional employed by the board, was present for this exchange; she believed that John Doe I had “teas[ed]” Allison in class by acting as a “prankster” or “jokester . . . .” Afterward, Donovan told Allison that she believed that John Doe I was very mature for a freshman, which was a view that had been shared by several other teachers at the high school. Donovan also shared that John Doe I had been attracting an unusual amount of attention for a freshman—even from senior girls, who had been asking him to the prom.

ings, as well as rumors that Robert believed had spread among the teachers that Allison had been flirting with John Doe I.[7] There is no evidence, however, that Robert was aware of the content of Allison's private Instagram messages. Although John Doe I tried to end his contacts with Allison, she persisted in sending him messages through the fall of 2014, continuing until her arrest on January 7, 2015, for charges arising from the sexual assault of John Doe II, which we will discuss subsequently.

Around the same time, Allison attempted to develop her relationship with John Doe I by initiating a similar online relationship on Instagram with John Doe III, who was John Doe I's best friend. John Doe III initially went to Allison's classroom a few weeks into the 2014–2015 school year at the request of John Doe I to try to resolve the tension that had developed between Allison and John Doe I by the end of the summer, as John Doe I had tired of their communications and did not want to speak with her any more. Thereafter, Allison called John Doe III to her classroom approximately six times during school hours, summoning him from multiple classes, for conversations about her private life, her marriage, and her fantasies. She also asked John Doe III to relay messages to John Doe I. During several of those classroom visits, Allison touched John Doe III inappropriately by hugging him tightly in a way that put her breasts in close proximity to his face.

During the summer of 2014, Allison also became acquainted with John Doe II, first in her capacity as a core conditioning coach for the high school's football team, and later as the faculty yearbook advisor. John Doe II learned that Allison and John Doe I were exchang-

[7] John Doe I testified at his deposition that he felt uneasy during his meetings with Allison because he suspected that Robert did not like him, and she had told him that Robert did not like how much time they were spending together.

ing messages on Instagram after he asked John Doe I several times about the special attention that she was giving him during football practices and conditioning sessions. John Doe II did not think that anyone else at practices, including players or coaches, had noticed these interactions. During a subsequent conversation after summer conditioning practice had ended, John Doe I showed John Doe II the various Instagram messages between John Doe I and Allison, which John Doe II described as "creepy" and akin to what a "high school girl" would send a "high school guy . . . ."

In the fall of 2014, John Doe II and Allison also worked together in the school gym, which she helped to manage, and where he went on a daily basis in order to stay conditioned during recovery from a football injury. Their conversations initially focused on exercise. Subsequently, Allison and John Doe II exchanged Instagram contact information in connection with her role as a yearbook advisor and John Doe II's drafting of his senior quote. Allison, who was not one of John Doe II's teachers, summoned him from his classes to her classroom on more than five occasions during school hours, ostensibly to review his yearbook quote. She repeatedly declined to approve his quote on the ground that it was not appropriate for publication; John Doe II disagreed with her assessment because the quote made no references to profanity, drug or alcohol use, or sexual activity. During these brief visits, Allison raised the topic of the recent passing of John Doe II's father and offered to help because she had experience involving a friend's suicide attempt. Their conversations then became more personal and included the topic of her troubled marriage to Robert.

John Doe II and Allison also began to exchange messages on Instagram; John Doe II was curious to see whether her communications with him would be as inappropriate as they were with John Doe I. Several

weeks later, the content of the messages progressed from school or athletic topics to "[s]trictly . . . personal" topics, including Allison's marital problems, and she sent him sexually suggestive photographs of herself and engaged in banter containing sexual overtures. Although John Doe II became increasingly uncomfortable with the conversations, he did not report or try to stop them because he was afraid of the social repercussions should other students learn of his relationship with Allison.

In December, 2014, Allison sent an Instagram message inviting John Doe II to her classroom during a free period, where she closed the blinds, locked the door, kissed him, and performed fellatio on him. This was the sole occasion that Allison and John Doe II had physical contact. After that encounter, John Doe II was "scared" and "ghosted" Allison; she continued, however, to try to contact him, with further Instagram messages inviting him over to her home for sexual activity because Robert would be away performing with his band.

All three plaintiffs tired of Allison's advances and conduct, particularly as they feared the spread of rumors about what Allison had done with John Doe II. The plaintiffs then met—in the words of John Doe II—to create a plan "to get rid of her." The plaintiffs subsequently met with Allison in a contentious encounter, after which John Doe I and John Doe II reported her to Salutari, the high school's principal. On January 7, 2015, Allison was arrested and charged with the sexual assault of John Doe II. She ultimately pleaded guilty and was sentenced to two years imprisonment.[8]

[8] John Doe III's relationship with Allison did not come to light until more than one year later. In the spring of 2015, he asked his guidance counselor, Christine Coyle, to allow him to transfer out of Robert's class, but he did not disclose any personal involvement with Allison to Coyle, and she believed that his request was because of his friendship with John Doe I.

Although Allison was secretive about her activities with the plaintiffs, her appearance and attire had attracted attention around the school and the community.[9] At summer football practices, Allison would wear only a sports bra and tight fitting athletic shorts made of a spandex type material,[10] leading some of the male football coaches to compliment her appearance and ask her to wear the shorts again.[11] She did not think that request was appropriate but was not offended because she considered it "good-natured teasing amongst friends . . . ." Most of the football coaches, including Steve Filippone, the head football coach, con-

[9] Allison also began to draw attention online, particularly on a now defunct social media app called Yik Yak, which permitted users to post discussions anonymously based on their location. The ubiquity of Yik Yak's use by students resulted in its ban from the high school's Wi-Fi network because of its reputation for enabling cyberbullying and other student conflicts. Allison first learned of this online attention on Yik Yak in the spring of 2014, when she accompanied some female students to Salutari's office to report some negative or sexual comments that had been made on the app about those students. Salutari was already aware of her mentions on the app, as were other teachers, with one, Paul Coppola, jokingly calling Allison an "Internet sensation . . . ." She then informed Salutari of the sexual nature of the comments; because of Yik Yak's anonymous nature, she did not know who had made them. Salutari informed Phil Rosati, the high school's school resource police officer, of Allison's complaint about the Yik Yak post, although he was skeptical that anything could be done because there was no illegal content and the post was anonymous. On Rosati's advice, Salutari told Allison to keep Salutari informed if there were any more posts and if she heard the names of any students who might be involved; Rosati himself offered to continue to monitor the situation, as he often first learned of problems directly from students.

[10] The plaintiffs also emphasize that Allison dressed similarly on runs through town, attracting attention from motorists who would honk their horns. They claim that this was unusual behavior, given that many teachers make efforts to avoid running into students and their families outside of school.

[11] John Doe III claims that Allison's attire exposed her breasts and genitalia to the students, which constituted "a form of mental sexual abuse" that triggered the football coaches' reporting obligations. The cited deposition transcripts do not, however, support the assertion of actual exposure, indicating only that the color of her thong undergarment and the outlines of her buttocks were visible through the thin fabric of her athletic shorts; John Doe III testified that he could not see any skin color through the fabric.

sidered Allison's attire to be appropriate because it was consistent with what they often saw young women wear to exercise in settings like the gym, particularly given the summer heat. The coaches flirted with Allison often, and they frequently engaged in "locker [room] talk" among themselves about her appearance.[12] They believed that she was trying to get the attention of the male students, with one coach, Michael Ferraiolo, joking that she would not be interested in a group of "middle-aged bald men" like themselves.

Semple, the high school's athletic director, believed that it would have been unprofessional and inappropriate for any female coach to wear only a sports bra around the student athletes; although he did not personally witness Allison dressed that way, had he done so, he would have asked her to cover up by giving her a high school T-shirt.[13] Allison was not the first woman who worked professionally with the football team; they frequently had women contracted as athletic trainers. The coaches hired Allison because of her training expertise and excellent reputation as a teacher. No member of the high school's athletic staff ever witnessed Allison flirting with any student athletes.

Finally, we note that Allison attributed her behaviors that gave rise to these cases to her troubled marriage to

[12] One assistant coach, Erick Becker, stated that he was "pretty darn surprised" about Allison wearing only a sports bra and thought the attire was inappropriate in a school setting. He thought she was trying to attract the attention of the coaching staff. He nevertheless viewed any locker room talk about Allison's appearance to be inappropriate commentary on a woman's body, and he attempted to avoid such conversations.

[13] Although there was no formal dress code for student athletes, it was undisputed that the female students at the high school would have been directed to cover up had they been dressed similarly at an athletic practice. John Doe II testified that Allison's shorts were consistent with what the female student athletes wore to practice, but he thought it was "unusual" for an "authority figure" not to wear a tank top to cover a sports bra, given that the female student athletes would not be allowed to dress similarly.

Robert; those difficulties were exacerbated by Robert's view of the public attention that she was attracting on social media and around the school, including attention from male students who had been flirting with her. Allison and Robert often fought publicly at the school in front of other faculty and students, during lunch in the teachers' lounge, at staff meetings, and in her classroom, where he once threw items off her desk and across the room. One incident involving their marriage occurred at a Friday night football game, where Robert witnessed Allison interacting from the stands with three suited up football players, who were standing on the sideline below, in a way that made him feel uneasy; Robert was angered by Allison "act[ing] as though she was a wonderful mother" by holding their toddler daughter as a "prop." He was "disgusted" because he believed that she was "very appreciative" of how the football players were watching her while she was elevated above them in the stands, smiling, laughing, and flicking her head back to clear the hair from her eyes. Robert thought that Allison's "preening and posturing behavior" was intended to elicit a reaction from him, given their marital difficulties.[14] He told her that "we're

[14] During another episode in which Robert was concerned about Allison's conduct at the high school, he asked another department head, Peter Nye, to speak to Allison about her attire, namely, the propriety of a slim fitting red dress and high heeled shoes that she had worn to school, including for a back-to-school night with parents. Robert was upset that "people were talking" about Allison's dress, and Nye himself—who did not think the dress was inappropriate—had heard approximately six conversations about it among faculty and staff members who believed that Allison wore that dress to highlight her recent weight loss. Mia Corvino, a female colleague, similarly did not believe that the dress was inappropriate or excessively revealing. When Robert and Nye met with Allison, the conversation ended abruptly when she said that Principal Salutari "likes the way I dress." Robert and Nye did not escalate the matter further because they believed that Salutari would not be receptive to their concerns about her attire, especially as there was no dress code for faculty and staff at the high school, and it would have been difficult from a labor relations perspective to approach that issue with a faculty or staff member.

going to read about [you] in the newspaper someday." Robert believed Allison to be "a woman [who] was teetering on the precipice of being kind of unhealthy and making some bad decisions and being very unhealthy and making some bad decisions, never at the expense of [her] students but at the expense of [their] marriage and [their] own . . . security."[15] Indeed, Robert described Allison as someone who, to that point, had otherwise been a "law-abiding" person "who walked the straight and narrow," which made the news of her sexual activities with the plaintiffs even more shocking to him. Subsequently, Robert wrote a book about the events of these cases.[16]

The plaintiffs brought these actions for damages pursuant to the municipal liability statute, § 52-557n, claiming in the operative complaints that they were injured by the defendants' failure, among other things, (1) to prevent and/or interrupt Allison's inappropriate relationship with the plaintiffs and her participation in extracurricular activities involving the physical training of male students, (2) to report Allison's conduct to the proper authorities in violation of their ministerial duties under the board reporting policy and the mandatory reporting statutes, given their "constructive notice" of her conduct because multiple teachers had reasonable cause to believe that she was sexually abusing the plaintiffs, (3) to monitor Allison's social media usage to ascertain whether she was violating policies concerning communications between teachers and students, and (4) to properly train and supervise their employees,

[15] Robert testified, however, that this comment was unconnected to the conversation with the football players, and he did not believe that she was engaging or was going to engage in sexual conduct with them; instead, he intended to shock her given the negative effect technology had been having on their family and his anger that he was carrying the majority of the domestic responsibilities in their household.

[16] See generally R. Marchese, Land of July: A Real Life Scandal of Sex & Social Media at a Connecticut High School (2018).

particularly with respect to the warning signs of inappropriate relationships between students and teachers, and the use of classrooms and hallways.[17] The trial court subsequently granted the defendants' motions to consolidate the three cases for discovery, trial and apportionment of liability. See Practice Book § 9-5 (a).

After discovery, the defendants moved for summary judgment, arguing, with respect to the issues in this appeal, that the plaintiffs could not establish negligence and causation and, further, that they were entitled to governmental immunity under § 52-557n. In response, the plaintiffs contended that there were numerous genuine issues of material fact that precluded summary judgment, including (1) whether the defendants had breached their ministerial duty to report Allison under the board reporting policy and the mandatory reporting statutes, and (2) whether the plaintiffs were identifiable persons subject to imminent harm for purposes of that exception to discretionary act immunity under § 52-557n (a) (2) (B).

The trial court granted the defendants' motions for summary judgment in all three cases. Determining that the duty to report the abuse of students is ministerial in nature given the dictates of the mandatory reporting statute and the board reporting policy, the trial court nevertheless concluded that there was no evidence to provide any of the high school staff members with the requisite "reasonable cause to suspect" that Allison was sexually abusing the plaintiffs. See General Statutes § 17a-101a (a) (1). The trial court contrasted the record in these cases with other Superior Court cases in which "the mandatory reporter either witnessed the abuse or

[17] John Doe II and John Doe III also claimed indemnity from the town and from the board pursuant to General Statutes §§ 7-465 and 10-235, respectively, for the negligence of Salutari. John Doe II also brought claims against Allison personally for assault and for negligent and intentional infliction of emotional distress. See footnote 3 of this opinion.

the child told the mandatory reporter or school employee about the abuse." The trial court emphasized testimony that no school employee, including the football coaches, had ever witnessed Allison flirt with any male students and that she had always reacted appropriately when male students flirted with her. The trial court observed that none of the social media posts at issue would have triggered a "reasonable suspicion that a student was being abused or was at risk of imminent harm," and rejected the plaintiffs' reliance on Allison's attire at football practices because "the fact that [she] dressed inappropriately is not enough alone or in conjunction with any other event to cause reasonable suspicion in a school employee that a student is being abused or at risk of imminent harm." Further, the court observed that the plaintiffs' visits to Allison's classroom would not have created reasonable cause to suspect abuse, insofar as they were brief in duration and spaced out in frequency, giving no reason for any teacher to question the plaintiffs' whereabouts or the legitimacy of their visits to her classroom. For the same reasons, the court also concluded that the plaintiffs had not raised a genuine issue of material fact with respect to the applicability of the identifiable person-imminent harm exception to discretionary act immunity.[18]

Finally, with respect to other issues, the trial court declined to consider the arguments of John Doe II and John Doe III that a ministerial duty of professionalism was established by the testimony of Semple, the high school athletic director. The court concluded in footnotes that a breach of any such duty was not pleaded in the complaints. Similarly, the court concluded that

[18] The trial court then applied these principles to conclude that common-law immunity for discretionary acts similarly barred attempts by John Doe II and John Doe III to use an indemnification theory under General Statutes §§ 7-465 and 10-235 to hold the board liable for Salutari's alleged negligence, including a breach of any policy.

John Doe III had failed to plead the claim, first asserted in his objection to the motion for summary judgment, that the town or its police department had breached an obligation to monitor the security cameras at the high school and emphasized that a plaintiff cannot make a factual allegation for the first time in response to a motion for summary judgment.[19] Accordingly, the court granted the defendants' motions for summary judgment in all three cases and rendered judgments accordingly. These appeals followed.

Before turning to the plaintiffs' specific claims, we note the following relevant background principles. Beyond the well established standard by which we engage in plenary review of a trial court's grant of summary judgment, the "following principles of governmental immunity are pertinent to our resolution of the [plaintiffs'] claims. The . . . doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

[19] The trial court nevertheless considered the merits of this claim, as it rejected John Doe III's assertions that the defendants breached a duty to monitor the security video cameras in the hallways, which would have shown when he entered Allison's classroom. The court relied on Salutari's testimony that he or the police view the camera footage only when there is a reported event and that the video footage is automatically erased every few weeks when the storage is full. The court stated that, "[w]ithout [John Doe III's] reporting [Allison's] conduct, there was no reason for the [high] school or the police department to watch the security camera footage."

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that [t]here is a difference between laws that impose general

duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary." (Internal quotation marks omitted.) *Cole* v. *New Haven*, 337 Conn. 326, 336–38, 253 A.3d 476 (2020).

## I

## MINISTERIAL DUTY CLAIMS

This appeal presents two issues with respect to claimed violations of a ministerial duty. First, the plaintiffs contend that there was a genuine issue of material fact with respect to whether the defendants breached their ministerial duty to report a reasonable suspicion of child abuse, as imposed by the mandatory reporting statute and the board reporting policy. Second, John Doe II claims that the testimony of Semple, the athletic director, established a ministerial duty of professionalism and that there was a genuine issue of material fact with respect to whether Allison's attire constituted a breach of that duty. We address each claim in turn.

### A

### Mandatory Reporting of Sexual Abuse

The plaintiffs first claim that the trial court incorrectly concluded that there was no genuine issue of material fact that the defendants had not breached their ministerial duty under the mandatory reporting statute and the board reporting policy to report child abuse,

the language of which mirrors the statute in all relevant aspects. The plaintiffs argue that the trial court improperly required them to prove that the teachers involved had actual knowledge of abuse, rather than applying the objective standard of "reasonable cause" to believe the existence of abuse. The plaintiffs then cite an array of conduct by Allison that they argue constituted reasonable cause for numerous high school employees to suspect an imminent risk of sexual abuse or sexual abuse of students by Allison. With respect to the football practices, they contend—in the words of John Doe III—that Allison's "sexually explicit" act of wearing "skimpy shorts and sports bras that exposed her genitalia and breasts" created reasonable cause for the coaches to "suspect or believe" that they were at "imminent risk of sexual mental abuse," particularly given the coaches' apparent belief that she dressed that way to get the attention of the male student athletes. Turning to events during school hours, they also rely on Robert's claimed awareness of Allison's inappropriate attire in numerous settings and her flirtatious behavior with students, observing that John Doe I specifically believed that Robert did not like him and was aware that he had connected on social media with Allison, and Robert's confrontation of her at a Friday night football game, some of which Robert highlighted in a book he wrote about this incident. See footnotes 7 and 16 of this opinion. John Doe I and John Doe II also argue that reasonable cause for suspicion of sexual abuse or the imminent risk of sexual abuse is established by their repeated visits to Allison's classroom, with John Doe II being summoned from multiple classes to revise his yearbook quote, and the fact that she had locked her room for ten minutes during the school day when she assaulted John Doe II. John Doe III cites the unmonitored security cameras, which would have aroused a reasonable suspicion with respect to the plaintiffs' visits to Allison's

classroom if monitored, as illustrative of the "lackadaisical environment" at the high school that he contends reflected a dereliction of duty, reminiscent of "the three sitting monkeys: Hear no evil. See no evil. Speak no evil."

In response, the defendants concede the existence of a ministerial duty to report a reasonable suspicion of sexual abuse but argue that there was no breach of that duty because the facts in this record do not support a reasonable belief of sexual abuse given the "totality of the circumstances" at the time. They observe that there are no cases supporting a finding of reasonable suspicion without a reporter witnessing or being told firsthand of abuse. Turning to the specific facts of this case, the defendants argue that evidence of Robert's anger at Allison's attention seeking behavior, including her interaction with the football players at the Friday night game, did not amount to reasonable cause because Robert did not think that Allison was a danger to students.[20] The defendants also rely on undisputed testimony that it was not unusual for students to be called out of classes or to visit with teachers individually, and that Allison's visits with the plaintiffs were brief in duration and occurred in a way that would not draw the attention from any individual teacher. They emphasize that there was no evidence that any teacher ever saw Allison actually flirt with or make sexual overtures to any student, including the closest situation,

[20] The defendants also argue that Robert had no duty to report under § 17a-101a because he was not acting within the scope of his employment when he remarked, with respect to Allison's interaction with the three football players at a Friday night game, that "we're going to read about [you] in the newspaper someday" or when he learned of her attracting attention while running through town. We need not address this scope of employment argument because, even if we assume, without deciding, that Robert's duties as a mandated reporter extended beyond school hours, we conclude that the facts of this case, viewed both individually and collectively, did not give rise to a reasonable suspicion of abuse or imminent abuse.

namely, when Robert saw her interact with the football players at the Friday night game. Similarly, the defendants argue that there is no evidence that any staff member was aware of the social media messaging between the plaintiffs and Allison or Allison's paying attention to John Doe I during football practices. Finally, the defendants contend that Allison's attire would not support a conclusion that she was abusing students because (1) most teachers and staff members viewed her attire as appropriate, and (2) as is reflected in the advisory committee notes to rule 412 of the Federal Rules of Evidence, the use of a person's attire to establish her sexual proclivities is "unreliable, at best, and sexist and narcissistic, at worst."[21] We agree with the defendants' argument that, on the facts of this case, there is no evidence to support reasonable cause for any of their employees to suspect that Allison was sexually abusing the plaintiffs or exposing them to an imminent risk of sexual abuse by her.

We begin by noting that it is undisputed that the employees of the town and the board—Principal Salutari, all teachers, including Robert, and the various football coaches—had a ministerial duty under the board reporting policy and the mandatory reporting statute to report to the Commissioner of Children and Families if, "in the ordinary course of [their] employment or profession," they obtained "reasonable cause to suspect" abuse of or "imminent risk of serious harm" to a child or student.[22] General Statutes § 17a-101a (a) (1); see also General Statutes § 17a-101a (b) (providing criminal penalties for failure to report); General Statutes § 17a-101b (prescribing content of report, twelve

[21] See Fed. R. Evid. 412, advisory committee notes.

[22] Numerous Superior Court decisions, which were followed by the trial court in this case, hold to this effect. See, e.g., *Doe* v. *Kennedy*, Superior Court, judicial district of Waterbury, Docket No. CV-09-5013921-S (November 29, 2012) (55 Conn. L. Rptr. 193, 196).

hour reporting deadline from point at which reasonable cause to suspect abuse occurs, and reporting process). Consistent with case law governing the concept of "reasonable suspicion" in the criminal law context, the mandatory reporting statute provides that "suspicion or belief may be based on factors including, but not limited to, observations, allegations, facts or statements by a child, victim . . . or third party. *Such suspicion or belief does not require certainty or probable cause*." (Emphasis added.) General Statutes § 17a-101a (d); see, e.g., *State* v. *Peterson*, 320 Conn. 720, 730–31 n.4, 135 A.3d 686 (2016) ("Reasonable and articulable suspicion is a lower standard than probable cause. . . . Proof of probable cause requires less than proof by a preponderance of the evidence, or in other words, less than proof that something is more likely than not." (Citation omitted; internal quotation marks omitted.)). Thus, reasonable cause to suspect "is an objective standard that focuses not on the actual state of mind of the [decision maker], but on whether a reasonable person, having the information available to and known by the [decision maker], would have had that level of suspicion." (Internal quotation marks omitted.) *State* v. *Peterson*, supra, 730. The assessment considers the "totality of the circumstances" at the time of the decision and must be based on "specific and articulable facts" and "rational inferences" taken therefrom. (Internal quotation marks omitted.) Id., 731. Whether reasonable cause or suspicion exists in view of a given set of facts presents a question of law subject to plenary review. See, e.g., *State* v. *Houghtaling*, 326 Conn. 330, 353–54, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018); *State* v. *Butler*, 296 Conn. 62, 72, 993 A.2d 970 (2010).

Considering the totality of the circumstances demonstrated by the evidence produced by the defendants, and unchallenged by the plaintiffs, we conclude that

none of the defendant's employees had reasonable cause to suspect that Allison was sexually abusing any of the plaintiffs or exposing them to an imminent risk of sexual abuse. First, Allison's personnel record was unblemished, and she was held in uniformly high regard by her colleagues and students at the high school; indeed, she was known to handle the common situation of student crushes appropriately by politely rebuffing them.[23] Second, although all of the teachers and coaches who testified at depositions in these cases agreed that it would be inappropriate and reportable misconduct for a teacher to flirt with a student, none of those teachers or coaches ever witnessed Allison flirting with a student, including any of the three plaintiffs. Even if we assume, without deciding, that Allison had acted in a flirtatious manner—consciously or not—at the Friday night football game by smiling, laughing, and tossing her hair in front of Robert and three football players, that conduct is simply too far removed from any type or instance of sexual abuse to supply reasonable cause to suspect an imminent risk of such abuse.

Third, the three plaintiffs' repeated visits to Allison's classroom did not appear unusual to other faculty members at the school because, as numerous faculty and staff members testified, teachers frequently called students to different classrooms at various points during the school day. It also was common for teachers to visit students in other classrooms for a variety of academic and extracurricular reasons, often to address academic performance issues, such as incomplete work. There also were open periods at the end of the day when

[23] We note that Allison had told Mia Corvino, a colleague, that John Doe I, among other male students, had a crush on her; Corvino believed that Allison properly laughed that off and acted appropriately and professionally. Corvino had heard during her classes that other boys had similar crushes on Allison, which she did not consider unusual; it was "the nature of the business" for some students to have crushes on teachers and the responsibility of the teachers to respond appropriately.

students could freely visit teachers for extra help. Moreover, Allison had a seemingly legitimate reason to summon students in her capacity as faculty yearbook advisor, and she varied the days and times at which she summoned the plaintiffs in order to avoid detection. John Doe II and John Doe III testified that they were never called out from any individual teacher's class more than twice.

Fourth, even if we assume, without deciding, that Allison's attire at the football practices and in the gym pushed the boundaries of propriety in an educational setting, there is absolutely no evidence of nudity in front of students; see footnote 11 of this opinion; and her attire does not indicate that she was engaged, or inclined to engage, in sexual impropriety with students. Cf. Fed. R. Evid. 412, advisory committee notes ("The rule has been amended to . . . exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. . . . Admission of such evidence would contravene [r]ule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b) (2) exception is satisfied, *evidence such as that relating to the alleged victim's mode of dress*, speech, or [lifestyle] will not be admissible." (Emphasis added.)).

In his brief, John Doe II identifies a seventeen fact chain[24] that, he argues, would suggest that people at

[24] John Doe II identifies the following seventeen facts that he claims establish reasonable cause to suspect that Allison was sexually abusing him: (1) Robert, as her husband and department head, "thought her dress and appearance [were] so inappropriate that he asked another teacher to address the issue with her"; (2) Robert testified about an evening at a high school football game where he "saw some players flirting with [Allison], and he commented to her that 'we're going to read about [you] in the [newspaper] someday' "; (3) Allison and Robert "routinely fought with each other—in front of students and staff—in order to start a fight or make a scene for the purpose of making [Robert] jealous"; (4) Robert "testified that [Allison's] personality had changed and that she was disappointed that the students

the school should have known what was happening with the plaintiffs. We agree with the trial court that this piling of inferences distorts the actual reality apparent to the various employees in real time. See *Doe ex rel. Brown* v. *Pontotoc County School District*, 957 So. 2d 410, 418 (Miss. App. 2007) ("[i]n retrospect, it is easier to see the signs of inappropriateness in [the coach's] actions, but at the time they were occurring, there was insufficient proof to claim the [school] [d]istrict was negligent in not taking action"); see also *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 575, 717 A.2d 215 (1998) ("virtually all harms, in hindsight, are literally foreseeable" (internal quotation marks omitted)). By aggregating the facts as they do, the plaintiffs impermissibly attribute knowledge of all of the facts to each of the high school's employees. As the plaintiffs themselves

no longer flirted with her—a fact she attributed to her 'mom' status"; (5) "on at least one occasion, Allison . . . sent John Doe I a bagel during school hours and in front of students and other teachers"; (6) "in her role as yearbook [advisor], [Allison] required John Doe II to change his yearbook quote at least five times, each time requiring him to be pulled out of a class and meet with her in person"; (7) "on some of these occasions, [Allison] would call [some] of [John Doe II's] teachers to request that he come to her classroom for the ostensible purpose of discussing his yearbook quote"; (8) "students commented to [John] Doe II that it was unusual to see an authority [figure] remove her tank top to reveal only a sports bra during a workout with the football team"; (9) "it was not permitted for the female student athletes to wear only their sports bras"; (10) "during the summer football program, [John] Doe II observed [Allison] paying special attention to [John] Doe I"; (11) "[John] Doe I and [Allison] were exchanging private messages on Instagram, and [John] Doe II learned that it turned into flirting"; (12) Allison "had multiple conversations with the football coaches about her attire, including one conversation [during which a] coach asked her to wear her tight fitting pink shorts again"; (13) Allison "testified that she believes much of her conduct at the time was designed to fuel a need for attention she did not feel she was getting through her marriage"; (14) Allison "testified that the coaches flirted with her incessantly"; (15) "an assistant coach, Erick Becker, testified that [Allison] dressed provocatively such that it was hard not to notice"; (16) "Becker further testified that it was an inappropriate way to dress around students"; and (17) "Becker and another coach had a conversation about the fact that Allison . . . appeared to be trying to get the attention of the students." (Emphasis omitted.)

agree, each defendant must be judged on the basis of only those particular facts known to that person. Put differently, aggregating the seventeen facts to create reasonable cause to suspect sexual abuse or imminent risk thereof is akin to charging the various high school employees with the responsibility of viewing a completed jigsaw puzzle, when all any of them could see at any relevant time was a piece or two. We do, however, emphasize that mandated reporters, such as the school employees involved in this case, should not hesitate to ask questions or to act further—including by making a report—when confronted with a situation that might in fact be an indicator of abuse. Indeed, the legislature envisioned such difficult decisions when it extended immunity to good faith reporters of suspected abuse or neglect in General Statutes § 17a-101e (b). See *Ward* v. *Greene*, 267 Conn. 539, 559–60, 839 A.2d 1259 (2004).

Moreover, even when the facts of this case are viewed in the aggregate and with the benefit of hindsight, they are still far less compelling than those in cases in which sister state courts have held that there was no duty to report under mandatory reporting statutes.[25] See, e.g.,

[25] Looking beyond mandatory reporting statutes, we note that other Connecticut, federal, and sister state courts have held similarly in the context of negligent hiring and retention claims in considering whether it was foreseeable, for duty purposes, that a school or church employee would sexually abuse a child in his or her charge—some in cases with fact patterns akin to this one. See *Gough* v. *Saint Peter's Episcopal Church*, 143 Conn. App. 719, 731–32, 70 A.3d 190 (2013) (existence of church's sexual abuse prevention policies did not render it reasonably foreseeable that priest would sexually abuse teenage boy, given "the uncontested evidence . . . that no one who knew [the priest] saw, heard or observed anything that alerted them that [the priest] would harm anyone in any manner," and "the plaintiff averred that he did not think that anyone at [the church] was aware of the incident and that he did not disclose to anyone that the incident occurred until decades later"); *Doe 175 ex rel. Doe 175* v. *Columbia Heights School District, ISD No. 13*, 873 N.W.2d 352, 360–61 (Minn. App. 2016) (there were insufficient "red flags" to make sexual abuse of teenage girl by high school football coach foreseeable, even when (1) girl had yelled " 'I love you' " to him at practice, prompting another coach to say " '[t]hat's trouble' " and to ask her to leave, (2) girl and coach were spotted talking in parking lot, which was

*Doe ex rel. Doe* v. *Boy Scouts of America*, 4 N.E.3d 550, 556–57, 562–63 (Ill. App. 2014) (distinguishing case from those involving more "unequivocally salacious overtures" and concluding that volunteer's report that scouting executive was " 'weird around kids' " at church and would go to YMCA on day of boys' swim team practices and position himself in way that he could use mirror to watch boys change clothes did not trigger mandatory reporting obligations because it was "not so clearly prurient, and did not signal such an immediate danger to scouts, as to warrant depriving him of any opportunity to explain himself"); *Doe* v. *Logan*, 602 S.W.3d 177, 187–88 (Ky. App.) (teacher was not obligated to report colleague because he was not aware of colleague's abuse of special education student, despite fact that he had observed colleague engage in otherwise "inappropriate behavior" that he did not "believe . . . was sexual in nature," including "holding, hugging, or putting arms around students"), review denied, Kentucky Supreme Court, Docket No. 2020-SC-0085 (July 1, 2020); *Doe ex rel. Brown* v. *Pontotoc County School District*, supra, 957 So. 2d 418 (school did not breach duty to

considered common occurrence, (3) girl used computer in weight room office while coach was supervising weight room, and (4) coach had been seen "alone with an unknown 'young girl' " in weight room on Saturday); *Dia CC* v. *Ithaca City School District*, 304 App. Div. 2d 955, 956, 758 N.Y.S.2d 197 ("[There was] no evidence that the [school] [d]istrict had any knowledge or notice that the [English as a Second Language] teacher may molest a student," given the teacher's good employment history for more than fifteen years "without incident," the teacher's clean background checks prior to hiring, and the fact that the student's "classroom teacher acted reasonably in releasing [him] to another teacher. Allowing a teacher to work alone one-on-one with a student did not breach the [school] [d]istrict's duty to supervise students . . . ." (Citation omitted.)), appeal denied, 100 N.Y.2d 506, 795 N.E.2d 38, 763 N.Y.S.2d 812 (2003); *A.H. ex rel. C.H.* v. *Church of God in Christ, Inc.*, 297 Va. 604, 629–30, 831 S.E.2d 460 (2019) (church's knowledge of past sexual abuse allegation did not trigger duty to terminate youth pastor when there was no pleading that church was aware of specifics or that allegation had been verified by social services or law enforcement authorities).

report affair between teacher and teenaged student when evidence consisted of single "uncorroborated rumor," all physical contact occurred while teacher and student were alone, except for rubbing of shoulders at basketball game that "apparently went unnoticed by attendees," teacher had good reputation and employment history, and their interactions were "under the guise of innocence," such as tutoring); cf. *Doe* v. *Dimovski*, 336 Ill. App. 3d 292, 296–97, 783 N.E.2d 193 (contrasting case to one consisting only of rumors that had been denied by students themselves and concluding that female student's direct report of sexual abuse to school counselor created ministerial duty to report), appeal denied, 204 Ill. 2d 658, 792 N.E.2d 306 (2003). Accordingly, we conclude that the trial court correctly determined that, on the facts in this record, none of the high school personnel had reasonable cause to believe that Allison was sexually abusing any of the plaintiffs or exposing them to an imminent risk of sexual abuse.

B

Whether Semple's Testimony Established a Ministerial Duty of Professionalism

We next address John Doe II's contention that the trial court incorrectly concluded that the testimony of Semple, the high school athletic director, did not establish a "ministerial duty of professionalism for his subordinates." Specifically, John Doe II relies on Semple's testimony that he "expected his subordinates, including head [football] coach Filippone, to enforce certain standards of professionalism, including requiring any coach, male or female, to cover up if shirtless." John Doe II argues that the "failure to enforce this duty" resulted in "the defendants' permitting the now convicted sexual predator Allison . . . to dress in only the most fundamental attire while addressing the high school football

team in her role as a core conditioning coach." John Doe II then contends that there is ample evidence to establish that Semple failed to communicate the duty of professionalism to his staff, which itself raises a question of fact precluding summary judgment.

In response, the defendants rely on *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), and argue that, with no formal dress code or policy in place at the high school, Semple's testimony about "professionalism" did no more than establish a general practice by which discretion is exercised, particularly given that the faculty collective bargaining agreement would have created problems with enforcing his version of "common sense" rules about attire. See footnote 14 of this opinion. We agree with the defendants and conclude that Semple's opinion of what constitutes professionalism, standing alone, cannot provide the basis for a clearly promulgated policy directed toward all school employees and does not, therefore, create a ministerial duty.[26]

"[O]ur courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, *by its clear language*, compels a municipal employee to act in a prescribed manner, without the exercise of judg-

[26] As a preliminary matter, we note that John Doe II relies on *Haynes* v. *Middletown*, 314 Conn. 303, 315 n.8, 101 A.3d 249 (2014), and argues that the trial court improperly declined to address the issue on the ground that it had not been pleaded in the complaint. The defendants argue in response that the trial court correctly determined that John Doe II did not plead a theory of negligence arising from Allison's wardrobe, which distinguishes this case from *Haynes*, in which we held only that the plaintiff need not affirmatively plead an exception to discretionary act immunity. Given our conclusion with respect to the merits of John Doe II's claim, we need not address this pleading issue.

We also note that, although John Doe III raised a similar claim before the trial court, he does not renew it on appeal.

ment or discretion." (Emphasis added; internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 338. A ministerial duty need not be written and may be created by oral directives from superior officials, the existence of which are established by testimony. See *Ventura* v. *East Haven*, supra, 330 Conn. 639–41; see also *Cole* v. *New Haven*, supra, 342 ("[w]hen the facts are viewed in the light most favorable to the plaintiff, we conclude that [the police sergeant's] testimony, in combination with the [municipal pursuit policy] and the [statewide pursuit policy], establishes the existence of a ministerial duty as a matter of law not to use a complete roadblock maneuver to stop the plaintiff simply for violating the city's dirt bike ordinance, and also provides evidence from which a reasonable fact finder could conclude that [the police officer] violated that ministerial duty"); *Ventura* v. *East Haven*, supra, 640 n.14 ("in the absence of an explicit written directive, the testimony of a municipal official may be sufficient to establish the existence of a ministerial duty"). In contrast, descriptions of general practices or expectations that guide an employee's exercise of discretion do not create a ministerial duty. See *Ventura* v. *East Haven*, supra, 640–41 ("There are, no doubt, any number of guidelines and practices that police officers adhere to when responding to the myriad situations they confront on a daily basis. The mere fact that an officer, either by training or experience, ordinarily responds to a situation in a particular manner does not transform his or her response into a ministerial duty."). Specificity is required in all aspects of the directive. See *Strycharz* v. *Cady*, 323 Conn. 548, 566–67, 148 A.3d 1011 (2016) (concluding that school superintendent's "testimony provided a sufficient basis to conclude that school administrators had the ministerial duty to assign staff members to monitor students throughout the school" but also "contains no directive sufficient to support a finding that [the administrators] had the min-

isterial duty to ensure that assigned staff members, once notified of their responsibilities, *actually* reported to and adequately discharged their assignments" (emphasis in original)); see *Marvin* v. *Board of Education*, 191 Conn. App. 169, 176–78, 213 A.3d 1155 (2019) (ministerial duty was not created by custodian's "job description [that] provides [only] generally that the custodial staff '[p]erforms necessary work to maintain the cleanliness and appearance of all hard surface flooring, including . . . mopping,' " and "there was no specific policy, procedure, or directive that applied to the inspection and maintenance of the floors at the school, and . . . there existed only a general policy that the school should be maintained in a clean and safe condition").

We agree with the defendants that Semple's testimony about "professionalism" lacked the specificity necessary to create an enforceable ministerial duty. In contrast to a specific dress code—which Salutari testified did not exist at the high school because of collective bargaining issues; see footnote 14 of this opinion; there is no evidence that Semple's views of professionalism in attire ever were communicated to the school employees in a manner that clearly established a duty to dress in a prescribed way, without the exercise of judgment or discretion. Accordingly, we conclude that Semple's conception of professionalism is not by itself a sufficiently definite and specific concept to serve as the basis for a ministerial duty and that the trial court properly granted summary judgment with respect to this issue.

## II

## IDENTIFIABLE PERSON-IMMINENT HARM EXCEPTION TO DISCRETIONARY ACT IMMUNITY

John Doe II and John Doe III next claim that the trial court incorrectly concluded that the identifiable person-

imminent harm exception to discretionary act immunity, as explicated in *Haynes* v. *Middletown*, 314 Conn. 303, 312–23, 101 A.3d 249 (2014), and *Doe* v. *Petersen*, 279 Conn. 607, 616–21, 903 A.2d 191 (2006), does not apply in this case. Acknowledging that the trial court correctly determined that he was an identifiable person during school hours, John Doe II argues that the seventeen facts that provide reasonable cause to report a suspicion of sexual abuse; see footnote 23 of this opinion; also render him a person subject to imminent harm, with the likelihood of that harm apparent to the defendants as public officials. John Doe III argues similarly, relying on (1) Allison's attire at summer football practices, "in full view and knowledge of the coaching staff three times a week for six weeks," (2) his deposition testimony about how often he was summoned from class, and (3) numerous hall monitors' collective failure to question any of the plaintiffs "as to their reasons for being out of class or going to [Allison's] classroom." John Doe III also relies on the fact that the school resource officer and the school administration did not actively monitor the high school's video security system.

In response, the defendants argue that John Doe II and John Doe III were identifiable victims only during school hours, and not during the optional summer football program, meaning that only four of the claimed circumstances apply to support a claim that there was imminent harm. Citing the remoteness of the harm considered in *Brooks* v. *Powers*, 328 Conn. 256, 178 A.3d 366 (2018), the defendants emphasize that no one was aware that the plaintiffs had been called out of class excessively, as it was not unusual for a student to visit a different classroom or to receive a bagel from a teacher. They also contend that there is no evidence to support the proposition that Allison's attire made it more likely that she would perform a sexual act on a student, particularly given that the act did not occur until December,

2014, and that she wore the attire in question during the summer. Quoting *Edgerton* v. *Clinton*, 311 Conn. 217, 231, 86 A.3d 437 (2014), the defendants emphasize that there is no duty to inquire and that "[t]he 'apparentness' prong of the identifiable person-imminent harm exception is an objective test pursuant to which the courts 'consider the information available to the [school official] at the time of [his or] her discretionary act or omission.' " The defendants emphasize that, because additional inquiry is not required, "the same reason that the circumstances did not support reasonable suspicion of abuse of" John Doe II or John Doe III means that "there is no evidence that the circumstances would have made it apparent to a reasonable school official that harm . . . was imminent . . . ." We agree with the defendants' argument that there is no genuine issue of material fact with respect to the apparentness element of the identifiable person-imminent harm exception to governmental immunity.[27]

It is well established that "[§] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

[27] The defendants also argue, as an alternative ground for affirming the judgments in the cases of John Doe II and John Doe III, that their failure to proffer expert testimony to support their claims as to the defective supervisory structure at the high school is inherently fatal to their negligence claims. We need not address this argument, given our conclusion as to discretionary act immunity.

"This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Citations omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018).

We begin by noting that it is undisputed that, because John Doe II and John Doe III were "public school student[s] at school during school hours, [they were] . . . identifiable person[s] for purposes of the imminent harm to identifiable persons exception"; id., 9; and, for the purpose of addressing the plaintiffs' claims in this appeal, we assume without deciding that they occupied that status during football practices, as well.[28] But see *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436, 165 A.3d 148 (2017) ("[O]ur decisions underscore . . . that

[28] Describing as "unconscionable" this court's failure "to expand the exception for identifiable victim[s] to include any student on school property who has a right and purpose to be there," John Doe III asks us to overrule the line of cases standing for the proposition that the "only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." *Durrant* v. *Board of Education*, 284 Conn. 91, 107, 931 A.2d 859 (2007); see also *St. Pierre* v. *Plainfield*, 326 Conn. 420, 437–38, 165 A.3d 148 (2017) (citing cases). Because we assume, without deciding, that John Doe II and John Doe III were identifiable persons at all relevant times, we do not address this request.

whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . . Accordingly, [t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours . . . .'' (Internal quotation marks omitted.)); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 656–57, 235 A.3d 599 (middle school soccer player was not identifiable person given voluntary nature of participation in sport), cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). Accordingly, our focus in this appeal is on whether the trial court correctly concluded that the defendants' acts or omissions did not implicate either an imminent harm or ''a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.'' (Internal quotation marks omitted.) *Martinez* v. *New Haven*, supra, 328 Conn. 8.

Our recent decision in *Martinez* aptly summarizes the line of decisions in the wake of *Burns* v. *Board of Education*, 228 Conn. 640, 649, 638 A.2d 1 (1994), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), which apply the identifiable person-imminent harm exception to discretionary act immunity in the public school context, and we need not repeat that detailed analysis here. See *Martinez* v. *New Haven*, supra, 328 Conn. 8–10. It suffices to say that ''the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that *the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm*.'' (Emphasis added; internal quotation marks omitted.) Id., 9. Applying that standard, we conclude that there is no genuine issue of material fact

with respect to either the imminence or apparentness prongs. Sexual abuse causes unmistakably serious harm to its victims, but the facts of this case suggest that Allison's actions—in particular her sexual assaults of John Doe II and John Doe III—were the culmination of a generally clandestine pattern of behavior. Although some might have viewed Allison's attire at the summer football practices as inappropriate for an educational setting, there is nothing to suggest that anyone would reasonably anticipate a sexual assault of a student would be the immediate result of that attire.[29] Cf. *Brooks* v. *Powers*, supra, 328 Conn. 273–75 (woman who drowned in water one-half mile from where she was seen standing in field during storm was not identifiable person subject to imminent harm for purposes of constables' failure to respond given attenuation between drowning and risk of being in field); *Maselli* v. *Regional School District No. 10*, supra, 198 Conn. App. 658–59 ("exacerbated postconcussion symptoms and diminished academic performance" were "too attenuated" from injury and allegedly negligent response by coach when middle school soccer player was struck in face by ball to be imminent or apparent). This is particularly so, given that Allison's professional record had been unblemished until the events of this case, and she was held in uniformly high regard by students and faculty alike. Moreover, there is no evidence that the plaintiffs' repeated visits to Allison's classroom were abnormalities that should have been apparent to any staff members, given the undisputed evidence that students routinely visited teachers' classrooms at numerous times for legitimate pedagogical or extracurricular reasons, and Allison avoided raising suspicion by summoning the plaintiffs at a diverse array of times over

[29] Contrary to John Doe III's characterization of her attire as "a form of mental sexual abuse," there is no evidence that she actually exposed any intimate body parts to him or any other students at the football practices. See footnote 11 of this opinion.

an extended period of months. Indeed, those staff members, such as hallway monitors, were under no duty to ask questions beyond what was immediately apparent. See, e.g., *Edgerton* v. *Clinton*, supra, 311 Conn. 231–32; see also *Doe* v. *Petersen*, supra, 279 Conn. 609, 619–21 and n.11 (fifteen year old tennis player who suffered emotional distress when supervisor " 'cut [her] off' " from further disclosure of sexual abuse suffered at hands of coach was not subject to exception when manager had no idea of sexual assault that had been suffered). Finally, Robert's apparently negative reaction to Allison's interaction with the football players at the Friday night game cannot be understood as evincing a belief that she was *imminently* about to engage in an illegal sexual relationship with any student, let alone any of the plaintiffs specifically. Accordingly, we conclude that the trial court correctly determined that neither John Doe II nor John Doe III satisfied the imminent harm to identifiable persons exception to governmental immunity.

## III

## VIDEO MONITORING CLAIMS

Finally, we address the claim of John Doe III that the trial court incorrectly determined that he failed to allege in his complaint that the town was liable for the inactions of a police officer assigned as a school resource officer at the high school because that officer was an employee of both the town and the board. John Doe III contends that the trial court incorrectly determined that he had raised this claim for the first time in his memorandum of law objecting to summary judgment when his complaint "clearly alleged" that the town, acting through the police department, "failed to properly monitor the classrooms and hallways with proper personnel or through the use [of] video surveil-

lance that existed [when] the sexual assault of John Doe [III] took place."

In response, the defendants do not challenge John Doe III's argument that the trial court improperly construed his complaint, but argue—ostensibly as an alternative ground on which to affirm the judgment of the trial court—that the "trial court rightly analyzed the evidence, which was that [Principal Salutari] said the police had access to the footage, not that they had a duty to monitor the classrooms or anywhere else [that John Doe III's] activity may have occurred." The defendants contend that there was no evidence that "the police [had] the ability to monitor security video transmissions" and that, "even if they did, it does not establish that the police had any duty to do so. . . . Salutari expressly stated that the video was not monitored, much less that anyone had a duty to monitor it in any way differently from the way he testified it was used, namely, to go back after an incident to determine if the cameras detected it." We agree with the defendants and conclude that there is no evidence of any ministerial duty to monitor the security camera footage, rendering this a classic discretionary act subject to governmental immunity under § 52-557n (a) (2) (B).

Having reviewed the record in the absence of a reply brief challenging the defendants' assertions, we conclude that the trial court correctly determined that there was no evidence of a policy governing the manner and frequency with which security cameras and their footage are monitored. See footnote 19 of this opinion. Insofar as the plaintiffs failed to establish the existence of a ministerial duty in this regard, the high school's use of the security cameras remained a discretionary act. See, e.g., *Lewis* v. *Newtown*, 191 Conn. App. 213, 232, 214 A.3d 405 ("it is clear that the adoption of the school security guidelines by the defendants was an act of discretion encompassed within their general duty

to manage and supervise their employees and the schoolchildren, and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B)"), cert. denied, 333 Conn. 919, 216 A.3d 650 (2019); see also *Strycharz* v. *Cady*, supra, 323 Conn. 568–69 (public school administrators' "general responsibility to manage and supervise school employees" is discretionary act). Accordingly, we conclude that the trial court properly granted the defendants' motions for summary judgment.

The judgments are affirmed.

In this opinion the other justices concurred.

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## ROCHDI MAGHFOUR *v.* CITY OF WATERBURY (SC 20502)

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

*Syllabus*

The plaintiff, an employee of the defendant city, sought to resolve a dispute concerning a lien the city placed on certain settlement proceeds that he had received as a result of a motor vehicle accident that occurred in 2016. At all relevant times, the city was self-insured and paid for the medical care that the plaintiff received in connection with the accident. In July, 2017, the legislature passed an amendment (P.A. 17-165, § 1) to a statute (§ 7-464) concerning group insurance benefits for municipal employees that allowed a self-insured city that provides health benefits for its employees to file a lien on the portion of any settlement proceeds that represents payment for medical expenses incurred by a city employee when such expenses result from the negligence or recklessness of a third party. Later in July, 2017, the plaintiff filed an action against the third-party tortfeasor who had caused the plaintiff to sustain injuries in the accident. Thereafter, on October 1, 2017, P.A. 17-165, § 1, became effective. In October, 2018, the city filed a notice of lien, claiming a right to reimbursement for amounts that it had paid for the plaintiff's medical expenses from any judgment or settlement the plaintiff might receive arising from the accident. Approximately one week later, the plaintiff settled his civil action against the third-party tortfeasor. The plaintiff then brought the present action, claiming that P.A. 17-165, § 1, did not authorize the lien filed by the city because the plaintiff's injuries

occurred and his action against the third-party tortfeasor was commenced before the effective date of P.A. 17-165, § 1. The trial court granted the plaintiff's motion for summary judgment and rendered judgment thereon, concluding, inter alia, that the legislature did not expressly indicate that it intended for P.A. 17-165, § 1, to apply retroactively to pending actions and, therefore, that the statute (§ 55-3) precluding a new law that imposes any new obligation from being construed to have retroactive effect barred the city's lien. On the city's appeal from the trial court's judgment, *held* that the trial court properly granted the plaintiff's motion for summary judgment, as that court correctly determined that the city's lien stemmed from an improper, retroactive application of P.A. 17-165, § 1: the legislature did not explicitly provide that P.A. 17-165, § 1, should apply retroactively, and, because that public act created a new right for a self-insured municipality to assert a lien to recover medical expenses that it has paid and eliminated the right of a municipal employee to retain sums that he or she recovers from a third-party tortfeasor if those sums represent medical expenses paid by the municipality, P.A. 17-165, § 1, was substantive, and, pursuant to § 55-3, could operate prospectively only; moreover, there was no merit to the city's claim that allowing it to place a lien on the plaintiff's settlement proceeds would not effect a retroactive application of P.A. 17-165, § 1, in view of the fact that the plaintiff settled his action against the third-party tortfeasor after the effective date of that public act, as the settlement was not independent of the motor vehicle accident that ultimately led to the settlement and that occurred prior to the public act's effective date.

Argued December 8, 2020—officially released August 3, 2021*

*Procedural History*

Action for interpleader to resolve a dispute concerning a lien claimed by the defendant on certain settlement proceeds, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the plaintiff's motion for summary judgment, denied the defendant's motion for summary judgment, and rendered judgment for the plaintiff, from which the defendant appealed. *Affirmed.*

*Daniel J. Foster*, corporation counsel, for the appellant (defendant).

*Jonathan H. Dodd*, for the appellee (plaintiff).

* August 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

MULLINS, J. The defendant, the city of Waterbury (city), appeals from the judgment of the trial court rendered in favor of the plaintiff, Rochdi Maghfour. On appeal, the city contends that the trial court improperly granted the plaintiff's motion for summary judgment because it erroneously concluded that General Statutes § 7-464, as amended by § 1 of No. 17-165 of the 2017 Public Acts (P.A. 17-165), did not authorize the city's lien in this case. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts, as found by the trial court and contained in the record, and procedural history are relevant to our disposition of this appeal. On June 20, 2016, the plaintiff was injured in a motor vehicle accident. He was an employee of the city, which is a self-insured municipality. Therefore, the city paid for medical care resulting from his injuries.

On July 14, 2017, the plaintiff initiated an action against the third-party tortfeasor who had caused his injuries in the motor vehicle accident. Earlier that month, the legislature had enacted P.A. 17-165, § 1, which amended § 7-464 by adding subsections (c) and (d).[1] See P.A. 17-165, § 1; 60 S. Proc., Pt. 8, 2017 Sess., pp. 3076–77, 3101–3102; 60 H.R. Proc., Pt. 13, 2017 Sess., pp. 5329–35. The new subsections allow a self-insured

[1] General Statutes § 7-464 provides in relevant part: "(c) A self-insured town, city or borough that provides group health benefits for its employees has a lien on that part of a judgment or settlement that represents payment for economic loss for medical, hospital and prescription expenses incurred by its employees and their covered dependents and family members when such expenses result from the negligence or recklessness of a third party. . . .

* * *

"(d) As used in subsection (c) of this section: (1) 'Self-insured town, city or borough' means a town, city or borough that provides group health benefits to its employees by paying submitted medical, hospital and prescription expense claims from its revenues . . . ."

city, town, or borough to file a lien on the portions of judgments or settlements that represent payment for medical expenses incurred by its employees when such expenses result from the negligence or recklessness of a third party. See P.A. 17-165, § 1. Public Act 17-165, § 1, had an effective date of October 1, 2017.

After the effective date of P.A. 17-165, § 1, the city filed a notice of lien dated October 15, 2018, with the plaintiff's attorney. In that notice, the city claimed a right to reimbursement of medical expenses for which it had paid from any judgment or settlement the plaintiff might receive arising from his June 20, 2016 motor vehicle accident. Thereafter, on October 23, 2018, the plaintiff settled his civil action against the third-party tortfeasor.

Following the settlement, the plaintiff and the city could not reach an agreement to resolve the issue of whether the city was entitled to a lien on the settlement for the amount of the medical expenses it had paid. Consequently, the plaintiff initiated the present action in the trial court contesting the validity of the city's lien on the proceeds of his settlement.[2] In his petition, the plaintiff claimed that § 7-464, as amended by P.A. 17-165, § 1, did not authorize the lien filed by the city because the plaintiff's injury occurred and his action against the third-party tortfeasor was commenced before the effective date of the act.

Each party filed a motion for summary judgment. The trial court granted the plaintiff's motion for summary

[2] The plaintiff initiated this action under § 7-464 (c) (4) (C), which provides in relevant part: "If agreement cannot be reached on the application of equitable defenses to the claimed lien amount, then either the employee, covered dependent, family member or the self-insured town, city or borough may petition the Superior Court for resolution on the application of equitable defenses. . . ."

The parties do not dispute that the trial court had jurisdiction to hear the plaintiff's claim, so we do not address the issue of whether the plaintiff's action was appropriately brought under § 7-464 (c) (4) (C).

judgment and denied the city's motion for summary judgment. In doing so, the trial court concluded that the legislature did not expressly indicate that it intended for P.A. 17-165, § 1, to apply retroactively to pending actions and, therefore, that General Statutes §§ 1-1 (u)[3] and 55-3[4] barred the lien from affecting pending litigation and from applying retroactively. This appeal followed.[5]

On appeal, the city asserts that the trial court improperly granted the plaintiff's motion for summary judgment because the plain language and legislative intent of § 7-464, as amended by P.A. 17-165, § 1, indicate that the city's lien would apply to the proceeds of the plaintiff's settlement reached after the act's effective date. The city contends that, because the plaintiff reached his settlement after the effective date of P.A. 17-165, § 1, and the plain language of the statute applies to settlements, its lien under the act would not operate retroactively in the present case. According to the city's reasoning, P.A. 17-165, § 1, simply applies to any settlements reached after the effective date of the act. The plaintiff responds that the trial court correctly determined that the city was not authorized to file a lien on the proceeds of his settlement in this matter because § 55-3 bars P.A. 17-165, § 1, from applying retroactively and § 1-1 (u) prevents it from applying to existing litigation.

We begin by setting forth the standard of review governing this appeal. "The scope of our review of the

[3] General Statutes § 1-1 (u) provides: "The passage or repeal of an act shall not affect any action then pending."

[4] General Statutes § 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

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

trial court's decision to grant the [plaintiff's] motion for summary judgment is plenary." *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020). "To the extent that the trial court's decision . . . requires us to construe a [statute], our review is also plenary and is guided by our well established legal principles regarding statutory construction. . . . In construing statutes, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citations omitted; internal quotation marks omitted.) Id., 410–11.

Both the plaintiff and the city agree that their competing motions for summary judgment gave rise to no genuine issue as to any material fact. Thus, the issue of whether the trial court properly granted the plaintiff's motion for summary judgment turns solely on a point of statutory interpretation, namely, whether, as a matter of law, § 7-464, as amended by P.A. 17-165, § 1, authorizes the city to file a lien on the plaintiff's settlement from his civil action against the third-party tortfeasor.

As instructed by § 1-2z, we begin our analysis with the text of § 7-464 (c), which provides in relevant part that "[a] self-insured town, city or borough that provides group health benefits for its employees has a lien on that part of a judgment or settlement that represents payment for economic loss for medical, hospital and prescription expenses incurred by its employees and their covered dependents and family members when such expenses result from the negligence or recklessness of a third party. . . ." As we noted previously, P.A. 17-165, § 1, provided that the amendment to § 7-464 became effective on October 1, 2017. The legislature,

however, did not expressly indicate whether it intended the amendment to apply retroactively to events that occurred before its effective date, such as the plaintiff's motor vehicle accident. Therefore, the plain language of the statute does not answer the question on appeal, and we must examine the relationship of § 7-464 (c) with our law governing the retroactivity of statutes.

"In considering the question of whether a statute may be applied retroactively, we are governed by certain well settled principles, [pursuant to] which our ultimate focus is the intent of the legislature in enacting the statute. . . . [O]ur point of departure is . . . § 55-3 . . . ." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 292, 215 A.3d 149 (2019). Section 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." "[W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively. . . . [Although] there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Procedural statutes . . . therefore leave the preexisting scheme intact."[6] (Inter-

[6] The city asserts on appeal that the trial court incorrectly determined that § 1-1 (u) applied to its lien because the lien was not at issue in the plaintiff's civil action against the third-party tortfeasor and, therefore, would not affect that action. The plaintiff responds that the trial court correctly determined that § 1-1 (u) bars P.A. 17-165, § 1, from affecting his litigation, as it was pending at the time of the act's effective date. We need not decide whether § 1-1 (u) is applicable to this case because we conclude that § 55-3 is dispositive of the matter.

nal quotation marks omitted.) *King* v. *Volvo Excavators AB*, supra, 292.

Because the legislature did not expressly provide that P.A. 17-165, § 1, should apply retroactively, the presumption stands that, if § 7-464, as amended by the act, affects *substantive rights*, then it shall apply prospectively only. See id. Here, then, we must determine whether § 7-464, as amended by P.A. 17-165, § 1, affects a substantive or procedural right in order to answer the question of whether the city is entitled to the lien in this case.

Prior to the passage of P.A. 17-165, § 1, a self-insured municipality did not have the express right to assert a lien to recover medical expenses paid as benefits from the proceeds of an employee's litigation against third-party tortfeasors.[7] See, e.g., P.A. 17-165, § 1; see also, e.g., Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 1, 2017 Sess., p. 247, remarks of Representative Stephanie E. Cummings (state representative who previously spoke with city's leadership acknowledged during her testimony in support for passage of house bill that became P.A. 17-165, § 1, that, as self-insured municipality, city lacked right under Connecticut law to recover collateral source benefits). After P.A. 17-165, § 1, went into effect, however, a self-insured municipality had the right to assert a lien to recover medical expenses it had paid. See General Statutes § 7-464 (c) and (d).

The statutory change thus confers a new right on a self-insured municipality, such as the city. Correspondingly, the statute, as amended, simultaneously eliminates the right of plaintiffs, held prior to the enactment

[7] Any right to subrogation or a lien under the workers' compensation scheme did not apply in the present case because there was no allegation that the plaintiff's injuries occurred during the course of his employment with the city. Prior to the passage of P.A. 17-165, § 1, General Statutes § 52-225c prohibited the city from recovering the amount of benefits provided to the plaintiff as a collateral source.

of P.A. 17-165, § 1, to retain sums they recover from negligent or reckless third-party tortfeasors who have harmed them if those sums represent medical expenses paid by the municipality. Thus, because P.A. 17-165, § 1, created a new right for self-insured municipalities and limited the rights of their employees, we conclude that § 7-464, as amended by the act, is substantive. See, e.g., *Koskoff*, *Koskoff & Bieder* v. *Allstate Ins. Co.*, 187 Conn. 451, 455–57, 446 A.2d 818 (1982) (holding that amendment affecting insurance company's lien recovery amount was substantive rather than procedural); see also, e.g., *Little* v. *Ives*, 158 Conn. 452, 457, 262 A.2d 174 (1969) ("[l]egislation which limits or increases statutory liability has generally been held to be substantive in nature").[8] The statute therefore must operate prospectively only.

The city asserts that allowing it to file a lien on the plaintiff's settlement proceeds in the present case would not present a retroactive application of the statute. Specifically, the city asserts that, because the plaintiff settled his action against the third-party tortfeasor on October 23, 2018, after the effective date of P.A. 17-165, § 1—which was October 1, 2017—upholding its lien does not require a retroactive application of the act. We disagree.

As this court has previously concluded, "a statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based

[8] Public Act 17-165, § 1, also imposes a new obligation on the plaintiff that did not previously exist, namely, that he was being forced to pay money in the form of a lien from a sum he recovered as a result of his applicable settlement under § 7-464 (c). See, e.g., *Little* v. *Ives*, supra, 158 Conn. 453–57 (holding that statute could not apply retroactively under § 55-3 when it imposed new obligation and liability on defendant highway commissioner, i.e., filing certificate of taking within reasonable amount of time after filing highway layout map and being subject to paying additional damages for not doing so, respectively).

in prior law. *Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.*" (Emphasis in original; internal quotation marks omitted.) *Shannon* v. *Commissioner of Housing*, 322 Conn. 191, 204, 140 A.3d 903 (2016). In other words, "a law has retroactive effect when it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (Internal quotation marks omitted.) Id., 205–206. This court further cautioned that "[t]he conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (Internal quotation marks omitted.) Id., 204. Moreover, this court noted that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." (Internal quotation marks omitted.) Id.

We conclude that allowing the city to pursue statutory lien rights in the present case would result in an improper, retroactive application of P.A. 17-165, § 1, because it would attach new legal consequences to events completed before the act's effective date. Those events are the legal rights to which the plaintiff became entitled as a result of personal injuries sustained by him on June 20, 2016, the date of the motor vehicle accident. The act impaired the right of the plaintiff to obtain compensation for personal injuries caused by the tortfeasor's negligence on certain conditions, one of those being that any such recovery would be free and clear of any claims by the city requiring repayment of sums expended for medical care relating to those injuries. Public Act 17-165, § 1, created a new liability or obligation on the part of the plaintiff to pay proceeds

of his settlement to the city to reimburse the city for past payments made by it. It also created a correlative, new right entitling the city to obtain reimbursement for medical expenses from the proceeds of the plaintiff's settlement.

Indeed, neither the plaintiff's obligation nor the city's corresponding right existed at the time of the plaintiff's motor vehicle accident or at the time the city paid most of the medical expenses, and, in this particular case, even the commencement of the plaintiff's underlying civil action predated the effective date of P.A. 17-165, § 1. Thus, applying P.A. 17-165, § 1, to a settlement related to a motor vehicle accident that occurred prior to the effective date of the act is a retroactive application of the act. Contrary to the city's position, the settlement does not stand on its own. Rather, the settlement stems from the motor vehicle accident that occurred prior to the effective date of P.A. 17-165, § 1, and the respective substantive rights and obligations of the parties relating to that accident cannot be altered retroactively. Accordingly, we conclude that allowing the city to file a lien on the plaintiff's settlement proceeds in the present case would constitute an improper, retroactive application of the act.

In summary, because the legislature did not explicitly provide that § 7-464, as amended by P.A. 17-165, § 1, should apply retroactively, and, because it is substantive in nature, § 55-3 requires that the statute operate prospectively. The postevent amendments to § 7-464 cannot attach new legal consequences to the plaintiff's motor vehicle accident, from which his settlement arose. Therefore, the trial court correctly determined that the city's lien stemmed from an improper, retroactive application of P.A. 17-165, § 1, and properly granted the plaintiff's motion for summary judgment.

The judgment is affirmed.

In this opinion the other justices concurred.

# JOSEPH HALLADAY *v.* COMMISSIONER OF CORRECTION (SC 20369)

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

*Syllabus*

Pursuant to this court's decision in *State* v. *Curcio* (191 Conn. 27), certain interlocutory orders and rulings of a trial or habeas court may be appealable when the order or ruling terminates a separate and distinct proceeding or when the order or ruling so concludes the rights of the parties that further proceedings cannot affect them.

The petitioner, who had been convicted, on a guilty plea, of murder and tampering with physical evidence, sought a writ of habeas corpus, claiming that his plea agreement was the result of the ineffective assistance of trial counsel. The respondent, the Commissioner of Correction, subsequently filed a motion for the production of relevant materials from the petitioner's underlying criminal defense and investigative files. The habeas court rejected the petitioner's claim that those materials were protected by the attorney-client privilege, granted the respondent's motion, and ordered the petitioner to produce from the criminal defense file copies of any materials related to his ineffective assistance claim, as well as a privilege log identifying any undisclosed materials the petitioner contended were unrelated to that claim. The habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, which granted the respondent's motion to dismiss the appeal for lack of a final judgment. On the granting of certification, the petitioner appealed to this court, claiming that the Appellate Court improperly dismissed his appeal for lack of a final judgment and claiming, alternatively, that this court should reach the merits of his privilege claims pursuant to the statute (§ 52-265a) allowing direct appeals from interlocutory orders in matters involving a substantial public interest. *Held*:

1. The Appellate Court properly dismissed the petitioner's appeal for lack of subject matter jurisdiction, as the habeas court's discovery order was not an appealable final judgment under either prong of *Curcio*: an interlocutory discovery order terminates a separate or distinct proceeding under the first prong of *Curcio* only if the lower court has issued a clear and unequivocal order that is sufficiently definite, specific, and comprehensive concerning a discovery request served on a nonparty for information that is not required to resolve the underlying issue in the case, and, because the petitioner was a party to the habeas proceedings, the discovery order did not terminate a separate and distinct proceeding concerning his property interest in his criminal defense file; moreover, the second prong of *Curcio* was not satisfied because the

right that the petitioner sought to vindicate, namely, the right to confidentiality in his criminal defense file, could still be affected by further proceedings insofar as the habeas court would conduct, in response to the privilege log that it ordered the petitioner to produce, an in camera review of the petitioner's individual claims of privilege as to specific items within the file.

2. This court declined the petitioner's request to reach the merits of his privilege claims by treating his appeal as a direct appeal from an interlocutory order on certification by the Chief Justice pursuant to § 52-265a, as the present case did not present a matter of substantial public interest or urgency.

Argued February 17—officially released August 5, 2021*

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New Haven, where the court, *Hon. Jon C. Blue*, judge trial referee, granted the respondent's motion for production and ordered the petitioner to produce certain materials; thereafter, the court, *Hon. Jon C. Blue*, judge trial referee, denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, which granted the respondent's motion to dismiss the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

*Kathryn W. Bare*, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

*Christine Perra Rapillo*, chief public defender, *Emily H. Wagner*, assistant public defender, and *Jennifer Bourn*, supervisory assistant public defender, filed a brief for the Office of the Chief Public Defender as amicus curiae.

* August 5, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ROBINSON, C. J. The principal issue in this certified appeal is whether a discovery order issued by a habeas court that implicates the attorney-client privilege between a petitioner and the attorneys who represented him during the underlying criminal proceedings is an appealable final judgment under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). The petitioner, Joseph Halladay, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court, which dismissed his appeal from the order of the habeas court directing the petitioner to produce certain investigative materials contained in the file of his criminal defense attorneys. On appeal, the petitioner claims that (1) the Appellate Court improperly dismissed his appeal for lack of subject matter jurisdiction, and (2) the habeas court improperly granted the motion for production filed by the respondent, the Commissioner of Correction, over his claims of privilege. Because the habeas court's order does not constitute an appealable final judgment, we cannot review whether the habeas court properly rejected the petitioner's claim that his attorneys' case file was privileged. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. On February 9, 2011, pursuant to a plea agreement, the petitioner pleaded guilty to the crimes of murder in violation of General Statutes § 53a-54a (a) and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1). The plea agreement provided that the petitioner would receive

[1] We granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly dismiss the petitioner's appeal for lack of a final judgment?" And (2) "If the answer to the first question is 'no,' did the trial court properly reject the petitioner's claim of privilege in his attorneys' case file?" *Halladay* v. *Commissioner of Correction*, 333 Conn. 921, 921–22, 217 A.3d 634 (2019).

a sentence in a range of twenty-seven to forty years' imprisonment; the trial court sentenced him to forty years' imprisonment. Subsequently, on May 25, 2018, the petitioner filed a revised amended petition for a writ of habeas corpus, claiming, inter alia, that the plea agreement was the result of the ineffective assistance of the public defenders who had been assigned to represent him in the underlying criminal proceedings. Specifically, the petitioner alleged that the assistance of counsel was ineffective because of their failure, among other things, to perform adequate factual investigation and legal research, to adequately impeach or cross-examine certain witnesses, to investigate and present evidence on specific matters, to consult or present the testimony of various experts and professionals, to present the petitioner's testimony, to adequately prepare a defense, to present mitigating evidence during sentencing, and to preserve the petitioner's appellate rights, as well as numerous other failures regarding the plea negotiations.

The respondent subsequently filed a motion for the production of relevant materials from the petitioner's underlying criminal defense and investigative files.[2] The habeas court heard the respondent's motion on February 22, 2019. In its order granting the respondent's motion, the habeas court stated: "Given the breadth

[2] Prior to filing the motion for the production of the relevant materials, the respondent filed a motion requesting *all* the materials in the criminal defense file. The court, *Newson, J.*, denied the motion, stating that it exceeded the limited discovery provided for in habeas proceedings and that there were other means by which to develop defenses to the petition. We note that the habeas court, *Hon. Jon C. Blue*, judge trial referee, which issued the ruling that is the subject of the present appeal, was not bound by that earlier decision. See, e.g., *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 624, 35 A.3d 260 (2012) ("[a] judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision" (internal quotation marks omitted)).

and generality of the allegations made in the revised amended petition . . . it seems unlikely that any investigative materials in . . . trial counsel's files are unrelated to those allegations, but, in the absence of an in camera inspection of the files in question, this issue cannot be definitively determined by the court. In the event that the petitioner contends that certain materials in the files in question are unrelated to his claims, he is ordered to create a privilege log identifying those materials. . . .

"The motion for production is granted. The petitioner is ordered to produce copies of any materials contained within his underlying criminal defense investigative files that relate to his claim that criminal defense counsel rendered ineffective assistance . . . in connection with their representation. The petitioner is additionally ordered to produce a privilege log of undisclosed materials.

"Compliance is ordered by March 15, 2019. It is understood that, if the petitioner chooses to file an amended habeas petition narrowing his claims, the scope of materials deemed relevant to such amended claims may also be narrowed." (Citation omitted.)

On March 15, 2019, the petitioner filed both a motion for reconsideration with the habeas court and an appeal from the habeas court's discovery order with the Appellate Court.[3] The habeas court denied the motion for reconsideration, and the Appellate Court subsequently granted the respondent's motion to dismiss the appeal

[3] Following the habeas court's order of production, the petitioner's habeas counsel contacted the Office of the Chief Public Defender (OCPD) to inform it of the court's order requiring production of the defense file. Counsel from the OCPD informed the petitioner's habeas counsel of its objection to the disclosure of any work product contained in the file and took the position that the petitioner could not consent to the disclosure of any such material because it belonged to the petitioner's criminal defense counsel and the OCPD, not the petitioner.

for lack of a final judgment. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the petitioner claims that (1) the Appellate Court improperly dismissed the petitioner's appeal for lack of a final judgment, and (2) we should reach the merits of his claims and conclude that the habeas court's order would have violated his attorney-client privilege, as waiver does not commence until trial begins. We address each claim in turn.

I

The petitioner claims, inter alia, that the habeas court's discovery order constituted an appealable final judgment under *State* v. *Curcio*, supra, 191 Conn. 31, because it (1) terminated a separate and distinct proceeding regarding his property interests in the case file, and (2) concluded the petitioner's right to maintain the confidentiality of the case file so that no further proceedings could affect that right.

We begin by setting forth the applicable standard of review. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review [as to whether the Appellate Court had jurisdiction] is plenary." (Internal quotation marks omitted.) *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 312–13, 210 A.3d 554 (2019).

"Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." *State* v. *Curcio*, supra, 191 Conn. 30. Under General Statutes §§ 52-263 and 51-197a, the "statutory right to appeal is limited to appeals by aggrieved parties from final judgments." Id. "In both criminal and civil

cases, however, we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, or (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. We address each *Curcio* prong in turn.

A

We begin with the petitioner's claim that the habeas court's order effectively terminated a separate and distinct legal proceeding for purposes of the first prong of *Curcio* because the discovery dispute resolved a property interest in his case file, which was separate from the merits of the habeas petition. The petitioner relies on *Abreu* v. *Leone*, 291 Conn. 332, 340–41, 968 A.2d 385 (2009), and *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 755–56, 48 A.3d 16 (2012), two cases in which this court held discovery orders to be final judgments. In response, the respondent relies on *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 207 A.3d 493 (2019), and argues that the discovery order is not a separate and distinct proceeding under *Curcio* but, rather, a mere step along the road to the final judgment in the habeas proceeding to which the petitioner is a party, thus distinguishing this case from the authorities relied on by the petitioner. We agree with the respondent and conclude that the discovery order did not terminate a separate and distinct legal proceeding.

In *Abreu*, the intervening plaintiff, the Department of Children and Families (department), appealed from the order of the trial court compelling it to disclose information that would violate General Statutes § 17a-28 (b), which prohibits the disclosure of records main-

tained by the department. See *Abreu* v. *Leone*, supra, 291 Conn. 334–35. In determining that the challenged order was an appealable final judgment, we focused on the fact that the department was not a party to the underlying action and, thus, lacked the statutory right to appeal from the conclusion of that proceeding. See id., 349–50. We also emphasized that the trial court order at issue was unequivocal in its directives and that there were no further proceedings concerning the matter between the plaintiff and the defendant that involved the department. See id., 345–47.

Subsequently, in *Woodbury Knoll, LLC*, a nonparty law firm brought a writ of error from the trial court's order to produce materials that it claimed were protected by attorney-client privilege and the attorney work product doctrine. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 752. In determining whether there was subject matter jurisdiction, this court identified three guiding principles emerging through its final judgment jurisprudence: (1) "the court's focus in determining whether there is a final judgment [under the first prong of *Curcio*] is on the order immediately appealed, not [on] the underlying action that prompted the discovery dispute"; (2) "determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly"; and (3) "although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order."[4] (Emphasis

[4] Relying on these principles, the petitioner also argues that he should not have to be subject to a contempt finding before being entitled to appellate review of the discovery order. See, e.g., *Barbato* v. *J. & M. Corp.*, 194 Conn. 245, 250, 478 A.2d 1020 (1984) ("If the party chooses to keep the information confidential, even after being ordered by the trial court to divulge it, he or she may be held in contempt. A judgment of contempt is a final, reviewable

omitted; internal quotation marks omitted.) Id., 760–61. In applying these principles and holding that there was an appealable final judgment in *Woodbury Knoll, LLC*, we expressly articulated an exception to our final judgment jurisprudence for nonparties to the underlying matter.[5] See id., 769.

Our recent decision in *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 711, articulates the status of the *Woodbury Knoll, LLC* nonparty exception, as narrowed by other cases: "[A]n interlocutory discovery order [terminates a separate or distinct proceeding] under the first prong of *Curcio* only if the trial court has issued a clear and unequivocal order that is sufficiently definite, specific, and comprehensive concerning a discovery request served on a *nonparty* for information that is not required to resolve the underlying issue."[6] (Emphasis added.) Id., 736; see also *McConnell* v.

judgment."). We disagree. In *Abreu* and *Woodbury Knoll, LLC*, the challenged orders directly conflicted with a statute or ethical duty, respectively, that precluded the attorney from complying. In this case, no such obligation binds the petitioner.

We acknowledge the petitioner's claim that complying with the habeas court's order would have exposed him to possible legal action by the Office of the Chief Public Defender (OCPD). In addition to this being merely hypothetical, neither the petitioner nor the OCPD, which filed an amicus curiae brief in support of the petitioner's position, cites any legal theory under which the OCPD could take legal action against the petitioner for turning over the case file as ordered. Thus, we have no occasion to consider any counterbalancing factor that might militate against requiring the parties to be held in contempt, as in *Abreu* and *Woodbury Knoll, LLC*.

[5] In so concluding, we emphasized that a "*different rule for nonparties* would not undermine the rules governing the discovery process between parties in any manner." (Emphasis added.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 771.

[6] *Redding Life Care, LLC*, concerned a tax appeal between the plaintiff property owner and the defendant town. See *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 714–15. The town filed a motion to depose the plaintiff in error, who had completed appraisals on the property in dispute in connection with the tax appeal. See id., 715. The appeal arose from the trial court's denial of the plaintiff in error's motion seeking a protective order to avoid the deposition. Id.

*McConnell*, 316 Conn. 504, 512–13, 113 A.3d 64 (2015); *Niro* v. *Niro*, 314 Conn. 62, 72–73, 100 A.3d 801 (2014). Because the petitioner is indeed a party to the habeas proceedings, we conclude that the discovery order did not terminate a separate and distinct proceeding and, accordingly, is not an appealable final judgment under the first prong of *Curcio*.[7]

B

An interlocutory order is appealable under the second prong of *Curcio* "[when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31. The petitioner contends that the second prong of *Curcio* is satisfied because the discovery order threatens the preservation of his right to confidentiality in his defense counsel's case file. The petitioner claims that the right was established in two ways, namely, (1) by the habeas court's decision entitling him to withdraw any claims prior to disclosing the file, and (2) by the Superior Court's decision in *Breton* v. *Commissioner of Correction*, 49 Conn. Supp. 592, 600–602, 899 A.2d 747 (2006), which provides that, when a party places the contents of an attorney's advice at issue by filing a habeas petition claiming ineffective assistance of counsel, that party impliedly waives the attorney-client privilege but can reassert that privilege by withdrawing the applicable portions of the habeas petition. In response, the respondent contends that the discovery order did not conclude the rights of the parties because there very well could have been future proceedings following the receipt of the ordered privilege log. See, e.g., *State* v. *Jamar D.*, 300 Conn. 764, 773, 18 A.3d

[7] Because the petitioner is a party to the habeas proceedings, we need not consider whether the discovery order in the present case is a clear and unequivocal order that is sufficiently definite, specific, and comprehensive; all elements of the standard are required to satisfy the first prong of *Curcio*. See *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 738.

582 (2011) (defendant's transfer from youthful offender docket was not appealable final judgment under *Curcio* because it was still subject to future proceeding and not yet finalized). We conclude that there was no final judgment under the second prong of *Curcio*.

"The second prong of the *Curcio* test, on which the [petitioner] relies in the present case, permits an appeal if the decision so concludes the rights of the parties that further proceedings cannot affect them. . . . That prong focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . . In other words, the [appellant] must do more than show that the trial court's decision threatens him with irreparable harm. The [appellant] must show that that decision threatens to abrogate a right that he or she *then* holds. . . . The right itself must exist independently of the order from which the appeal is taken." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745–46, 150 A.3d 1109 (2016); accord *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 226–27, 901 A.2d 1164 (2006).

The key to appellate jurisdiction under the second prong of *Curcio* is not so much that the right is already secured to a party; indeed, what is at issue in an appeal is the effect of the challenged order on the scope of the claimed right at issue. Rather, the second prong of *Curcio* boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing the litigation to proceed before the trial court will—in and of itself—

function to deprive a party of that right. See, e.g., *Blakely* v. *Danbury Hospital*, supra, 323 Conn. 746 ("[t]he rationale for immediate appellate review is that the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation" (internal quotation marks omitted)); *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 231 ("even when an order impinges on an existing right, if that right is subject to vindication after trial, the order is not appealable under the second prong of *Curcio*"). Paradigmatic examples of such rights that require immediate vindication via an interlocutory appeal are double jeopardy violations resulting in successive prosecutions; see, e.g., *State* v. *Crawford*, 257 Conn. 769, 777, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); collateral estoppel and res judicata; see, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011); and various immunities from suit. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (absolute immunity for statements made in judicial and quasi-judicial proceedings); *Shay* v. *Rossi*, 253 Conn. 134, 166, 749 A.2d 1147 (2000) (colorable claim to state's sovereign immunity is appealable final judgment because that "doctrine protects against suit as well as liability—in effect, against having to litigate at all"), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003); see also *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 233–34 (denial of motion for prepleading security by unauthorized insurer pursuant to General Statutes § 38a-27 (a) is appealable under second prong of *Curcio* because, "once the trial has concluded, the court will be unable to restore to the plaintiffs either their right to have the defendants post security or their right to obtain a default

judgment against the defendants"); cf. *Blakely* v. *Danbury Hospital*, supra, 751–52 (This court held that the defendant's interlocutory appeal challenging the trial court's decision that a savings statute permitted the plaintiff's wrongful death action was not a final judgment under the second prong of *Curcio*, even when the limitations period was jurisdictional in nature, because "jurisdictional prerequisites to suit are [not] intended to confer immunity from suit. If that were the case, an interlocutory appeal would be permitted every time a party challenged the satisfaction of any of the numerous justiciability matters that we have deemed to be jurisdictional in nature (standing, mootness, ripeness, political question doctrine) . . . or any condition precedent to suit in a statutorily created cause of action that similarly has been deemed jurisdictional," meaning that "appellate courts would be inundated with interlocutory appeals, in contravention of our intention that the *Curcio* exceptions to the final judgment rule be narrow." (Citation omitted; internal quotation marks omitted.)).

The issue presented in the present case falls squarely into the realm of discovery orders in pending cases that are not subject to interlocutory appeals under the second prong of *Curcio*, even when they concern the disclosure of materials that are potentially subject to the attorney-client privilege or other protections. The leading case on this point is *Melia* v. *Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987), in which this court concluded that the trial court's order to an insurance company to disclose its claims file was not an appealable final judgment, despite the insurance company's assertion of the attorney-client privilege and attorney work product doctrine. See id., 253, 259. The court rejected the insurer's argument that "the privacy interests protected by the attorney-client privilege cannot be completely restored once they have been invaded

by a disclosure order," observing that, although "a remand for a new trial resulting from an erroneous order to disclose information protected by the privilege cannot wholly undo the consequences of its violation . . . the rights of the client in respect to use of privileged material during further proceedings in the litigation can be adequately safeguarded." Id., 257. The court further observed that its "concern for the efficient operation of the judicial system, which is the practical consideration behind the policy against piecemeal litigation inherent in the final judgment rule . . . has induced [it] to dismiss appeals [when] statutorily created rights of privacy, no less significant than the right of confidentiality for attorney-client communications, have been at stake." Id., 258. Thus, the court determined that "the occasional violation of the attorney-client privilege . . . is a lesser evil than that posed by the delay in the progress of cases in the trial court likely to result from interlocutory appeals of disclosure orders." Id., 259; see *State* v. *Fielding*, 296 Conn. 26, 39–40, 994 A.2d 96 (2010) (order directing state to duplicate and provide to defense counsel materials seized in connection with defendant's child pornography arrest was not appealable by state under second prong of *Curcio*, despite claim that, "once the materials at issue . . . are disclosed, the proverbial horse is out of the barn"); *Massachusetts Mutual Life Ins. Co.* v. *Blumenthal*, 281 Conn. 805, 807–809, 815, 917 A.2d 951 (2007) (denial of application for temporary injunction to enforce confidentiality protection for internal investigative reports provided to attorney general pursuant to General Statutes (Rev. to 2007) § 35-42 was not appealable under second prong of *Curcio*).

Applying these principles to the present case, we observe that the petitioner's claimed right to maintain the confidentiality of the case file is one that is not akin to that narrow set of rights that require immediate

appellate vindication by interlocutory appeal to avert their loss. This is particularly so given that the petitioner filed his appeal prior to producing a privilege log to the habeas court, which means that the appeal preceded any resolution by the habeas court in camera of individual claims of privilege as to specific items. The habeas court's rulings on these individualized determinations might well have been to the petitioner's satisfaction, obviating any perceived need for an interlocutory appeal. Put differently, the timing of this interlocutory appeal renders it a potentially piecemeal appeal even as to the privilege issue, let alone the habeas action as a whole.[8] Accordingly, we conclude that it is not appealable under the second prong of *Curcio*.

Because the discovery order at issue does not satisfy either prong of *Curcio*, we conclude that it is not an appealable final judgment. Accordingly, the Appellate Court properly dismissed the petitioner's appeal for lack of subject matter jurisdiction.

[8] In arguing that *Melia* v. *Hartford Fire Ins. Co.*, supra, 202 Conn. 252, is not dispositive, the petitioner contends that (1) his interests should be given more weight than concerns about judicial economy because of the relationship between the attorney-client privilege and his constitutional right to counsel, and (2) judicial efficiency concerns are not as poignant in the habeas context because "discovery disputes involving attorney-client privilege are almost nonexistent in habeas corpus cases." The respondent conceded the second point at oral argument before this court, and, indeed, this court has, subsequent to its decision in *Melia*, rejected the proposition that allowing interlocutory appeals of discovery orders would open the floodgates. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 767–68 ("Simply put, any concern over a flood of discovery order appeals is both misinformed and speculative. Indeed, we need look no further than the fact that, in the three years since *Abreu* was decided, no flood of appeals from discovery orders has occurred."). Although these pragmatic considerations are well taken, disclosure orders such as the one at issue in the present case do not fit within the narrow exception provided by the second prong of *Curcio*, given our repeated rejections of "the horse has left the barn" arguments to establish a right that requires immediate vindication by interlocutory appeal, lest it be lost. See, e.g., *State* v. *Fielding*, supra, 296 Conn. 39.

II

Notwithstanding our conclusion that we lack subject matter jurisdiction over this appeal, the petitioner nevertheless asks us to reach the merits of his privilege claims. The petitioner argues in his reply brief that the Chief Justice should certify this issue for an expedited appeal as a question of great public importance pursuant to General Statutes § 52-265a.[9]

On the rare occasion, this court has treated a case certified for appeal from a judgment of the Appellate Court as a late petition to the Chief Justice under § 52-265a,[10] which does not require a final judgment for appellate jurisdiction. See, e.g., *State* v. *Komisarjevsky*, 302 Conn. 162, 164–65, 25 A.3d 613 (2011) (raising issue sua sponte); see also *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 713 n.1, 189 A.3d 578 (2018) ("[t]his court has construed § 52-265a to allow the Chief Justice to certify an appeal in matters of public importance even if the order challenged is not a final judgment"). As we pointed out in *Komisarjevsky*, however, this remedy is highly unusual. See *State* v. *Komisarjevsky*, supra, 165–66 n.3. The Chief Justice granted the request for § 52-265a relief in that case because it presented urgent matters concerning a death penalty trial arising from the defendant's connection with a triple murder,

[9] The petitioner also argues in his reply brief that we should invoke our supervisory authority over the administration of justice to consider the merits of his claims. We decline the defendant's invitation given the extraordinary nature of that remedy, which nevertheless depends on the existence of subject matter jurisdiction in the first instance. See *State* v. *Reid*, 277 Conn. 764, 777–78, 894 A.2d 963 (2006).

[10] The Chief Justice may waive the "failure to follow the normal certification procedure" including a delay in filing, and consider the merits of an untimely petition for certification of a public interest appeal under § 52-265a. *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 300, 695 A.2d 1051 (1997); see id., 300–301; *State* v. *Ayala*, 222 Conn. 331, 342, 610 A.2d 1162 (1992).

sexual assault, and arson. See id., 166–67 and n.3. In *Komisarjevsky*, the defendant appealed from the trial court's granting of a motion to vacate the sealing order filed by the intervenors, who were members of the media, claiming that the vacating of that order would violate his right to a fair trial. See id., 164–66. The Appellate Court dismissed the appeal for lack of a final judgment, and this court granted certification to consider that issue. See id., 172. By the time the appeal was argued before this court, the start of evidence was scheduled for a date less than three months away. See id., 166 n.3. Given the urgent nature of the matter, this court chose "the most expeditious route properly available . . . to avoid potentially irreparable harm" and elected to treat the appeal as a late § 52-265a petition, which it then referred to the Chief Justice for certification. See id., 165, 165–66 n.3. Because the present case does not present a matter of similar public interest or urgency, we decline to exercise our authority to treat the petitioner's appeal as a late petition for certification to appeal under § 52-265a for consideration by the Chief Justice. See *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 301 n.17, 695 A.2d 1051 (1997) (whether to treat appeal as late § 52-265a petition, "despite [the appellant's] failure to follow the procedures of § 52-265a," depends "in large part . . . [on] the importance of the issues in the case"); see also *State* v. *Fielding*, supra, 296 Conn. 35 n.7 (declining to treat jurisdictionally defective appeal as § 52-265a petition given Chief Justice's determination that appeal from order requiring state to duplicate and provide defense counsel child pornography evidence did not present question of substantial public interest because newly enacted statute resolved issue for future cases, and trial court's order addressed state's security concerns). Accordingly, we do not reach the second issue of whether the trial court

properly rejected the petitioner's claim of privilege in his criminal defense file.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* ROBERT R.*
## (SC 20355)

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

*Syllabus*

Convicted of sexual assault in the first degree in connection with the sexual abuse of M, the stepsister of the defendant's girlfriend, S, the defendant appealed. At trial, M testified that the defendant had sexually assaulted her on four occasions, the first three of which occurred when M was a minor and the defendant was in his twenties. The fourth incident, which led to the defendant's conviction, occurred when M was eighteen years old. With respect to the latter incident, M testified that she was home alone when the defendant knocked on the door and that, after she asked him to leave, the defendant entered the home, grabbed her arm, pushed her toward the living room couch, and sexually assaulted her. M further testified that, after the defendant was startled by an outside noise, he went into the kitchen, where he ejaculated into a paper towel that he threw into a garbage can. At trial, the defendant denied that he ever sexually assaulted M, but he admitted to having consensual sex with her during that incident. He also denied that he ejaculated into a paper towel and threw it in the garbage. N, a forensic biologist, testified at trial regarding tests she conducted on the paper towel, which M had provided to the police shortly after the incident. N testified that those tests revealed the presence of semen but were negative for spermatozoa. P, a forensic science examiner, testified that tests she performed on the paper towel revealed the presence of the defendant's skin cells but were inconclusive as to whether his sperm cells were also present. Neither N nor P could indicate how the various substances came to be on the towel. During closing arguments, defense counsel focused on attacking M's credibility and exposing her motive to falsely accuse the defendant. Specifically, defense counsel attempted to present the defen-

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault 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.

dant's theory of the case that M had planted evidence by wiping herself with the paper towel after engaging in a consensual sexual encounter with the defendant and then presenting that paper towel to the police. The trial court nevertheless sustained the prosecutor's objection and precluded defense counsel from making that argument, concluding that it was not supported by any evidence in the record. On appeal, the defendant contended, inter alia, that the trial court had violated his constitutional right to the assistance of counsel by precluding defense counsel from arguing to the jury that M had planted physical evidence on the paper towel in an effort to falsely accuse the defendant. *Held*:

1. The trial court improperly precluded defense counsel from arguing to the jury during closing argument that M had planted physical evidence on the paper towel in an effort to substantiate her false allegations against the defendant, in violation of the defendant's constitutional right to the assistance of counsel, and, accordingly, this court reversed the judgment of conviction and remanded the case for a new trial:

a. The trial court improperly restricted the scope of defense counsel's closing argument by barring him from presenting the defendant's theory of the case, as there was sufficient evidence in the record from which the jury reasonably could have inferred that M planted the evidence on the paper towel to substantiate her false allegations against the defendant: defense counsel relied on reasonable inferences from the facts in evidence, including the conflicting testimony of M and the defendant regarding the incident and whether the defendant ejaculated into the paper towel, testimony that it was M who provided the paper towel to the police, the testimony of N and P regarding their findings, and the testimony of one of M's stepsisters that M had a history of making false claims; moreover, the evidence presented at trial, namely, that M had a tumultuous relationship with her family, that she had a history of making false claims, and that she had been engaged in a consensual romantic relationship with the defendant, who married S only months after the incident in question, provided a basis for the jury to reasonably infer that M had a motive for planting evidence of the defendant's DNA on the paper towel.

b. The trial court's improper limitation on the scope of defense counsel's closing argument deprived the defendant of his constitutional right to the assistance of counsel, and, accordingly, the defendant was entitled to a new trial; M's testimony was the only source of evidence from which the jury reasonably could have concluded that the sexual encounter with the defendant was not consensual, the only argument presented by defense counsel to establish reasonable doubt as to the defendant's guilt concerned M's credibility, and, because the evidence regarding the paper towel provided the strongest evidence, from the defendant's perspective, that M lied about the incident, depriving defense counsel of the opportunity to make that argument was to deprive the defendant of the full and fair participation of his counsel in the adversary process.

2. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of sexual assault in the first degree on the ground that the state failed to prove that he used force or the threat of force; M's testimony with respect to the alleged sexual assault, including that the defendant grabbed her arm, pushed her toward the couch, removed her underwear, and inserted his penis inside of her as she tried to push him off and protested, was sufficient to establish the force element required for a conviction of first degree sexual assault.

3. This court declined to address the defendant's claim that the trial court had abused its discretion in admitting the testimony of an expert in the field of child and adolescent sexual abuse, insofar as the expert's expertise was in child sexual abuse and M was eighteen years old when the incident at issue occurred; although it was possible that the defendant's claim would arise during the defendant's new trial if the prosecutor elected to call the same expert, the trial court may further evaluate the issue on remand, as the prosecutor may call that expert and probe her experience in working with eighteen year olds or may call a different expert, in which case the record would look different from the one presently before this court.

Argued May 6—officially released August 6, 2021**

*Procedural History*

Substitute information charging the defendant with three counts of the crime of risk of injury to a child, and with one count each of the crimes of sexual assault in the first degree and sexual assault in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Russo*, *J.*; verdict and judgment of guilty of sexual assault in the first degree, from which the defendant appealed. *Reversed*; *new trial.*

*Cameron L. Atkinson*, with whom, on the brief, were *Norman A. Pattis*, *Kevin Smith* and *Zachary Reiland*, for the appellant (defendant).

*Matthew A. Weiner*, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Ann F. Lawlor*, supervisory assistant state's attorney, for the appellee (state).

** August 6, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Opinion*

McDONALD, J. The defendant, Robert R., appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree. On appeal, the defendant claims that (1) the trial court violated his sixth amendment right to the assistance of counsel by precluding defense counsel during closing argument from arguing to the jury that the complainant, M, had planted physical evidence on a paper towel in an effort to substantiate her false allegations against the defendant, (2) there was insufficient evidence to prove that the defendant used force or the threat of force, as required to sustain his conviction of sexual assault in the first degree, and (3) the trial court improperly admitted expert testimony from a witness who specializes in child and adolescent sexual abuse. We agree with the defendant with respect to his first claim and, accordingly, reverse the judgment of conviction.

The jury reasonably could have found the following relevant facts. When M was twelve years old, she moved to Bridgeport to live with her father, Louis, stepmother, Dora, and stepsister, Isabelle. Another of M's stepsisters, Stephanie, was dating the defendant. Stephanie and the defendant lived together down the street from Louis and Dora. At the time M moved to Bridgeport, the defendant was in his mid-twenties. M testified that the defendant sexually assaulted her on multiple occasions and exposed her to sexually inappropriate situations when she was between the ages of thirteen and eighteen years old. Specifically, M testified to four incidents.

The first incident described by M occurred when she was thirteen years old. One evening, the defendant came to M's house because he had an argument with Stephanie. Louis told the defendant that he could "stay on the couch." M testified that, when she brought the

defendant a blanket, he "touch[ed] [her] butt," followed her to her bedroom, and sexually assaulted her. M testified that, the next morning, the defendant sexually assaulted her a second time in her bedroom. M told Louis about the sexual assaults, and Louis and Dora then took her to Bridgeport Hospital. M ultimately left the hospital before being examined by a physician. Louis' testimony regarding this incident, however, varied from M's. He testified that, on the evening in question, he and the defendant were watching wrestling and drinking beer in the living room. The defendant went upstairs to use the bathroom. Louis recalled that he went upstairs and found the defendant, fully clothed, looking in on M while she slept. He then told the defendant to "get the hell out," and the defendant left the house. Louis also testified that he found the defendant hiding in the closet in M's bedroom one morning but could not recall if it was the morning after he first found the defendant looking in on M.

M also recounted a second incident. She testified that, when she was thirteen years old, the defendant asked her to send him nude pictures of herself. M testified that she complied and that the defendant then sent her a nude picture of himself. Isabelle, however, testified that she was present when the defendant and Stephanie informed Louis that M had been sending the defendant nude pictures of herself. Isabelle also testified that she did not know anything about the defendant sending pictures to M. Finally, Isabelle recalled that M had a history of "making false claims."

M described a third incident that occurred when she was fourteen or fifteen years old. M testified that, one night, when her friend, V, slept over at her house, the defendant came into M's bedroom, removed her clothes, and sexually assaulted her. V confirmed that she regularly slept over at M's house. She stated that, during the sleepovers, she would sleep in M's twin bed with

M. V testified, however, that she did not recall the defendant ever entering M's bedroom while she slept over.

Finally, M testified that a fourth incident occurred on July 28, 2016, when M was eighteen years old. Specifically, M recounted that, after returning home from a summer program at a nearby university, she let her dog out into her fenced in backyard. Shortly thereafter, the defendant knocked on the front door. When M opened the door, she saw the defendant holding her dog, and he explained that he found the dog down the street from M's house. M took the dog from the defendant, and the defendant asked M where Louis was. M responded that he had not arrived home from work. M then asked the defendant to leave because Louis did not want him there when M was home alone. M testified that the defendant, instead of leaving, kept inching into the home, until he grabbed M's arm, pushed her toward the living room couch, and sexually assaulted her. M testified that, during the assault, "I was trying to push him off me with my arms, but he kept holding [them] down, so I kept turning my body like this, with my knees, trying to push him off me, and he didn't want to get off. And I was yelling, help, can you stop, can you get off me, and then he didn't want to get off me." M testified that the defendant ended the assaultive sexual intercourse with her suddenly when he was startled by a car pulling out of a neighbor's driveway. According to M, the defendant got off of her, went into the kitchen, began to masturbate, ejaculated into a paper towel, threw the paper towel into a garbage can, and left.

Following the assault, M called Louis and told him what had just transpired. She also texted Isabelle that the defendant had "touched" her and that she "fe[lt] disgusted." The police were subsequently called, and M reported the incident to officers on the scene and provided them with the paper towel into which she claimed the defendant had ejaculated. M was then taken

by ambulance to the hospital, where medical personnel performed a physical examination and administered a sexual assault evidence collection kit. The defendant was interviewed by the police and denied having any sexual contact with M.

In connection with the allegations made by M, the state charged the defendant with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and two counts of risk of injury to a child in violation of § 53-21 (a) (1).

At trial, the defendant testified in his own defense. He denied each allegation, stating that he never sexually assaulted M. The defendant, however, did admit to having consensual sex with M on July 28, 2016, when she was eighteen years old, a claim that he denied when he was initially questioned by the police. He explained to the jury that he lied to the police initially because he was being interviewed within earshot of Stephanie, and she did not know at that point that he had "cheat[ed] on" her with M. The defendant testified that he began having consensual, physical encounters with M in March, 2016. He stated that the encounters began with "romantic conversations" in the car, then progressed to making out, and eventually led to the two having consensual sex. The defendant testified that they had consensual sex on two occasions: first, approximately one week prior to the July, 2016 incident in M's home, and, the second time, on July 28, 2016.

With respect to the July 28, 2016 incident, the defendant testified that he had found M's dog on the street and took it back to her house. When M opened the door, she hugged him, and they began to kiss. According to the defendant, things quickly progressed, and the two

began having sex against the doorway. The defendant testified that, shortly after moving to the couch, he became self-conscious, realizing that this was the time that Louis typically arrived home from work, and he was worried that Louis would walk in on them. The defendant further testified that, as a result, he ended the encounter, left the house, and went home. The defendant specifically denied M's claim that he ejaculated into a paper towel and threw it in the garbage can, explaining that, after he stopped having sexual intercourse, he just pulled up his pants and left. He also testified that M did not seem upset when he left the house.

Jennifer Nelson, a forensic biologist, also testified at trial. Nelson testified that she analyzed the bodily fluids found on the paper towel at the state forensic laboratory. Specifically, she conducted tests on the paper towel, looking for the presence of semen and spermatozoa.[1] These tests revealed the presence of semen on the paper towel but were negative for spermatozoa. Nelson testified that she did not know how the substances came to be on the paper towel. Angela Przech, who works as a forensic science examiner at the state forensic laboratory, testified that she performed DNA testing on a stain found on the paper towel. Przech's testing revealed that the defendant's DNA profile was included in a DNA mixture found in an epithelial fraction sample of the stain.[2] Przech testified that she assumed that M was the other DNA contributor. Regarding the DNA profile found in the sperm-rich fraction sample, M was eliminated as a source, and the defendant's "profile was inconclusive when compared to the evidentiary sample." In short, Przech's testing revealed

[1] Nelson testified that spermatozoa are "sex cell[s] that [are] deposited in semen when ejaculated from a male."

[2] Przech explained that sperm cells and epithelial cells are different: "[E]pithelial cells are like your skin cells, and the sperm cells are from sperm."

that the defendant's skin cells were on the paper towel, but her testing was inconclusive as to whether his sperm cells were also present. Przech also testified that she did not know how the substances came to be on the paper towel.

The jury ultimately found the defendant guilty of sexual assault in the first degree in connection with the events of July 28, 2016, and not guilty of the remaining charges. The court sentenced the defendant to a total effective sentence of twenty years' incarceration, two of which are the mandatory minimum, suspended after eight years, and ten years of supervised probation. This appeal followed. Additional facts will be set forth as necessary.

I

We first consider the defendant's claim that the trial court improperly precluded defense counsel during closing argument from arguing to the jury that M had planted physical evidence on the paper towel in an effort to substantiate her false allegations against the defendant, thereby violating the defendant's right to the assistance of counsel under the sixth amendment to the United States constitution.

During closing argument, defense counsel focused on attacking M's credibility and exposing her motive to falsely accuse the defendant. Specifically, with respect to the events of July 28, 2016, defense counsel "attempted to present [his] theory that [M] wiped her genitals with the paper towel after the defendant left . . . following their consensual, sexual encounter, and then presented that paper towel to the police in an effort to manufacture evidence to support her false claim that the intercourse was not consensual, but sexual assault." Specifically, the following exchange transpired:

"[Defense Counsel]: So, when you look at that event, you know, July 28, 2016, [M's] version is—is not—is not credible. And I should say it isn't a competition between which version you find more credible. It is whether . . . the evidence that's presented here convinces you beyond a reasonable doubt. And, again, the judge will instruct you as to what that means, but it means more than possibly or probably.

"And with respect to the evidence with the paper towel, you heard . . . Nelson testify that they did not find sperm on that towel, they found components of semen. And I did ask her, wouldn't you expect to find sperm on there if there was ejaculate on there? She said, well, not necessarily, or something along those lines. *But—and you heard* [*the defendant*] *testify, I never touched a paper towel, he doesn't know what they're talking about. Well, then, how does* [*his*] *DNA get on the paper towel? And the answer is it comes from* [*M*]. *That's her house, her kitchen.* And—

"[The Prosecutor]: I'm going to object, Your Honor; there was no evidence to that.

"The Court: [Defense counsel]?

"[Defense Counsel]: It's argument, Your Honor.

"The Court: I don't think there was any evidence in the record of what you are explaining to the jury now. I'm going to sustain the state's objection.

"[Defense Counsel]: Very good, Your Honor. So, again, the case comes down to credibility, and the center of the state's case is the complaining witness, [M], and her testimony is not credible, certainly not credible enough to remove the state's burden of [proof] beyond a reasonable doubt." (Emphasis added.)

During the state's rebuttal closing argument, the prosecutor focused on bolstering M's credibility and attacking

the defendant's credibility. The prosecutor also highlighted M's testimony regarding the paper towel. Specifically, the prosecutor stated: "[M] told us how a neighbor was pulling out of the driveway, [she and the defendant] could hear the neighbor pulling out of the driveway. The driveway, according to [M], was right next to the—or abutted the living room in the home. And the defendant heard that, jumped up, ejaculated into a paper towel in the kitchen, which is a big, open room, and left."

The defendant contends that defense counsel's argument, that M planted the defendant's DNA on the paper towel, was consistent with the physical evidence collected from the paper towel and the defendant's testimony. Had defense counsel been allowed to argue that M planted the evidence on the paper towel, the defendant claims, M's "credibility would have been further challenged." In short, the defendant contends that the state had the opportunity to fully present its theory of the case to the jury but that he was not afforded the same opportunity.

The state disagrees and contends that the defendant's claim on appeal "is meritless because there was no evidence before the jury from which it reasonably could have concluded that the semen stains found on the paper towel were put there by M." Therefore, the state argues, "the trial court properly precluded [defense counsel] from urging the jury to reach a conclusion based solely on speculation." Alternatively, the state contends that, even if the trial court's ruling was improper, it did not deprive the defendant of his sixth amendment right to the assistance of counsel.

We begin with the standard of review and relevant legal principles. "The sixth amendment guarantee in the federal constitution of the right to assistance of counsel has been held to include the right to present

closing arguments."[3] (Internal quotation marks omitted.) *State* v. *Ames*, 171 Conn. App. 486, 516, 157 A.3d 660, cert. denied, 327 Conn. 908, 170 A.3d 679 (2017). As the United States Supreme Court has explained, "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary [fact-finding] process in a criminal trial. Accordingly, it has universally been held that [defense counsel] has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." *Herring* v. *New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . [Although] we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, 223 Conn. 52, 59–60, 612 A.2d 755 (1992). Although defense counsel may not make speculative arguments to the jury, we have explained that "counsel may comment [on] facts properly in evidence and [on] *reasonable inferences* drawn therefrom." (Emphasis

[3] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The sixth amendment right to the assistance of counsel applies to state criminal proceedings by incorporation through the due process clause of the fourteenth amendment. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

added.) *State* v. *Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095 (1977).

It is beyond dispute that, "[i]f the trial court denies the defendant an opportunity to give closing arguments, the reviewing court should grant a new trial." *State* v. *Plaskonka*, 22 Conn. App. 207, 211, 577 A.2d 729, cert. denied, 216 Conn. 812, 580 A.2d 65 (1990). We have gone further and held that "[t]he right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so when . . . the prohibited argument bears directly on the defendant's theory of the defense." *State* v. *Arline*, supra, 223 Conn. 64.

Here, defense counsel's closing argument focused on attacking M's credibility and exposing her motive to falsely accuse the defendant of sexual assault. Defense counsel sought to present his theory of the case to the jury—that M had planted the evidence on the paper towel by wiping herself following a consensual, sexual encounter with the defendant. It is clear to us that this argument was proper because it is based on reasonable inferences from facts in evidence. Contrary to the trial court's conclusion that there was no evidence in the record to support the argument, we conclude that defense counsel's argument relied on reasonable inferences from the following evidence: (1) M's testimony that the defendant ejaculated into the paper towel following the alleged sexual assault; (2) testimony from both M and an officer who responded to the scene that M provided the paper towel to the police; (3) Nelson's testimony that no spermatozoa were present on the paper towel; (4) Przech's testimony that she assumed that the DNA found on the paper towel matched M's;

(5) the defendant's testimony denying M's claim that he ejaculated into a paper towel and his version of events that, after he stopped having sex, he just pulled up his pants and left; (6) the fact that only M and the defendant were home at the time of the incident; and (7) according to at least one witness, M had a history of "making false claims."

Moreover, the jury reasonably could have concluded, on the basis of various testimony throughout trial, that M's relationship with her family was strained and that M and the defendant were engaged in a romantic, consensual relationship. For example, M testified that she was worried that Louis would not believe her about the July 28, 2016 assault because she and Dora did not have a good relationship. The nature of M and Dora's relationship was confirmed by Dora, who testified that she "tried to have a relationship with [M], but she never let me in," and that M told her many times, "you're not my mother." Dora also told the police that M was ruining her relationship with Louis. Additionally, Isabelle testified that she was aware of "a history of [M] making false claims." For her part, Stephanie testified that she does not speak to Louis and they are not on good terms as a result of the July 28, 2016 incident. These facts provided a basis for the jury to reasonably infer that M had a motive for planting the defendant's DNA on the paper towel.

As to the nature of the relationship between M and the defendant, the defendant testified that, in March, 2016, he and M began "having romantic conversations," they began "getting intimate," and were in a "romantic relationship . . . ." The defendant also testified that, by July, 2016, he and M "were already in a relationship, and not a relationship as boyfriend and girlfriend, more as we were making out type stuff." Indeed, during her rebuttal closing argument, the prosecutor emphasized the defendant's characterization of the nature of his

relationship with M as a "love affair . . . ." Finally, the defendant testified that he was engaged to Stephanie and ultimately married her just three months after M alleged that he had sexually assaulted her. Again, these facts tended to make reasonable the defendant's theory regarding the paper towel.

It would not have been an unreasonable inference for the jury to conclude that M had planted the evidence on the paper towel after the sexual encounter with the defendant ceased, either because of her tumultuous relationship with her family or because she was romantically interested in the defendant and was not happy that he was engaged to Stephanie. Moreover, regardless of her motive for allegedly planting the evidence, the jury was presented with two versions of events based solely on the testimony of M and the defendant. M testified that the defendant ejaculated into a paper towel. The defendant testified that he did not. Given that it is undisputed that the only two people in the home at the time of the alleged sexual assault were M and the defendant, if the jury accepted the defendant's testimony that he did not ejaculate into a paper towel, it would not have been an unreasonable inference to conclude that the only other way the defendant's DNA could have gotten on the paper towel was by M's act of placing it there. To be sure, it is no less reasonable than an inference that the defendant ejaculated into the paper towel. As the prosecutor conceded at oral argument, Nelson and Przech did not testify that it was more likely than not that the defendant's DNA ended up on the paper towel as a result of the defendant's ejaculating into it. They both testified that they did not know how the defendant's DNA came to be on the paper towel. Thus, the jury's determination as to how the defendant's DNA came to be on the paper towel was based solely on the testimony of M and the defendant. Defense counsel's argument was not "sheer speculation"

or "rhetorical advocacy"; (internal quotation marks omitted) *State* v. *Manley*, 195 Conn. 567, 580, 489 A.2d 1024 (1985); rather, it was based on logical inferences from the facts as presented to the jury if it credited the defendant's testimony.

In *Arline*, we "agree[d] with the reasoning of the Maine Supreme [Judicial] Court in *State* v. *Liberty*, 498 A.2d 257 (Me. 1985)." *State* v. *Arline*, supra, 223 Conn. 65 n.11. In *Liberty*, the Maine high court concluded that the trial court erred in restricting defense counsel from arguing in summation certain evidence that had been admitted without objection. *State* v. *Liberty*, supra, 258. The court explained: "In a closing argument each party should be permitted to summarize the case from the perspective of that party's interpretation of all the evidence in the case and the inferences to be drawn therefrom. It is not for the presiding [judge] to proscribe argument as to a portion of the evidence which the jury has heard." Id., 259. Likewise, in the present case, defense counsel should have been permitted to present the defendant's theory of the case to the jury, just as the state did, given that there was sufficient evidence in the record from which the jury reasonably could have inferred that M planted the evidence on the paper towel to substantiate her false allegations against the defendant.

The state nevertheless contends that the defendant's argument relies on "the assumption that, if the jury credited the defendant's testimony, the only way it could have reconciled that testimony with the lab results was by concluding that M had wiped her genitals after a consensual encounter" with the defendant. The state purports to negate that assumption by speculating about other possible conclusions the jury could have reached on the basis of the defendant's testimony and the other evidence in the record. We are not persuaded. The defendant is not required to prove that *the only*

*way* the jury could have reconciled the testimony and other evidence was by concluding that M wiped herself with the paper towel. The defendant need only establish that *one way* the jury could have reconciled all the testimony and other evidence was by concluding that M wiped herself. In other words, the defendant does not have to conclusively establish that the jury would have accepted his argument; he need only establish that it was a reasonable inference for the jury to make on the basis of the evidence. See, e.g., *State* v. *Kinsey*, supra, 173 Conn. 348 ("counsel may comment [on] facts properly in evidence and [on] reasonable inferences drawn therefrom").

Accordingly, we conclude that the trial court improperly restricted the scope of defense counsel's closing argument when it barred counsel from arguing to the jury that M had planted physical evidence in an effort to substantiate her false allegations against the defendant. We next consider whether the trial court's action in denying the defendant the opportunity to present his theory of the case to the jury denied him the right to the assistance of counsel.

The right to the assistance of counsel ensures an "opportunity to participate fully and fairly in the adversary [fact-finding] process." *Herring* v. *New York*, supra, 422 U.S. 858. "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Id., 862. "In a criminal trial, which is in

the end basically a [fact-finding] process, no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." Id.

Our appellate courts have previously found reversible error when the trial court precluded defense counsel from discussing certain issues during closing argument, particularly when an issue was significant and "[bore] directly on the defendant's theory of the defense." *State* v. *Arline*, supra, 223 Conn. 64. For example, in *Arline*, this court reversed the judgment of the Appellate Court and remanded the case for a new trial when the trial court improperly precluded defense counsel from questioning the credibility of the complainant during closing argument. Id., 64–65. Specifically, we concluded that the trial court improperly precluded defense counsel during closing argument from commenting on certain facts that had been elicited from the complainant on cross-examination that tended to establish her motive or bias. Id., 55–56, 62–63. We explained that the defendant's theory of defense was centered on attacking the complainant's credibility, and, although there were other pieces of evidence that called the complainant's credibility into question, the testimony elicited on cross-examination provided the only evidence of motive or bias. Id., 64. Given the centrality of the issue to the case, we concluded that preventing defense counsel from arguing motive or bias of the state's chief witness deprived the defendant of his sixth amendment right to the assistance of counsel. Id., 64–65; see, e.g., *State* v. *Ross*, 18 Conn. App. 423, 433–34, 558 A.2d 1015 (1989) (defendant was entitled to new trial when trial court prohibited defense counsel from commenting on fact that sole eyewitness to shooting, under state's theory of case, did not testify at trial).

Here, M's testimony was the only source of evidence from which the jury reasonably could have concluded

that the defendant sexually assaulted her.[4] The results of the forensic testing and the sexual assault evidence collection kit did not establish that the July 28, 2016 sexual encounter, which the defendant admitted occurred, was nonconsensual.[5] The only argument presented by defense counsel to establish reasonable doubt of the defendant's guilt was directed at M's credibility. Although there were numerous evidentiary bases from which M's credibility could be challenged,[6] the testimony and other record evidence regarding the paper towel provided the strongest evidence, from the defendant's perspective, that M lied about the July 28, 2016 encounter. To deprive defense counsel of the opportunity to argue that the state's chief witness lied, when the linchpin of the defense was attacking the credibility of that witness, is to deprive the defendant of the full and fair participation of his counsel in the adversary process. See, e.g., *State* v. *Arline*, supra, 223 Conn. 64 ("The right to present a closing argument is abridged . . . when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so when

[4] As defense counsel emphasized during closing argument, "[t]his case essentially comes down to one witness. All of these accusations stem from one individual, the complaining witness, [M]. There are medical reports and—and other reports that are there, but she is the source of that information. There isn't any independent information in those reports. So, we should look at her testimony and her credibility and assess [that evidence] to see if it supports a finding of [guilt] beyond a reasonable doubt . . . ."

[5] Although the results of the sexual assault evidence collection kit established that the defendant's DNA was included in the sperm-rich fraction sample of the vaginal swab, they contained no evidence that the July 28, 2016 incident was nonconsensual. Indeed, the nurse who administered the sexual assault evidence collection kit testified that there was no evidence of trauma, scratches, or bruises, and no physical injuries were noted in the report.

[6] For example, although M testified that she was violently sexually assaulted, her text to Isabelle indicated that the defendant had "touched" her. Additionally, the state did not introduce any evidence of physical injuries or ripped clothing.

. . . the prohibited argument bears directly on the defendant's theory of the defense.").

The trial court's restriction on defense counsel's closing argument was particularly significant in this case because the state argued that M's testimony was credible because she had no motive to fabricate her testimony. During the state's rebuttal closing argument, the prosecutor argued: "Why on earth, if [M and the defendant] are in a sexual relationship, would [M] call [Louis] and call and text Isabelle about the defendant sexually assaulting her, and then [talk] to the police about it, [talk] to the people at the hospital about it? Why would she do that? How does [M's] life get any better by making this up? Ask yourselves that." What's more, the prosecutor emphasized to the jury that the defendant had lied to the police when he was initially questioned. Specifically, the prosecutor stated: "In assessing the defendant's credibility, I would ask—I would urge you to consider the lies that the defendant told, that he admitted he told while he was—when he was testifying here. We know that he lied to the police about being in the house on July 28, 2016. He lied. He was in the house. . . . We know that he lied to the police about not having sexual contact with [M] on that date. . . . He lied to [Stephanie]. He admitted to lying about that."

This case turns on questions of credibility, and we find it disconcerting that the defendant was not afforded an equal opportunity to emphasize his theory that M also lied about the July 28, 2016 incident. The entire case with respect to the July 28, 2016 incident centered on the credibility of the only two eyewitnesses to that incident. The effectiveness of the defendant's arguments regarding M's credibility was critical to the outcome, particularly when there was other testimony from M's stepsister, Isabelle, that M had a history of "making false claims." Indeed, this is particularly noteworthy because the jury did not credit M's version of

events with respect to the other instances of alleged misconduct given that it found the defendant not guilty of the remaining charges. Accordingly, we conclude that the trial court's limitation of the scope of defense counsel's closing argument was improper and deprived the defendant of his constitutional right to the assistance of counsel.

Once a violation of the sixth amendment right to the assistance of counsel has been established, we need not inquire as to whether the error resulted in prejudice to the defendant. "[A] per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." *State* v. *Mebane*, 204 Conn. 585, 595, 529 A.2d 680 (1987), cert. denied, 484 U.S. 1046, 108 S. Ct. 784, 98 L. Ed. 2d 870 (1988); see, e.g., *State* v. *Arline*, supra, 223 Conn. 65. We, therefore, reverse the judgment of the trial court and remand the case for a new trial.

II

We next turn to the defendant's contention that the evidence presented at trial was insufficient to prove that he used force or the threat of force, as required to sustain his conviction of sexual assault in the first degree. Although we have determined that the defendant is entitled to a new trial, we address this claim because, if it is meritorious, a retrial would be barred by principles of double jeopardy. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 655, 1 A.3d 1051 (2010).

The defendant concedes that this claim was not properly preserved at trial. It is well established, however, that "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317

Conn. 773, 781, 120 A.3d 1188 (2015)]. . . . Accordingly, because there is no practical significance . . . for engaging in a *Golding* analysis, we review an unpreserved sufficiency of the evidence claim as though it had been preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

To establish that the defendant violated § 53a-70 (a) (1), the state was required to prove that the defendant "compel[led] another person to engage in sexual intercourse by the use of force against such other person . . . or by the threat of use of force against such other person . . . ." The defendant contends that the state's evidence of force or threat of force was improbable and unconvincing, and that the state presented no physical evidence to support M's allegation of sexual assault by force.

"The standard of review [that] we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). Importantly, we have previously held that "a single witness is sufficient to support a finding of guilt beyond a reasonable doubt." *State* v. *Whitaker*, 215 Conn. 739, 757 n.18, 578 A.2d 1031 (1990).

Here, with respect to the July 28, 2016 incident, M testified: "[The defendant] grabbed my arm, and I told

him to let me go, and he did not want to release me. And then I ended up tripping toward the couch, where he pushed me toward . . . . I was wearing a dress, and I had shorts underneath, and he ended up pulling down my pants and my underwear and inserting his penis inside me. . . . I was pushing him off, yelling, telling him to stop and get off me. . . . He kept forcing himself on me." She also testified that, during the assault, "I was trying to push him off me with my arms, but he kept holding [them] down, so I kept turning my body like this, with my knees, trying to push him off me, and he didn't want to get off. And I was yelling, help, can you stop, can you get off me, and then he didn't want to get off me." This testimony alone is sufficient to establish the force element required for a conviction of sexual assault in the first degree in violation of § 53a-70 (a) (1).[7] See, e.g., *State* v. *White*, 139 Conn. App. 430, 436–37, 55 A.3d 818 (2012) (rejecting sufficiency challenge to first degree sexual assault conviction when complainant's testimony, if credited, satisfied all elements of § 53a-70 (a) (1)), cert. denied, 307 Conn. 953, 58 A.3d 975 (2013); see also, e.g., *State* v. *Antonio W.*, 109 Conn. App. 43, 52–53, 950 A.2d 580, cert. denied, 289 Conn. 923, 958 A.2d 153 (2008).

This evidence, viewed in the light most favorable to sustaining the guilty verdict, is sufficient to support the defendant's conviction of sexual assault in the first degree.

## III

The defendant's final claim is that the trial court abused its discretion by admitting the testimony of Janet Murphy, an expert in the field of child and adolescent sexual abuse. Specifically, the defendant contends

[7] In addition to M's testimony, the emergency medical technician (EMT) who responded to M's house on July 28, 2016, testified that M was "visibly, tearfully upset" and was "very . . . uncomfortable . . . ."

that the trial court improperly admitted Murphy's testimony given that her expertise was in child sexual abuse and that M was an adult when the July 28, 2016 incident occurred. The defendant further contends that "[t]he state failed to show that Murphy had sufficient knowledge from her experience, training, or education to testify as an expert in the field of adult sexual abuse . . . ." (Emphasis omitted.) As such, the defendant claims that Murphy's expertise was inapplicable to the present case. The state contends that this argument is unpreserved. Alternatively, the state contends that the claim is substantively meritless because M was eighteen at the time of the July 28, 2016 incident and Murphy testified that she "see[s] kids really up into the early twenties, more up to eighteen, but some delayed adults we'll see into the early twenties . . . ."

As a general matter, when our appellate courts reverse a judgment and remand the case for a new trial, only claims likely to arise on retrial are addressed by the reviewing court. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 195, 942 A.2d 1000 (2008). In this case, we are remanding the case for a new trial with respect to the charge of sexual assault in the first degree in connection with the July 28, 2016 incident. It is undisputed that, at the time of this incident, M was eighteen years old. Although we cannot say that the claim relating to Murphy's expert testimony is unlikely to arise on remand, because the state may elect to call Murphy and further probe her experience working with eighteen year olds, or it may call another expert, that evidentiary presentation would involve a record different from the one presently before us, and, accordingly, we decline to address this claim at this time. See, e.g., *State* v. *Jackson*, 334 Conn. 793, 822, 224 A.3d 886 (2020); *State* v. *Rizzo*, 266 Conn. 171, 250–51 n.44, 833 A.2d 363 (2003). We leave it to the trial court to further evaluate the issue if Murphy is called to testify at the defendant's new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

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# DEBRA NORMANDY ET AL. *v.* AMERICAN MEDICAL SYSTEMS, INC., ET AL.
## (SC 20500)

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

*Syllabus*

The plaintiffs, D and M, sought to recover damages from the defendant B Co. for its alleged negligence, recklessness, and civil conspiracy, and for its alleged violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Connecticut Product Liability Act (§ 52-572m et seq.), in connection with a surgical procedure performed at B Co.'s hospital. Specifically, in 2009, D's obstetrician and gynecologist implanted a mesh sling manufactured by the defendant A Co. in D's body for the purpose of treating her stress urinary incontinence. Although D's obstetrician and gynecologist was not an employee of B Co., she has privileges to practice at B Co.'s hospital, where the procedure occurred. The sling implanted in D was stocked by B Co.'s hospital at the request of some of the physicians who have privileges there, and B Co. paid A Co. $900 for the sling and then billed D's health insurance carrier $4230 for it. In 2014, D was diagnosed with "mesh exposure" and had the sling removed. In 2015, the plaintiffs commenced this action against A Co. and B Co. but subsequently withdrew their claims against A Co. The plaintiffs alleged, inter alia, that B Co. had engaged in the business of placing A Co.'s slings into the stream of commerce by purchasing them from A Co., stocking and marketing them, and selling them to patients and medical professionals. The trial court granted B Co.'s motion for summary judgment, concluding that the plaintiffs' product liability claim failed because B Co. was not a product seller and that the plaintiffs' CUTPA and common-law claims were time barred under the three year statutes (§§ 42-110g (f), 52-577 and 52-584) of limitations and repose. The trial court also determined that the limitation and repose periods had not been tolled by either the continuing course of conduct or the fraudulent concealment doctrine. On the plaintiffs' appeal, *held*:

1. The trial court correctly concluded that there was no genuine issue of material fact as to whether B Co. was a product seller of the A Co. sling for purposes of the plaintiffs' product liability claim and, accordingly,

properly granted B Co.'s motion for summary judgment in connection with that claim: the jurisdictions that have considered the issue, which is one of first impression in Connecticut, have predominantly held that hospitals are providers of a service, namely, medical treatment, and are immune from strict liability for the harm caused by defective products used in the medical treatment of patients, and, under the circumstances of the present case, this court agreed that B Co. was not a "product seller," as that term is defined in § 52-572m (a), because the essence of the relationship between D and B Co. was for the furnishing of medical services rather than the sale of goods; moreover, although B Co.'s hospital website contained information regarding different surgical procedures for incontinence, the only mention of the A Co. sling appeared on the website of the medical practice to which D's obstetrician and gynecologist belonged, there was no evidence that B Co. had any control over the content of that website, and D admitted to receiving no marketing information regarding the A Co. sling from B Co., such that any mention of the A Co. sling could not be attributed to advertising by B Co.; furthermore, the facts that B Co. stocked the A Co. sling, billed D's health insurance carrier for it at a significant upcharge, and may potentially have profited from the transaction did not, by themselves, render B Co. a product seller, especially given that services provided by hospitals are often carried out in emergency situations, which require that medical supplies be stocked and ready for use; in addition, the majority of the amount that B Co. had billed D's health insurance carrier was for recovery and operating room services, further indicating that the essence of the transaction was for the provision of services.

2. The plaintiffs, who did not dispute that they commenced their action more than five years after D's surgery took place, could not prevail on their claim that the trial court incorrectly determined that the three year statutes of limitations and repose period were not tolled by either the continuing course of conduct or the fraudulent concealment doctrine: a. The statute of limitations applicable to the plaintiffs' CUTPA claim and statute of limitations and period of repose applicable to the plaintiffs' common-law claims were not tolled by the continuing course of conduct doctrine: the plaintiffs failed to establish a genuine issue of material fact with respect to whether B Co. ever committed an initial wrong by marketing the A Co. sling, which was a necessary factual predicate for their claim that the continuing course of conduct doctrine tolled the statute of limitations applicable to the CUTPA claim, as the only mention of the sling in any marketing material appeared on the website of the practice to which D's obstetrician and gynecologist belonged, over which B Co. had no control, and D admitted that she never received any such marketing information from B Co.; moreover, because it is solely the responsibility of the treating physician to inform a patient of the risks and benefits of a proposed medical procedure, B Co. did not, as the plaintiffs claimed, have an independent or fiduciary duty to inform D of

the risks associated with the sling procedure that continued even after the procedure had been completed.

b. The statute of limitations and period of repose applicable to the plaintiffs' common-law claims were not tolled by the fraudulent concealment doctrine; the plaintiffs failed to establish a genuine issue of material fact with respect to whether B Co. intentionally concealed any information regarding the risks of the sling procedure generally or the A Co. sling specifically, as B Co.'s website identified risks associated with that procedure, and the record contained no evidence that any alleged concealment by B Co. was for the specific purpose of delaying the plaintiffs' filing of their complaint.

Argued December 10, 2020—officially released August 9, 2021*

*Procedural History*

Action to recover damages for, inter alia, a violation of the Connecticut Product Liability Act, and for other relief, brought to the Superior Court in the judicial district of Waterbury and transferred to the Complex Litigation Docket, where the plaintiffs withdrew the complaint as to the named defendant; thereafter, the court, *Bellis*, *J.*, granted the motion for summary judgment filed by the defendant Bristol Hospital, Inc., and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

*Jacqueline E. Fusco*, with whom was *Brenden P. Leydon*, for the appellants (plaintiffs).

*Michael G. Rigg*, for the appellee (defendant Bristol Hospital, Inc.).

*Opinion*

ROBINSON, C. J. The principal issue in this appeal is whether a hospital that purchases, stocks, and supplies a medical device, and then bills a patient for its use during surgery, is a "product seller," as defined by

* August 9, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

General Statutes § 52-572m (a),[1] for purposes of imposing strict liability under the Connecticut Product Liability Act (product liability act). See General Statutes § 52-572m et seq. The named plaintiff, Debra Normandy,[2] appeals[3] from the trial court's granting of the motion for summary judgment filed by the defendant Bristol Hospital, Inc.,[4] with respect to her complaint alleging injuries arising from the defendant's violations of, inter alia, the product liability act, the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the common law. On appeal, the plaintiff contends that the trial court incorrectly concluded that (1) the defendant was not a product seller for purposes of imposing strict liability under the product liability act, and (2) her CUTPA and common-law claims were time barred because the statutes of limitations applicable to those claims were not tolled. We conclude that the defendant, as a hospital, is not a product seller for purposes of imposing strict liability pursuant to the product liability act under the circumstances of this case, in which the defendant provided general informa-

[1] General Statutes § 52-572m (a) provides: " 'Product seller' means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term 'product seller' also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products."

[2] Mark Normandy, who is Debra Normandy's husband, is also a plaintiff in this action. The sole count of the operative complaint pertaining to Mark Normandy is the product liability count, which alleges that he suffered emotional distress and a loss of consortium, a claim that is derivative of Debra Normandy's statutory claim. For the sake of convenience, all references to the plaintiff in this opinion are to Debra Normandy.

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

[4] We note that the plaintiff's original, two count complaint was against both Bristol Hospital, Inc., and the named defendant, American Medical Systems, Inc. The plaintiff subsequently withdrew her complaint as to the named defendant on July 10, 2015. Accordingly, all references herein to the defendant are to Bristol Hospital, Inc.

tion regarding various medical procedures on its website and did not significantly participate in placing the medical device at issue into the stream of commerce. We further conclude that the statutes of limitations governing the plaintiff's CUTPA and common-law claims were not tolled. Accordingly, we affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiff, reveals the following facts and procedural history. In 2009, Amy S. Breakstone, an obstetrician and gynecologist who is a member of the CCOG Women's Health Group (practice group), diagnosed the plaintiff with stress urinary incontinence. To treat the plaintiff's condition, Breakstone recommended the surgical implantation of the Monarc Subfascial Hammock pelvic mesh sling (Monarc mesh sling), which was manufactured by American Medical Systems, Inc. See footnote 4 of this opinion. On December 2, 2009, Breakstone performed that surgery on the plaintiff at the defendant hospital. Breakstone is not an employee of the defendant, but she has privileges to practice there.

The defendant maintains a website on which it provides information about its affiliated physicians, including Breakstone, as well as various procedures that are available to patients. The practice group of which Breakstone is a member maintains its own webpage that provides information about incontinence therapies, including specific treatment devices. The practice group's webpage provides a hyperlink titled "Monarc," which is the brand of pelvic sling implanted in the plaintiff. The Monarc mesh sling implanted in the plaintiff was stocked by the defendant at the request of some its physicians; the defendant paid American Medical Systems, Inc., $900 for the Monarc mesh sling and then billed the plaintiff's health insurance carrier $4230 for it.

Although physicians have utilized pelvic mesh products containing a "monofilament polypropylene mesh,"

like the Monarc mesh sling, to treat stress incontinence surgically, "there is scientific evidence that suggests that this material is biologically incompatible with human tissue and should not be used in the pelvic region." On January 24, 2014, the plaintiff was diagnosed with a "mesh exposure" that caused her discomfort and ultimately required surgical removal of the Monarc mesh sling.

The plaintiff brought this action on March 9, 2015, via a two count complaint, alleging, inter alia, violations of the product liability act and CUTPA. Subsequently, the plaintiff filed a request for leave to amend the complaint, seeking to add five new counts against the defendant, alleging common-law claims for negligence, breach of express warranty, breach of implied warranty, recklessness, and civil conspiracy in the third through seventh counts, respectively.[5] The defendant objected to the plaintiff's request to amend the complaint and moved for summary judgment, arguing, inter alia, that the defendant is not a product seller under the product liability act and that the plaintiff's CUTPA and common-law claims were time barred.

The trial court granted the plaintiff's request to amend the complaint, treating it as the operative complaint in considering the defendant's motion for summary judgment. In granting the defendant's motion for summary judgment, the trial court concluded that there was no genuine issue of material fact that the defendant was not a product seller as a matter of law, deeming it "clear from the evidence submitted that the essence of the relationship between [the plaintiff] and the defendant . . . was the provision of medical services, by way of surgery to implant the [Monarc mesh sling]." The trial court further concluded that "[t]he defendant did not

[5] The complaint also alleged a loss of consortium claim on behalf of her husband. See footnote 2 of this opinion.

place the [Monarc mesh sling] into the stream of commerce but, rather, was a user or consumer of [the sling], as it is of all equipment and products used to provide medical services and [to] treat patients." (Footnote omitted.) In so concluding, the court determined that the majority of Connecticut trial courts, sister state courts, and leading treatises agree that hospitals are not product sellers for purposes of strict product liability. The court also granted the defendant's motion for summary judgment as to the remaining CUTPA and common-law claims, concluding that they were time barred. In doing so, the court concluded that neither the continuing course of conduct nor the fraudulent concealment doctrine tolled the applicable statutes of limitations. Accordingly, the court rendered judgment for the defendant on all counts of the amended complaint. The court denied the plaintiff's subsequent motion for reconsideration. This appeal followed.

On appeal, the plaintiff contends, inter alia, that the trial court incorrectly concluded that (1) the defendant was not a product seller as a matter of law, and (2) the continuing course of conduct and fraudulent concealment doctrines did not toll the applicable statutes of limitations. We address each claim in turn.

Before turning to the plaintiff's specific claims, we note the well settled standard of review governing summary judgment motions. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary

foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]he scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 729, 224 A.3d 525 (2020).

I

We begin with the plaintiff's claim that the trial court incorrectly concluded that there was no genuine issue of material fact as to whether the defendant is a product seller for purposes of the product liability act. The plaintiff argues that the defendant "was engaged in the business of selling mesh slings and that the primary, if not sole, purpose of its relationship with [the plaintiff] was providing the sling to be implanted by . . . Breakstone." The plaintiff asserts that evidence of the defendant's regularly stocking pelvic mesh products, marketing the Monarc mesh sling on its website, and selling that device at a markup created a genuine issue of material fact as to whether the defendant was engaged in the business of selling the Monarc mesh sling. In response, the defendant argues that the trial court correctly concluded that it is not a product seller under the product liability act because it was "not engaged in the business" of selling the Monarc mesh sling and because the essence of the relationship between the defendant and the plaintiff "was that of medical service provider and patient." We agree with the defendant and conclude that there is no genuine issue of material fact as to whether it was a product seller of the Monarc mesh sling.

In 1965, Connecticut adopted, as a matter of state common law, § 402A of the Restatement (Second) of Torts. *Garthwait* v. *Burgio*, 153 Conn. 284, 289, 216 A.2d 189 (1965); see 2 Restatement (Second), Torts § 402A, p. 347 (1965). "Section 402A recognized an action for strict product liability in tort without the

requirement of privity between the seller and the consumer or proof of manufacturer fault." *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 184, 136 A.3d 1232 (2016). "In 1979, our legislature adopted our product liability act. . . . That liability act required all common-law theories of product liability to be brought as a statutory cause of action." (Citation omitted.) Id., 187. Thus, "all claims or actions brought for personal injury . . . caused by the . . . marketing . . . of any product" are brought under the product liability act. General Statutes § 52-572m (b). The product liability act defines "product seller" in relevant part as "any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. . . ." General Statutes § 52-572m (a). Plaintiffs "must establish and prove, inter alia, that . . . the defendant was engaged in the business of *selling* the product . . . [and] the defect existed at the time of the *sale* . . . ." (Emphasis in original, internal quotation marks omitted.) *Zichichi* v. *Middlesex Memorial Hospital*, 204 Conn. 399, 403, 528 A.2d 805 (1987). "Once a particular transaction is labeled a 'service,' as opposed to a 'sale' of a 'product,' it is outside the purview of [the] product liability [act]." Id.

Connecticut courts applying the product liability act have considered "a party . . . a product seller [when] a sale of a product is a principal part of the transaction and [when] the essence of the relationship between the buyer and seller is *not* the furnishing of professional skill or services." (Emphasis in original; internal quotation marks omitted.) *Truglio* v. *Hayes Construction Co.*, 66 Conn. App. 681, 685, 785 A.2d 1153 (2001); see *Paul* v. *McPhee Electrical Contractors*, 46 Conn. App. 18, 23, 698 A.2d 354 (1997) (electrician was not product seller because he merely installed light fixture and was not responsible for placing it in stream of commerce).

Thus, in determining whether a hospital is a product seller of a surgical device under the product liability act, which is a question of first impression for this court, we must determine whether, under the circumstances of the case, that hospital is engaged in the business of selling a product.

Although "[n]o unifying test has been devised to determine whether strict liability applies in any given [sales service] combination," the reporters' notes to the Restatement (Third) of Torts observe that hospitals provide both services and products. Restatement (Third), Torts, Products Liability § 20, reporters' note to comment (d), p. 289 (1998).[6] However, "[m]ost jurisdictions hold that hospitals and doctors provide a service—medical treatment—and immunize them from strict liability for harm from defective products used in medical treatment, whether the product is implanted in the patient, loaned to the patient, or merely used as a tool." Id.

[6] The plaintiff argues that the trial court improperly relied on § 20 of the Restatement (Third) of Torts because the "[a]doption of [the Restatement (Third) of Torts] for product liability claims has been rejected in Connecticut." The plaintiff relies on *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 408, 152 A.3d 1183 (2016), in which this court declined to adopt the Restatement (Third) or to make any substantive changes to our product liability tests, instead favoring "modest refinements" to the approach under the Restatement (Second). This court, however, has deemed the Restatement (Third) instructive and persuasive in other contexts. See *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 335–36, 107 A.3d 381 (2015) (referencing Restatement (Third) in recognizing range of reasonable foreseeability); *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 624–25, 99 A.3d 1079 (2014) (referring to Restatement (Third) when defining essential elements of product malfunction claim as example of developing theory); see also *Hayes* v. *Caspers, Ltd.*, 90 Conn. App. 781, 792–93, 881 A.2d 428 (trial court's jury instruction on proximate cause "functionally mirror[ed]" test in Restatement (Third), which "provide[d] yet another basis for sustaining the validity of the court's instructions"), cert. denied, 276 Conn. 915, 888 A.2d 84 (2005). In contrast to *Bifolck*, the issue presented in the present case does not require us to undertake a significant shift from the analysis of the Restatement (Second). Accordingly, we deem the Restatement (Third) instructive.

A review of sister state decisions demonstrates that hospitals are predominantly held to be service providers rather than product sellers for purposes of strict liability because the essence of the transaction between a hospital and a patient is for medical services rather than the sale of goods.[7] See, e.g., *Hector* v. *Cedars-Sinai Medical Center*, 180 Cal. App. 3d 493, 507–508, 225 Cal. Rptr. 595 (1986) (hospital was not product seller of pacemaker but provider of medical services); *Ayyash* v. *Henry Ford Health Systems*, 210 Mich. App. 142, 144–47, 533 N.W.2d 353 (1995) (hospital provided service for implant procedure and was not product seller), appeal denied, 450 Mich. 992, 549 N.W.2d 561 (1996); *Royer* v. *Catholic Medical Center*, 144 N.H. 330, 335, 741 A.2d 74 (1999) (hospital was not engaged in business of selling prosthetic devices as matter of law); *Johnson* v. *Mountainside Hospital*, 239 N.J. Super. 312, 321, 571 A.2d 318 (App. Div.) (hospital was not strictly liable for defective respirator leased to patient), cert. denied, 122 N.J. 188, 584 A.2d 248 (1990); *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 104, 123 N.E.2d 792 (1954) (it was apparent that essence of relationship between hospital and patient was for services because "the patient bargains for, and the hospital agrees to make available, the human skill and physical material of medical science to the end that the patient's heath be restored"); *Cafazzo* v. *Central Medical Health Services, Inc.*, 542 Pa. 526, 533–34, 668 A.2d 521 (1995) (hospital was not seller of defective prosthetic device that was incidental to provision of services as matter of law); see also *Farrell*

[7] In a situation that is distinguishable from the present case, we note that hospitals have been deemed product sellers when the product at issue is not "integrally associated with the medical treatment." Restatement (Third), supra, § 20, reporter's note to comment (d), p. 290; see *Johnson* v. *Sears, Roebuck & Co.*, 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (hospital may be strictly liable for "mechanical and administrative services"); *Thomas* v. *St. Joseph Hospital*, 618 S.W.2d 791, 796–97 (Tex. Civ. App. 1981, writ ref'd n.r.e.) (hospital may be strictly liable for patient's gown that caught on fire).

v. *Johnson & Johnson*, 335 Conn. 398, 420–21, 238 A.3d 698 (2020) (upholding directed verdict on innocent misrepresentation claim because "[the plaintiff's] purchase of [the pelvic] mesh was *secondary* to the main purpose of the transaction, namely, to seek surgical assistance for her pelvic organ prolapse" (emphasis added)); *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 294, 880 A.2d 999 (upholding grant of summary judgment because hospital was not product seller of device implanted during surgery when essence of transaction was for services, not goods), cert. denied, 276 Conn. 910, 886 A.2d 424 (2005).

We find particularly illustrative a decision of the Texas Court of Appeals, *Easterly* v. *HSP of Texas*, *Inc.*, 772 S.W.2d 211, 212–13 (Tex. App. 1989), which concluded that the defendant hospital was not the product seller of an epidural kit. The Texas court considered the distinction between a product seller and service provider and inquired whether "the hospital introduced into the stream of commerce a defective product unrelated to the essential professional relationship" so as to render the hospital a product seller or, instead, whether the epidural kit "was intimately and inseparably connected to the professional service of providing [the plaintiff] with anesthesia . . . ." Id., 213. The court concluded that the hospital was "not in the business of selling epidural kits separate from the medical relationship between doctor and patient involving the furnishing of medical services." Id. Therefore, the court held that "[t]he 'sale' of the epidural kit was integrally related to the medical procedure—the kit was not a separate good sold in a commercial transaction." Id.

In the present case, the plaintiff claims there is a genuine issue of material fact as to whether the defendant was engaged in the business of selling the Monarc

mesh sling.[8] The plaintiff argues that, because the defendant stocked the Monarc mesh sling, advertised it on the hospital website, and billed her insurance for it at a significant upcharge, the essence of the relationship between the defendant and the plaintiff was the sale of the product, rendering the defendant a product seller under the product liability act.[9]

We begin our analysis of the record with the plaintiff's argument that the defendant acted as a product seller when it advertised and marketed medical devices, such as the Monarc mesh sling, on its hospital website and when it advertised Breakstone as an associated physician. This argument is not supported by the record. The defendant's website provides information regarding "different types of surgical procedures for incontinence," as well as information regarding its physicians, including Breakstone. Nowhere on the defendant's website does it describe or mention the Monarc mesh sling. The content on the defendant's website is purely educational or informational in nature, as it describes in general terms the options available to patients to treat

[8] The plaintiff relies on the observation of the United States District Court for the District of Connecticut that there is no "broad categorical rule" that hospitals cannot be product sellers of medical devices they sell to patients. *Mihok* v. *Medtronic, Inc.*, 119 F. Supp. 3d 22, 37 (D. Conn. 2015). The defendant, however, does not argue that hospitals can *never* be product sellers under the product liability act. It simply argues that, *on the facts of this case*, it is not a product seller because of its relationship with the plaintiff and the nature of the transaction centering on surgical services rather than the sale of the product itself.

[9] The plaintiff also argues that the trial court improperly failed to find that "a fiduciary duty existed such that the defendant was required to inform the plaintiff of the dangers of the [Monarc] mesh sling about which it had actual knowledge and . . . the opportunity to mitigate." This court, however, has already concluded that the nonemployee treating physician, rather than the hospital, owes a fiduciary duty to a patient to warn them of the risks of a procedure. See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 185–86, 196, 896 A.2d 777 (2006). Thus, the defendant did not owe an independent fiduciary duty to the plaintiff to warn her of any risks associated with her surgical procedure.

incontinence, along with the risks that may accompany such procedures. In fact, the only mention of the Monarc mesh sling on any website in the record is on that of the practice group. There is no evidence that the defendant has any control over the content of the practice group's webpage, meaning that any mention of the Monarc mesh sling can hardly be said to be advertising by the defendant. Indeed, the plaintiff herself testified at her deposition that she did not receive any literature or marketing information regarding the Monarc mesh sling from the defendant.[10] Thus, if the defendant's website constitutes advertising at all, it is advertising the hospital as a service provider.

The plaintiff further argues that there is a genuine issue of material fact as to whether the defendant advertises the Monarc mesh sling because the deposition testimony of Korrine A. Roth, the defendant's Systems Director of Quality Improvement, seemingly contradicted her affidavit, which stated that the defendant "does not market, advertise, or solicit the sale of medical or surgical products." We disagree. Instead, we agree with the defendant that Roth's deposition testimony is wholly consistent with the statement in her affidavit that the defendant advertises its services and not particular products. Roth testified that, "[i]n general, [the defendant's] marketing or advertising [was for] promoting our service for the hospital, promoting our services. . . . So we market and advertise what we do." Roth unambiguously replied in the negative

[10] At her deposition, the plaintiff was asked: "Have you ever seen any advertising from [the defendant]?" The plaintiff replied, "I have." She then responded in the negative when asked whether any of the defendant's advertisements "mention[ed] the sling that [she] had received during [her] surgery . . . ." Finally, she was asked: "Did you ever see any advertisements at all for the sling that you received during your surgery, from anybody?" The plaintiff responded: "Just the brochure that . . . Breakstone had given me. . . . There wasn't much information though. I mean, they were just promoting their product."

when asked: "And you believe that you don't market or advertise medical or surgical products?"[11]

The plaintiff next argues that the essence of her relationship with the defendant was for the procurement of the Monarc mesh sling because the defendant obtained and stocked the mesh sling, any services provided were dependent on its sale, and the defendant billed the plaintiff at a significant upcharge. We disagree. It is undisputed that the defendant paid $900 for the Monarc mesh sling and subsequently billed the plaintiff's health insurance carrier $4230. The mere fact that the defendant billed for the Monarc mesh sling does not conclusively establish that its sale was the main purpose of the plaintiff's relationship with the defendant. See *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, 692 F. Supp. 2d 1012, 1023 (S.D. Ill. 2010) ("the sale of pharmaceuticals is just one aspect of the transaction between patient and pharmacist"), aff'd sub nom. *Walton* v. *Bayer Corp.*, 643 F.3d 994 (7th Cir. 2011); *Brandt* v. *Boston Scientific Corp.*, 204 Ill. 2d 640, 648, 792 N.E.2d 296 (2003) ("it is not reasonable to infer that [the plaintiff] simply went to the hospital, bought

[11] The plaintiff also argues that, because the United States Food and Drug Administration (FDA) defines both "device user facility" and "distributor" to include hospitals, the defendant should be considered a product seller in the context of strict product liability. 21 C.F.R. § 803.3 (d) and (e) (2020). The plaintiff fails to provide any authority to support her argument that hospitals are considered "distributors" by the FDA and that such a conclusion would be persuasive in the product liability context. The plain language of the federal regulations includes hospital in the definition of "device user facility." See id., § 803.3 (d). "Distributor" is defined in relevant part as "any person (other than the manufacturer or importer) *who furthers the marketing of a device from the original place of manufacture to the person who makes final delivery or sale to the ultimate user*, but who does not repackage or otherwise change the container, wrapper, or labeling of the device or device package. . . ." (Emphasis added.) Id., § 803.3 (e). Because we conclude that there is no genuine issue of material fact that the defendant did not market the Monarc mesh sling to the plaintiff, the defendant is not a "distributor" under the plain language of the federal regulations.

the sling, and left"). Furthermore, the fact that the defendant billed the plaintiff far more than it paid for the Monarc mesh sling, and potentially may have profited from providing the product, does not by itself render the defendant a product seller under the product liability act.[12] See *Hector* v. *Cedars-Sinai Medical Center*, supra, 180 Cal. App. 3d 505 ("[t]he 85 percent surcharge in and of itself does not place the hospital in the business of selling pacemakers"). Indeed, given the nature of the services provided by hospitals, often in emergency situations, that a hospital keeps medical supplies on its shelves ready for use does not, without more, render it a product seller.

Finally, we consider other indicia that the essence of the transaction in the present case was for services rather than the sale of a product. First, we observe that the defendant did not bill the plaintiff's health insurance carrier for the cost of the Monarc mesh sling alone. Instead, the defendant billed for the total amount associated with the surgical procedure, including $4230 for the mesh sling and more than $10,000 for various supplies and recovery and operating room services.[13] Although not dispositive, the fact that the majority of the bill was for services, rather than products, strongly indicates that the essence of the transaction was for the provision of services. See *Brandt* v. *Boston Scientific Corp.*, supra, 204 Ill. 2d 652 (noting that, because "[o]nly a small fraction of the total charge was for the sling," predominant purpose of transaction was for services, not goods). Second, the plaintiff testified at her deposi-

[12] The defendant points out that the record does not indicate how much ultimately was paid by the plaintiff's health insurance carrier.

[13] The record indicates that the defendant billed $1757.93 for other supplies, such as pharmaceuticals and surgical supplies, $2110 for recovery room services, $5890.50 for operating room services, and $335 for various laboratory testing and treatment. As we noted, there is no evidence in the record of the amount the plaintiff's health insurance carrier actually paid to the defendant. See footnote 12 of this opinion.

tion that the reason she went to the defendant for the surgery, as opposed to another hospital, was because Breakstone, as her physician, scheduled the surgery there.[14]

Because the defendant did not actively advertise the Monarc mesh sling for sale to patients, and because the particular transaction between the plaintiff and the defendant was primarily for services rather than the sale of the medical product, we conclude that the trial court correctly determined that the defendant was not a product seller as a matter of law. Accordingly, the trial court properly granted the defendant's motion for summary judgment on the product liability count.

II

We turn now to the plaintiff's claim that the trial court incorrectly concluded that the plaintiff's CUTPA and common-law claims were time barred because the statutes of limitations applicable to those claims were not tolled under the doctrines of continuing course of conduct or fraudulent concealment. "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically 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. . . . When 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.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

[14] When asked at her deposition why she went to "Bristol Hospital on December 1, 2009," the plaintiff stated, "Breakstone scheduled it. . . . The sling surgery."

It is undisputed that, because the plaintiff's surgery took place on December 1, 2009, and she did not commence this action until February 19, 2015, her claims are time barred by the applicable statutes of limitations and repose period in the absence of tolling.[15] The burden, therefore, shifts to the plaintiff to establish that there is a genuine issue of material fact as to whether the statutes of limitations and repose period were tolled under either the continuing course of conduct or fraudulent concealment doctrine. See id.

A

The plaintiff first argues that the statute of limitations for the CUTPA claim and statute of limitations and repose period for the common-law claims are subject to tolling under the continuing course of conduct doctrine because "the defendant continued to market and promote mesh slings" after the plaintiff's surgery, while concealing the risk of sling implant procedures until at least 2016.[16] The plaintiff further argues that the continu-

[15] The plaintiff's various claims are governed by three year statutes of limitations and a three year period of repose. See General Statutes § 42-110g (f) ("[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter"); General Statutes § 52-577 ("[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of"); General Statutes § 52-584 ("[n]o action to recover damages for injury to the person, or to real or personal property . . . 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").

"As this court previously has observed, [w]hile statutes of limitation[s] are sometimes called statutes of repose, the former bars [a] right of action unless it is filed within a specified period of time after [an] injury occurs, [whereas] statute[s] of repose [terminate] any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 416 n.2, 54 A.3d 1005 (2012); see also *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 341, 644 A.2d 1297 (1994).

[16] We note that the period of repose under General Statues § 52-584 may be tolled by the doctrines of continuing course of conduct and fraudulent

ing course of conduct doctrine tolls the statute of limitations and repose period applicable to her common-law claims because the defendant owed her a continuing duty to inform her of the risks associated with a mesh sling implant procedure, even after the procedure was completed, as well as a fiduciary duty to do so. In response, the defendant argues that the trial court correctly concluded that the statute of limitations for the CUTPA claim and statute of limitations and period of repose for the common-law claims were not tolled. The defendant asserts that the plaintiff failed to present evidence that the defendant advertised or marketed the Monarc mesh sling that was implanted in the plaintiff. The defendant also argues that hospitals do not have a general or fiduciary duty to inform a patient of the risks associated with surgical procedures. We agree with the defendant and conclude that, under the circumstances of this case, the statute of limitations for the CUTPA claim and statute of limitations and period of repose for the common-law claims were not tolled by the continuing course of conduct doctrine.

On a motion for summary judgment, when deciding whether a statute of limitations or repose is tolled by the continuing of conduct doctrine, 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.) *Martinelli* v. *Fusi*, 290 Conn. 347, 357, 963 A.2d 640 (2009).

Having reviewed the record, we conclude that the plaintiff has failed to establish a genuine issue of mate-

concealment. See *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 201, 905 A.2d 1135 (2006) (continuing course of conduct doctrine may toll period of repose in § 52-584); *Connell* v. *Colwell*, 214 Conn. 242, 246 n.4, 571 A.2d 116 (1990) (fraudulent concealment doctrine may toll period of repose under § 52-584).

rial fact with respect to whether the defendant ever advertised the Monarc mesh sling on its hospital website. Although the *practice group's* website provided a single mention and hyperlink to the Monarc mesh sling, the plaintiff has not demonstrated that the defendant had any control over the contents of that webpage.[17] Moreover, even if we were to assume that the generic mentions of mesh slings on the defendant's website constituted advertising, the record clearly indicates that the plaintiff herself never saw or received any such marketing by the defendant. See footnote 10 of this opinion. Because there is no evidence that the defendant committed the initial wrong of marketing the product in a way *that contributed to the plaintiff's injury*, the continuing course of conduct doctrine does not toll the statute of limitations applicable to the plaintiff's CUTPA claim.[18] See, e.g., *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 94, 202 A.3d 262 ("standing to bring a CUTPA claim will lie only when the purportedly unfair trade practice is alleged to have directly and proximately caused the plaintiff's injur-

[17] The plaintiff relies on *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 94, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019), to support her argument that her claim under CUTPA is not time barred. This case is distinguishable from *Soto*, however, because there is no evidence that the defendant itself marketed the Monarc mesh sling.

[18] The parties dispute whether the CUTPA statute of limitations may be tolled by the continuing course of conduct doctrine. The plaintiff argues that the doctrine does apply, citing a decision of the United States Bankruptcy Court for the District of Connecticut. See *In re Kellogg*, 166 B.R. 504, 507 (Bankr. D. Conn. 1994). In response, the defendant cites to our decision in *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 286, to support its argument that the continuing course of conduct doctrine does not toll the statute of limitations under CUTPA. In *Flannery*, we determined that, "[b]ecause the plaintiff's tolling claim is entirely nonviable, we need not address his second claim regarding the applicability of tolling to save an untimely CUTPA action." Id., 298. Here, we again do not need to reach the issue of whether the CUTPA limitation period may be tolled by the continuing course of conduct doctrine because we conclude that there is no factual predicate for the application of that doctrine.

ies"), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

We further conclude that the defendant did not have an independent duty to inform the plaintiff of the risks associated with a mesh sling implant procedure, even after the procedure had been completed, as well as a fiduciary duty. As the defendant argues, a hospital generally does not have an independent responsibility to inform a patient of risks associated with a medical procedure. See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 196, 896 A.2d 777 (2006). "[I]t is solely the responsibility of the nonemployee treating physician, and not the duty of the hospital, to inform the patient of the risks and benefits of, and alternatives to, a proposed medical procedure . . . ." Id., 185–86. Therefore, because the defendant hospital had no independent duty to inform the plaintiff of the risks associated with the mesh sling implant procedure, there is no genuine issue of material fact as to whether the continuing course of conduct doctrine tolls the statute of limitations and period of repose applicable to the plaintiff's common-law claims.

B

Finally, the plaintiff argues that the statute of limitations and period of repose applicable to her common-law claims are tolled under the doctrine of fraudulent concealment, as codified in General Statutes § 52-595.[19] The plaintiff seems to claim that the defendant fraudulently concealed the risks associated with the mesh sling implant procedure because the defendant had

[19] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

actual knowledge of the dangers and intentionally concealed that information from the plaintiff. In response, the defendant argues that it warned of the risks associated with mesh sling implantation surgery on its website and that the plaintiff failed to submit evidence to demonstrate any concealment on the part of the defendant.

"[T]o toll a statute of limitations by way of [the] fraudulent concealment statute [§ 52-595], a plaintiff must present evidence that a defendant: (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799–800, 99 A.3d 1145 (2014).

Having reviewed the record, we conclude that the plaintiff has failed to establish a genuine issue of material fact with respect to whether the defendant concealed any information regarding the risks of the mesh sling implant procedure generally or the Monarc mesh sling specifically. First, the defendant's website indicates there are risks associated with the procedure, stating: "Postoperative urinary problems, such as voiding problems, urinary tract infections, and urge incontinence may occur. The [United States Food and Drug Administration] has reported complications associated with some synthetic mesh slings." Second, the record contains no direct or circumstantial evidence that any alleged concealment by the defendant was for the specific purpose of delaying the plaintiff's filing of the complaint. We conclude, therefore, that the trial court correctly determined that the plaintiff's claims are time barred, as the statutes of limitations and period of repose were not tolled by the doctrines of fraudulent concealment or continuing course of conduct. Accord-

ingly, the trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's CUTPA and common-law claims.

The judgment is affirmed.

In this opinion the other justices concurred.

# ORDERS

# CONNECTICUT REPORTS

# VOL. 340

# ORDERS

KEYBANK, N.A. *v.* EMRE YAZAR ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 206 Conn. App. 625 (AC 42829), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that a mortgagee's failure to comply with the Emergency Mortgage Assistance Program (EMAP) notice requirements set forth in General Statutes § 8-265ee (a) deprives the trial court of subject matter jurisdiction over the mortgagee's foreclosure action?

"2. Did the Appellate Court correctly conclude that an EMAP notice that had been sent by a mortgagee to a mortgagor prior to a first foreclosure action, which was later dismissed, did not satisfy the notice requirements of § 8-265ee (a) in connection with a second foreclosure action subsequently commenced against the mortgagor based on the same default under the same mortgage?"

*Geoffrey K. Milne*, *Christopher J. Picard* and *Victoria L. Forcella*, in support of the petition.

*Ozlem Yazar*, self-represented, in opposition.

Decided November 23, 2021

STATE OF CONNECTICUT *v.* JOSEPH FIELDS

The defendant's petition for certification to appeal from the Appellate Court, 207 Conn. App. 791 (AC 43115), is denied.

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

*Kirstin B. Coffin*, assigned counsel, in support of the petition.

*Timothy J. Sugrue*, assistant state's attorney, in opposition.

Decided November 23, 2021

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STATE OF CONNECTICUT *v.* DEJA PASCHAL

The defendant's petition for certification to appeal from the Appellate Court, 207 Conn. App. 328 (AC 43270), is denied.

*James B. Streeto*, senior assistant public defender, in support of the petition.

*Laurie N. Feldman*, deputy assistant state's attorney, in opposition.

Decided November 23, 2021

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ALAIN LECONTE *v.* COMMISSIONER OF CORRECTION

The petitioner Alain Leconte's petition for certification to appeal from the Appellate Court, 207 Conn. App. 306 (AC 43584), is denied.

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

*Deborah G. Stevenson*, assigned counsel, in support of the petition.

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

Decided November 23, 2021

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TALIB SHAHEER *v.* COMMISSIONER OF CORRECTION

The petitioner Talib Shaheer's petition for certification to appeal from the Appellate Court, 207 Conn. App. 449 (AC 43685), is denied.

*J. Christopher Llinas*, assigned counsel, in support of the petition.

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

Decided November 23, 2021

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STATE OF CONNECTICUT *v.* HERIBERTO B.

The defendant's petition for certification to appeal from the Appellate Court, 207 Conn. App. 192 (AC 43966), is denied.

*John L. Cordani, Jr.*, assigned counsel, in support of the petition.

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

Decided November 23, 2021

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MAREK PIETRAKA *v.* MARZANNA ROGOWSKI

The plaintiff's petition for certification to appeal from the Appellate Court, 207 Conn. App. 901 (AC 44037), is denied.

*Marek Pietraka*, self-represented, in support of the petition.

*Marzanna Rogowski*, self-represented, in opposition.

Decided November 23, 2021

LORI BARNES ET AL. *v.* GREENWICH HOSPITAL ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 207 Conn. App. 512 (AC 44055), is denied.

*Frank N. Peluso*, in support of the petition.

*Diana M. Carlino*, *Megan E. Bryson* and *Carol S. Doty*, in opposition.

Decided November 23, 2021

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TIREA JACKSON *v.* COMMISSIONER OF CORRECTION

The petitioner Tirea Jackson's petition for certification to appeal from the Appellate Court, 207 Conn. App. 902 (AC 44210), is denied.

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

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

Decided November 23, 2021

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IN RE NEVEAH D. ET AL.

The petition of the respondent mother for certification to appeal from the Appellate Court, 208 Conn. App. 904 (AC 44648), is denied.

*David B. Rozwaski*, in support of the petition.

*Nisa Khan* and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided November 23, 2021

PEOPLE'S UNITED BANK *v.* TRACEY BROWN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 44750) is denied.

*Tracey Brown Vickers*, self-represented, in support of the petition.

*Robert J. Piscitelli*, in opposition.

Decided November 23, 2021

# Cumulative Table of Cases
# Connecticut Reports
# Volume 340

Barnes *v.* Greenwich Hospital (Order) . . . 904
Doe *v.* Madison . . . 1
*Negligence; governmental immunity; summary judgment; action against defendant town, defendant board of education, and defendant high school principal alleging negligence insofar as defendants failed to properly supervise teacher who sexually abused plaintiff students during school hours and failed to train school employees to identify and report such abuse or imminent risk of abuse; whether defendants breached ministerial duty to report reasonable suspicion of child abuse, as imposed by mandatory reporting statute (§ 17a-101a) and board of education reporting policy; whether defendants' employees had reasonable cause to suspect that teacher was sexually abusing plaintiffs or exposing plaintiffs to imminent risk of sexual abuse; whether deposition testimony of high school athletic director established ministerial duty of professionalism; whether imminent harm to identifiable persons exception to governmental immunity applied; whether town was liable for failure of its police officer, who was assigned to school as resource officer, to monitor school's security camera footage; whether there was ministerial duty to monitor security camera footage.*
Halladay *v.* Commissioner of Correction . . . 52
*Habeas corpus; denial of petition for certification to appeal from habeas court's discovery order; certification from Appellate Court; claim that habeas court improperly granted motion filed by respondent, Commissioner of Correction, for production of materials from petitioner's underlying criminal defense and investigative files, which purportedly were relevant to petitioner's ineffective assistance of counsel claim; whether Appellate Court properly granted respondent's motion to dismiss appeal on ground that habeas court's discovery order was not final judgment under* State *v.* Curcio *(191 Conn. 27); whether this court should reach merits of petitioner's appellate claims by treating his appeal as direct appeal from interlocutory order on certification by Chief Justice pursuant to statute (§ 52-265a) allowing Chief Justice to certify appeals involving matters of substantial public interest.*
In re Neveah D. (Order) . . . 904
Jackson *v.* Commissioner of Correction (Order) . . . 904
KeyBank, N.A. *v.* Yazar (Order) . . . 901
Leconte *v.* Commissioner of Correction (Order) . . . 902
Maghfour *v.* Waterbury . . . 41
*Lien filed on certain settlement proceeds pursuant to public act (P.A. 17-165, § 1); whether P.A. 17-165, § 1, authorized city to file lien when plaintiff's injuries occurred and his action against third-party tortfeasor was commenced before effective date of public act; whether trial court properly granted plaintiff's motion for summary judgment; claim that allowing city to place lien on plaintiff's settlement proceeds would not present retroactive application of statute because plaintiff settled his action against third-party tortfeasor after effective date of P.A. 17-165, § 1.*
Normandy *v.* American Medical Systems, Inc. . . . 93
*Negligence; recklessness; civil conspiracy; violation of Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); violation of Connecticut Product Liability Act (§ 52-572m et seq.); statutes of limitations; continuing course of conduct doctrine; fraudulent concealment doctrine; summary judgment; claim that defendant was liable for injuries sustained by named plaintiff in connection with surgical implantation of vaginal mesh sling performed at defendant's hospital by obstetrician and gynecologist who was not hospital employee; whether trial court incorrectly determined that defendant was not "product seller," as that term is defined in § 52-572m (a), for purposes of plaintiffs' product liability claim; whether essence of relationship between plaintiff patient and defendant was for provision of medical services or sale of mesh sling product; whether trial court correctly determined that statutes of limitations and repose period were not tolled by continuing course of conduct or fraudulent concealment doctrine.*

People's United Bank *v.* Brown (Order) . . . . . 905
Pietraka *v.* Rogowski (Order) . . . . . 903
Shaheer *v.* Commissioner of Correction (Order) . . . . . 903
State *v.* Fields (Order) . . . . . 901
State *v.* Heriberto B. (Order). . . . . 903
State *v.* Paschal (Order) . . . . . 902
State *v.* Robert R. . . . . 69

*Sexual assault first degree; whether trial court improperly precluded defense counsel from arguing to jury defendant's theory that victim had planted physical evidence in effort to substantiate her false allegations against defendant, in violation of defendant's constitutional right to assistance of counsel; whether there was sufficient evidence in record to support defendant's theory of case; claim that evidence presented at trial was insufficient to support his conviction of first degree sexual assault; claim that trial court had abused its discretion in admitting testimony of expert in field of child and adolescent sexual abuse when victim was eighteen years old at time of alleged sexual assault.*

# CONNECTICUT APPELLATE REPORTS

# Vol. 209

CASES ARGUED AND DETERMINED

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

**CASES ARGUED AND DETERMINED**

IN THE

# APPELLATE COURT

OF THE

# STATE OF CONNECTICUT

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## IN RE AMANDA L.*
## (AC 44518)
## (AC 44519)

Bright, C. J., and Alvord and Sullivan, Js.

*Syllabus*

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, A, who had previously been adjudicated neglected. The respondents claimed that the termination of their parental rights was unconstitutional, unlawful, and fraudulent. *Held* that the trial court's decision was legally sound: the court found, by clear and convincing evidence, that the respondents never complied with the specific steps issued for their rehabilitation so that they could care for A as required under the applicable statute (§ 17a-112 (j) (3) (B)), and that termination of the respondents' parental rights was in the best interest of A, and the respondents did not challenge those findings; moreover, the respondents' claims were unsupported by reference to the record, citations to applicable law, or any analysis.

Argued November 10—officially released November 30, 2021**

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* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** November 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, where the matter was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondents filed separate appeals to this court. *Affirmed.*

*Anthony L.*, self-represented, the appellant in Docket No. AC 44518 (respondent father).

*Kimberly A.*, self-represented, the appellant in Docket No. AC 44519 (respondent mother).

*John E. Tucker*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee in Docket Nos. AC 44518 and AC 44519 (petitioner).

*Melissa J. Veale*, for the minor child.

*Opinion*

PER CURIAM. In these consolidated appeals,[1] the respondent parents, Kimberly A. and Anthony L., appeal from the judgment of the trial court terminating their parental rights with respect to their minor child, Amanda L. (Amanda). Specifically, the respondents claim that the termination of their parental rights was

[1] The respondents filed two separate appeals from the trial court's judgment. Specifically, Anthony L. filed the appeal in Docket No. AC 44518, while Kimberly A. filed the appeal in Docket No. AC 44519. Both appeals raise identical issues. Accordingly, pursuant to Practice Book § 61-7 (b) (3) and (c), this court sua sponte ordered that the appeals be consolidated and that the respondents file a single, consolidated brief and appendix.

unconstitutional, unlawful, and fraudulent.[2] We affirm the judgment of the trial court.

The following facts, which the court found by clear and convincing evidence, and procedural history inform our review of this appeal. In 2016, the Department of Children and Families (department) received an anonymous note raising concerns about whether Amanda was being neglected by the respondents. Thereafter, the department launched an investigation and, in October, 2016, the petitioner, the Commissioner of Children and Families, filed a neglect petition on behalf of Amanda. In that petition, the petitioner alleged that Amanda was being denied proper care and attention as she had not been enrolled in school. Immediately after that petition was filed, the respondents began resisting all requests and court orders concerning Amanda and denied the department any access to her.

"Ultimately, after additional motions and orders, on March, 9, 2017, [the petitioner] filed a motion for order of temporary custody, which was granted." Amanda then was removed from the respondents' care and immediately was taken to Connecticut Children's Medical Center, where it became apparent that she "exhibited concerning behaviors and a lack of speech, although she was then already going on ten years old."

[2] On appeal, the respondents also challenge the neglect proceedings that occurred prior to the termination of their parental rights. The respondents, however, failed to pursue their separate appeals to this court from the judgment rendered in those proceedings and, therefore, those appeals were dismissed. Their petition for certification to appeal was also denied. *In re Amanda L.*, 330 Conn. 966, 200 A.3d 188 (2019). Accordingly, the respondents' claims concerning the neglect proceedings are not properly before us, and we, thus, decline to review them. See *In re Brooklyn O.*, 196 Conn. App. 543, 548, 230 A.3d 895 (2020) (respondent parent barred from challenging judgment from which he did not properly appeal); see also *In re Shamika F.*, 256 Conn. 383, 406–407, 773 A.2d 347 (2001) (refusing to countenance collateral attack on neglect proceedings in light of failure to appeal temporary custody orders).

Amanda was later diagnosed with level three autism, as well as other speech and intellectual disabilities. After the respondents refused to consent to either medical treatment or educational services for Amanda, the court entered orders authorizing the petitioner to make both medical and educational decisions for her.

The neglect trial occurred during the spring of 2018. On April 17, 2018, the court, *Abery-Wetstone*, *J.*, ruled from the bench and found that Amanda "has been denied proper care and attention physically, educationally, and emotionally" and adjudicated her neglected.[3] The court then committed Amanda to the petitioner's care and sustained the order of temporary custody. The court also set forth the specific steps required for the respondents' reunification with Amanda. "The central goals within the specific steps for the [respondents] were to take part in parenting programs and make progress [toward] any goals that these treatment programs would have established for them." The respondents, however, generally refused to take part in any of the steps ordered. In fact, the only step that the respondents took was to visit Amanda on a regular basis.

On December 11, 2018, the petitioner filed a petition for the termination of the respondents' parental rights. The petition alleged two grounds for termination: "(1) parental failure to rehabilitate so that they could assume a responsible position in their child's life within a reasonably foreseeable period of time, [pursuant to] . . . General Statutes § 17a-112 (j) (3) (B) (i); and (2) parental failure to rehabilitate where their child has been in the custody of [the petitioner] for more than fifteen months, pursuant to . . . § 17a-112 (j) (3) (B) (ii)." Trial on the termination petition took place on various

[3] On September 7, 2018, the court issued a written articulation of its ruling, wherein it adopted the findings of fact and conclusions of law that the petitioner had set forth in her motion for articulation.

dates between July, 2019, and October, 2020. On January 11, 2021, the court, *Hon. Barbara M. Quinn*, judge trial referee, issued its memorandum of decision, wherein it terminated the parental rights of the respondents and appointed the petitioner as the statutory parent for Amanda. The respondents then filed an emergency motion for reconsideration and reversal, and motions for a new, fair and impartial trial, for an order, visitation and increased family contact, for a stay, and a supplemental motion in support of pleadings and response. The court, *Olear*, *J.*, denied all five postjudgment motions. These appeals followed.

We begin with the applicable standard of review and general governing principles. "Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . .

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in

§ 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . .

"[I]n order to prevail on a petition for the termination of parental rights pursuant to § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence the department's reasonable efforts or the parent's inability or unwillingness to benefit therefrom, and that termination is in the best interest of the child. In addition, under . . . § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence that the child . . . has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." (Citations omitted; internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 87–88, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020).

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Internal quotation marks omitted.) *In re Ja'La L.*, 201 Conn. App. 586, 595, 243 A.3d 358 (2020), cert. denied, 336 Conn. 909, 244 A.3d 148 (2021).

In the present case, the court was required to make two findings. First, the court was required to find, by

clear and convincing evidence, that the petitioner proved that the respondents had failed to achieve sufficient personal rehabilitation. See *In re Xavier H.*, supra, 201 Conn. App. 88. Second, the court had to find that the termination of parental rights was in the best interests of Amanda. See *In re Ja'La L.*, supra, 201 Conn. App. 595.

Turning to the first requirement, the court made the following findings: "The court concludes, from all of the credible and reliable testimony . . . that [the respondents] never participated in learning about the services Amanda needed to thrive. In addition, as those services began to improve her condition and her ability to function in the world around her, their refusal and failure as parents was demonstrated to be profound and hostile to their child's well-being. It is evident that both of [the respondents] do not possess the ability to regulate their own emotions to collaborate with the professionals so that they could become the above average and engaged caretakers this autistic child needs.

"The court concludes from the unopposed evidence in this trial that, as observed and found in the earlier trial, 'the respondents have prioritized their apparent psychological need to defy authority over Amanda's welfare.' The court finds, from the clear and convincing evidence, that the [respondents] failed to follow any specific steps for their rehabilitation other than visitation and persisted in their behavior which only serves to injure their child's potential to grow and become a more independently functioning adult. Their inability to adjust their own behavior to be able to rehabilitate so that they could parent this child in the reasonably foreseeable future has been without question and demonstrated by clear and convincing evidence.

* * *

"As the court has found from the clear and convincing evidence in this case, neither [respondent] ever complied with the specific steps issued for their rehabilitation so that they could care for their child. The only step either undertook was to visit with Amanda. The clear and convincing evidence demonstrates that both [the respondents] made no progress toward understanding Amanda's specialized needs or how to properly care for her so that she may become as independently functioning as possible, given her limitations. There is no evidence of any changes in their behavior and outlook to support the claim that they could reasonably be safely able to care for Amanda, now or in the near future. The court finds from the clear and convincing evidence that the first grounds alleged for termination of [the respondents'] rights have been proven by [the petitioner]."[4] (Footnote omitted.)

As to the dispositional phase, the court stated: "The court must now address the issue of whether termination of parental rights is in the best interests of Amanda. Amanda does not have a biological parent available to care for her . . . . She needs stability as well as an emotionally stable caretaker who can collaborate and cooperate with the professionals needed to provide Amanda's ongoing supportive care. As Amanda's clinician and other caretakers and staff testified, her care needs remain significant. She is a special needs child with significant disabilities who cannot be cared for without specialized support to keep her safe and functioning. Amanda, like all children, needs permanency. . . . After carefully considering Amanda's age and the

[4] Additionally, the court found that Amanda previously had been adjudicated neglected and that she had been in the custody of the petitioner for at least fifteen months, as required by § 17a-112 (j) (3) (B).

The court also considered and made written findings regarding each of the seven factors set forth in § 17a-112 (k).

totality of her circumstances, the court concludes, from the clear and convincing evidence, that termination of [the respondents' parental] rights is in her best interests."

Accordingly, the court in the present case made the factual findings that it was required to make before terminating the respondents' parental rights.[5] On appeal, the respondents do not challenge those findings. Instead, they claim, without reference to the record, citations to applicable law, or any analysis, that the termination of their parental rights was unconstitutional, unlawful, and fraudulent. Because such claims are not supported by the facts or the law and do not challenge the factual findings that support the court's decision to terminate the respondents' parental rights, they do not provide us with a valid basis to reverse the judgment of the court. See *In re Sequoia G.*, 205 Conn. App. 222, 226–27, 256 A.3d 195, cert. denied, 338 Conn. 904, 258 A.3d 675 (2021) (appellate courts will reverse trial court's determination that termination of parental rights is in best interests of child only if factual findings underlying court's decision are clearly erroneous).

The judgment is affirmed.

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## STATE OF CONNECTICUT *v.* MICHAEL BRYANT BOUVIER
## (AC 42430)

Prescott, Moll and Suarez, Js.

*Syllabus*

The defendant, who was convicted of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving, and whose

[5] Because the court had previously approved a permanency plan other than reunification, the court was not required to find that the department had made reasonable efforts to support the respondents' progress toward reunification. Nonetheless, the court found that the department had made such reasonable efforts but that "both [respondents] failed to participate in any effort [toward] reunification with Amanda and were therefore unwilling and unable to benefit from [the department's efforts] . . . ."

sentence was enhanced for twice previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, appealed to this court. The entirety of the motor vehicle stop that led to his arrest was recorded by a camera in the arresting state trooper's vehicle, although the audio recording was briefly interrupted when the trooper, K, temporarily turned off the microphone on his uniform, to speak with a second trooper, Q. The defendant claimed that the trial court improperly denied his motion to suppress certain statements he made to the police during a postarrest interview, as he claimed he had not voluntarily, knowingly and intelligently waived his rights under *Miranda* v. *Arizona* (384 U.S. 436), denied his motion to preclude the testimony of the arresting state troopers as a sanction for K having turned off his microphone, and sustained the state's objection to questions regarding a finding by a hearing officer of the Department of Motor Vehicles that no probable cause existed to arrest the defendant. *Held*:

1. The defendant could not prevail on his claim that the trial court erred in denying his motion to suppress his statements to the police during his postarrest interview: the court properly determined that the defendant had been advised of his *Miranda* rights before he made his statements in response to police interrogation, the defendant having previously conceded that he was advised of his rights both while being transported to the police station and while at the station and the defendant failed to challenge the first advisement as invalid, thus, the defendant conceded that he was taken into custody, properly advised of his rights prior to interrogation, remained silent, and later decided to speak during interrogation; moreover, the court properly determined that the defendant implicitly had waived his *Miranda* rights voluntarily, knowingly and intelligently prior to making statements to the police, as it reasonably could be inferred that the defendant understood his right to remain silent, as he did so after K initially advised him of his rights, and, at the police station, he was again advised of his rights as well as the consequences of refusing a Breathalyzer test, which he acknowledged; furthermore, the defendant's knowledge of his rights from his two prior arrests further supported the court's conclusion that he understood those rights, as did the defendant's course of conduct in voluntarily answering multiple questions by the police and declining the opportunity to contact an attorney after it had been offered to him.
2. The trial court did not abuse its discretion in denying the defendant's motion in limine, in which he sought either to preclude the testimony of K and Q or an instruction permitting the jury to draw an adverse inference against the state because K intentionally had turned off his body camera during the traffic stop, as K's action did not constitute a failure to preserve evidence or the destruction of evidence: the evidence before the court showed that K had acted in a manner that failed to create an audio recording, thus, evidence consisting of such a recording

did not actually exist; moreover, the defendant failed to cite to any authority demonstrating that the troopers had a legal duty to record their conversation at the scene of the motor vehicle stop, as the administrative guidelines cited by the defendant did not create a cognizable due process interest in the defendant, and the court made no finding that the troopers actually violated those guidelines.

3. The defendant could not prevail on his claim that the trial court erred in sustaining the state's objection to questions defense counsel asked K regarding a finding by a hearing officer of the Department of Motor Vehicles that no probable cause existed to arrest the defendant: the court properly did not admit the hearing officer's finding of no probable cause to permit the defendant to impeach the arresting officers' credibility as the finding constituted extrinsic evidence, and defense counsel properly was permitted to, and did, cross-examine the arresting officers regarding their administration of field sobriety tests; moreover, the defendant's unpreserved claim that the hearing officer's finding was relevant and admissible to prove that no probable cause existed to arrest the defendant was not reviewable pursuant to the second prong of *State* v. *Golding* (213 Conn. 233) because the claim was purely evidentiary in nature and not of constitutional magnitude; furthermore, even if this court were to reach the merits of the defendant's claim, the finding, if offered to prove that there was no probable cause to arrest the defendant, would be inadmissible, as probable cause to arrest the defendant was not an element of either of the offenses on which the defendant was tried, thus, the finding was not material to the jury's determination of the case before it.

Argued April 5—officially released December 7, 2021

*Procedural History*

Two part substitute information charging the defendant, in the first part, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving, and, in the second part, with twice previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *D'Addabbo*, *J.*, denied the defendant's motion in limine to preclude certain testimony; thereafter, the court denied the defendant's motion to suppress certain evidence; subsequently, the first part of the information was tried to the jury before

*D'Addabbo*, *J.*; verdict of guilty; thereafter, the defendant was tried to the court, *D'Addabbo*, *J.*, on the second part of the information; finding of guilty; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*Patrick Tomasiewicz*, for the appellant (defendant).

*Felicia Valentino*, special deputy assistant state's attorney, with whom, on the brief, were *Sharmese Walcott*, state's attorney, and *Denise Smoker* and *Robert Diaz*, senior assistant state's attorneys, for the appellee (state).

*Opinion*

PRESCOTT, J. The defendant, Michael Bryant Bouvier, appeals from the judgment of conviction, rendered following a jury trial, of operating a motor vehicle while under the influence of alcohol in violation of General Statutes § 14-227a (a) (1) and reckless driving in violation of General Statutes § 14-222. He also appeals from the judgment of conviction, following a trial to the court on a part B information, of being a third time offender in violation of § 14-227a (g) (3). The defendant claims that the trial court improperly (1) denied his motion to suppress statements he made to the police during a postarrest interview because he allegedly had failed to voluntarily, knowingly, and intelligently waive his *Miranda* rights[1] prior to responding to questioning, (2) denied his motion in limine that sought to preclude the testimony of the arresting state troopers as a sanction for one of the troopers having turned off his body microphone during the motor vehicle stop, and (3) sustained the state's objection to questions regarding a finding made by a Department of Motor Vehicles hearing officer

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

that no probable cause existed to arrest him. We affirm the judgment of the court.

The jury reasonably could have found the following facts. During the early morning hours of June 1, 2017, Trooper Thomas Krynski of the Connecticut State Police was on duty patrolling Interstate 84 in the Hartford and West Hartford areas. The roadway was wet due to rain. At approximately 12:43 a.m., Krynski was operating his police cruiser near exit 46 when he observed in his mirror a car approaching in the left center lane. The car passed Krynski at approximately eighty miles per hour, far in excess of the fifty mile per hour speed limit. Krynski followed the car for approximately three miles, during which time he observed the driver making lane changes to pass other vehicles without using his turn signal, drifting from one lane to another, and not staying within a designated lane. When the car exited the highway at exit 42, Krynski followed and observed the car fail to stop at the stop sign located at the end of the exit ramp. At that time, Krynski initiated a traffic stop using his cruiser's lights and siren.

Krynski approached the driver's side window of the car and asked the driver, who was the sole occupant of the car, for his license, registration, and proof of insurance. The paperwork identified the driver as the defendant. Krynski observed that the defendant had glassy and bloodshot eyes, and he detected an odor of alcohol coming from the car. Krynski decided to conduct a preliminary sobriety test. He asked the defendant to follow his finger with his eyes and observed that the defendant's eyes were "jerking." He asked the defendant if he had had anything to drink, and the defendant responded, "Nothing." He next asked the defendant to step out of the car so that he could conduct the preliminary eye test a second time. Krynski again noted "jerkiness" in the defendant's eyes. When asked, the

defendant stated that he was coming from his girlfriend's house in Hartford.

Krynski returned to his cruiser to request back up so that he could conduct standardized field sobriety tests. Shortly thereafter, Trooper Michael Quagliaroli arrived in his cruiser on the scene. Krynski administered three separate field sobriety tests: the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. The administration of the sobriety tests was recorded by the dashboard camera on Krynski's cruiser, the audio for which was captured by a microphone worn by Krynski on his uniform. On the basis of his observations of the defendant's performance of the field sobriety tests, Krynski determined that none was performed to standard.

Krynski then approached Quagliaroli to speak to him. While doing so, Krynski turned off his body microphone for less than one minute. During this time, the video recording nevertheless continued. While the microphone was off, the two troopers discussed whether a sufficient basis to arrest the defendant existed, as well as whether they should leave his car on the street or have it towed. They ultimately concluded that the defendant should be arrested, and they placed him under arrest and transported him in a cruiser to the police station.

During the drive to the police station, Krynski orally advised the defendant of his *Miranda* rights. At the police station, Krynski brought the defendant into the booking area at which time he again advised the defendant of his *Miranda* rights, this time reading from a form. Krynski next explained the Breathalyzer testing process and the consequences of a refusal and asked the defendant to submit to a Breathalyzer test. The defendant refused the test and declined an opportunity to speak to a lawyer. Krynski called in another trooper

to witness the defendant's refusal. After Krynski again advised the defendant of the test and his right to refuse, the defendant refused to submit to the Breathalyzer test. Krynski then asked the defendant a series of questions listed on a postarrest interview form. When asked whether he had been drinking prior to his arrest, the defendant responded that he drank beer earlier in the evening at the Pig's Eye Pub in Hartford, but had stopped around 11 p.m. after consuming two, twenty-three ounce beers.

The state charged the defendant with operating under the influence of alcohol (OUI) and reckless driving. The state also charged the defendant in a part B information with being a third time OUI offender in violation of § 14-227a (g) (2) and (g) (3). Following a trial, a jury found the defendant guilty of both OUI and reckless driving. The defendant waived his right to a jury trial regarding the part B information, which then was tried to the court. The court, *D'Addabbo*, *J.*, found the defendant guilty of being a third time OUI offender. The court subsequently imposed on the defendant a total effective sentence of three years of incarceration, suspended after twenty months, followed by three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to suppress the statements he gave to the police during his postarrest interview. The defendant specifically argues that the evidence establishes that Krynski failed to advise the defendant of his *Miranda* rights at the station before questioning him. The defendant additionally argues that the court improperly determined that he implicitly had waived his *Miranda* rights prior to speaking with the police. We are not persuaded.

The following procedural history is relevant to our resolution of this claim. The evidence portion of the trial commenced on October 15, 2018. The state asked Krynski on direct examination whether he had asked the defendant any questions after the defendant had declined to submit to the Breathalyzer test. Krynski listed a series of processing questions from a postarrest interview form that he had asked the defendant, including questions concerning the defendant's height, weight, social security number, address, and phone number. Krynski also testified that, in addition to the processing questions, there was "another section" of the postarrest interview form. The defendant objected, and the jury was excused. The defendant requested an offer of proof, and the state explained that it had planned to elicit from Krynski the answers the defendant had given to certain questions from the postarrest interview form, including that the defendant had consumed two, twenty-three ounce beers at the Pig's Eye Pub.

The defendant argued that the admission of his answers regarding his alcohol consumption violated his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *State* v. *Ferrell*, 191 Conn. 37, 463 A.2d 573 (1983). The defendant asserted that he did not waive his *Miranda* rights because he did not sign a *Miranda* waiver form before the arresting officers questioned him.

During a recess on October 15, 2018, the defendant filed a corresponding written motion to suppress the statements he had made after his arrest and while in police custody,[2] and, outside the presence of the jury,

[2] Although the defendant's motion broadly sought to suppress all of the "statements made by the defendant after his arrest" and "any evidence obtained as the fruits of those statements," the court limited its consideration to the statements that the defendant made at the station in response to

the court heard testimony from Krynski as well as argument from both parties. On October 16, 2018, the court orally denied the defendant's motion to suppress the statements and later issued a written decision on the motion, dated December 21, 2018.

The court found the following facts in connection with the defendant's motion to suppress. Krynski first orally advised the defendant of his *Miranda* rights in the cruiser, shortly following his arrest. He was not questioned at that time.

At the station, and after advising the defendant of his *Miranda* rights for the second time, Krynski asked the defendant a series of questions printed in section D, titled "Post Arrest Interview," of the Officer's OUI Arrest and Alcohol Test Refusal or Failure Report form. Krynski asked the defendant, inter alia, how much alcohol he had consumed, what type of alcohol he had consumed, and where the defendant had been drinking on May 31, 2017. The defendant responded that he had consumed alcoholic beverages at a local bar.[3]

the questions from the postarrest interview form, including his statements concerning alcohol and food consumption. The defendant on appeal primarily, if not exclusively, challenges the court's decision to admit these statements.

The defendant asserts in his brief, however, that while in custody at the scene of the stop, Krynski asked the defendant about certain receipts from the Pig's Eye Pub, which the arresting officers uncovered in the defendant's car. In its written decision on the motion to suppress the defendant's postarrest statements, the court determined that the defendant "did not respond" to Krynski's question about the receipts. The court deemed the receipts inadmissible hearsay and prohibited the state from eliciting testimony concerning their contents or any description thereof.

[3] Although the court did not make an explicit factual finding concerning the amount of alcohol the defendant drank on May 31, 2017, the court concluded that the defendant answered the questions he was asked by Krynski at the station, including how much alcohol he had drunk. During the suppression hearing, outside of the presence of the jury, and at trial, before the jury, Krynski testified that the defendant answered that he consumed two, twenty-three ounce beers.

The court determined that the defendant was in custody at the time that he had made the statements and that the statements were elicited as a result of interrogation by the police. Accordingly, the court reasoned that the statements would be admissible only if the defendant had been advised properly of his *Miranda* rights before making them and knowingly and voluntarily had waived those rights.

The court found that the defendant had been advised of his *Miranda* rights twice prior to questioning: once in the cruiser, and again later at the station. The court also found that the defendant did not explicitly waive his *Miranda* rights orally or in writing.[4] Nonetheless, the court found that the defendant implicitly had waived his right to remain silent by voluntarily responding to the questions posed to him by Krynski. In so concluding, the court gave weight to the defendant's decision to remain silent on his initial advisement, his indication to Krynski that he understood his rights both generally and as they related to his decision to refuse the Breathalyzer test, and his familiarity with being arrested during his prior arrests. The court also noted that there was no evidence before it that indicated that the defendant's statements were coerced.

We begin by setting forth the applicable standard of review and governing legal principles. "Under our well established standard of review in connection with a motion to suppress, we will not disturb a trial court's finding of fact unless it is clearly erroneous in view of

[4] The court acknowledged that, at some point during booking, the defendant signed a notice of rights form, which memorialized the defendant's *Miranda* rights. The court concluded that this form was not an express waiver of his rights but, rather, indicated the defendant's understanding of the rights that he implicitly waived. The defendant asserts on appeal that, because he did not sign the notice of rights form until after being questioned, he did not waive his rights prior to questioning. This argument misconstrues the court's finding that the defendant implicitly waived his rights and that the completed notice of rights form did not amount to an explicit waiver.

the evidence and pleadings in the whole record . . . ." (Internal quotation marks omitted.) *State* v. *Arias*, 322 Conn. 170, 176–77, 140 A.3d 200 (2016). "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.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 679, 182 A.3d 67 (2018). Generally, "[b]ecause it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 766, 43 A.3d 567 (2012). "[W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). "[When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Arias*, supra, 177.

"It is well established that the prosecution may not use statements, whether exculpatory or inculpatory,

stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda* v. *Arizona*, [supra, 384 U.S. 444]. Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 294, 25 A.3d 648 (2011).

"Although [a]ny [police] interview of [an individual] suspected of a crime . . . [has] coercive aspects to it . . . only an interrogation that occurs when a suspect is in custody heightens the risk that statements obtained therefrom are not the product of the suspect's free choice. . . . This is so because the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements . . . . Thus, the court in *Miranda* was concerned with protecting defendants against interrogations that take place in a police-dominated atmosphere, containing inherently compelling pressures [that] work to undermine the individual's will to resist and to compel him to speak [when] he would not otherwise do so freely . . . . By adequately and effectively appris[ing] [a suspect] of his rights and reassuring the suspect that the exercise of those rights must be fully honored, the *Miranda* warnings combat [the] pressures inherent in custodial interrogations." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Castillo*, 165 Conn. App. 703, 713–14, 140 A.3d 301 (2016), aff'd, 329 Conn. 311, 186 A.3d 672 (2018). Thus, if a suspect is in custody and has been subjected to police interrogation, "prior to the questioning, the suspect [must be] advised that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the

presence of an attorney, either retained or appointed." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 185 n.1, 85 A.3d 627 (2014), citing *Miranda* v. *Arizona*, supra, 384 U.S. 444.

A

The defendant first argues that the evidence plainly establishes that Krynski failed to advise the defendant of his *Miranda* rights at the station until after questioning him. To support this argument, the defendant asserts that the video evidence from the booking area at the station "undermines" Krynski's trial testimony that he read the defendant his rights from a form prior to questioning the defendant because the booking video allegedly fails to show Krynski reading from *any* form while in the booking area. Because he was not advised of his *Miranda* rights at the station, the defendant argues, the court improperly denied his motion to suppress the statements he made at the station.

This is not the argument the defendant made in the trial court. The defendant filed a motion for a new trial dated November 28, 2018, and the court heard argument on that motion on December 21, 2018. In his motion, the defendant made a different argument than the one he now raises on appeal: namely, the defendant argued that a "close review" of the booking video demonstrated that Krynski failed to *provide to the defendant a written advisement of rights* at the station until after he had questioned the defendant. Contrary to his position on appeal, the defendant conceded in his motion for a new trial that the second *Miranda* advisement occurred but claimed that the second advisement took place after the defendant had been interrogated—specifically, the second advisement occurred when Krynski provided to the defendant the written advisement of rights. The court denied the defendant's motion, characterizing the

defendant's claims as "simpl[e] reiterations of arguments previously made during the trial [in support of a motion to suppress] and denied by the [trial] court."

"[I]t is not ordinarily the function of a reviewing court to make factual findings and . . . conclusions of fact may be drawn on appeal *only* where the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Emphasis added; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 762. On appeal, the defendant essentially argues that, when the court reviewed the booking video, it should have drawn an inference from the contents of the video that Krynski's testimony should not be credited because the video does not depict Krynski reading from a form. Put differently, the defendant argues that the court's interpretation of the booking video was clearly erroneous because the court failed to draw an inference from the video that is favorable to him. Moreover, it is also important to emphasize that the defendant never argued to the court that it should draw such an inference. Because "the function of [this court] is to review findings of fact, not make factual findings"; *State* v. *Wilson*, 111 Conn. App. 614, 621, 960 A.2d 1056 (2008), cert. denied, 290 Conn. 917, 966 A.2d 234 (2009); we decline to make findings of fact with respect to the defendant's alternative interpretation of the booking video.

More significantly, the defendant's argument that he was not advised of his *Miranda* rights at the police station is also unpersuasive because it fails to account for the fact that Krynski already had advised the defendant of his *Miranda* rights in the cruiser. The defendant admits that this first advisement in the cruiser took place before he was interrogated at the station. The

defendant does not argue that Krynski's advisement in the cruiser was inadequate in any way, such that he was entitled to a readvisement of his *Miranda* rights. The defendant, for instance, does not assert that the *Miranda* advisement in the cruiser was deficient because the advisement failed to reasonably convey to him his rights. See, e.g., *State* v. *McMillion*, 128 Conn. App. 836, 837–42, 17 A.3d 1165 (considering adequacy of content of *Miranda* advisement), cert. denied, 302 Conn. 903, 23 A.3d 1243 (2011). Beyond characterizing the advisement in the cruiser as untimely without further argument or authority, the defendant did not argue before the trial court and does not argue on appeal that a sufficient amount of time passed between the advisement in the cruiser and the interrogation, such that the police were obligated to readvise the defendant of his *Miranda* rights before questioning him.[5]

Because the defendant has failed to challenge as invalid Krynski's advisement of the defendant's *Miranda* rights in the cruiser, the defendant concedes that he was taken into custody, properly advised of his *Miranda* rights prior to police interrogation, remained silent, and later decided to speak in response to police interrogation. We thus conclude that, regardless of whether Krynski advised the defendant of his *Miranda* rights at the station,[6] the court properly determined that

[5] In a notice of supplemental authorities to this court, the defendant quoted five of eight factors that courts must consider in evaluating whether it is necessary for the police to again advise a suspect of his *Miranda* rights. See *In re Kevin K.*, 299 Conn. 107, 123, 7 A.3d 898 (2010). The defendant, however, failed to make any argument concerning whether, or how, any of these factors apply to the present case.

[6] We emphasize that the court's factual finding that the defendant was advised of his *Miranda* rights a second time in the booking area of the station is supported by evidence and, accordingly, is not clearly erroneous. See *FirstLight Hydro Generating Co.* v. *Stewart*, supra, 328 Conn. 679. Krynski testified outside of the presence of the jury that he had advised the defendant of his *Miranda* rights in the cruiser and then again at the station. The court reviewed two recordings: the video and audio recording from the scene of the arrest, which documented Krynski advising the defendant of

the defendant had been advised of his *Miranda* rights before he made his statements in response to police interrogation.

B

The defendant next argues that the court improperly determined that he implicitly had waived his *Miranda* rights prior to speaking with the police. The defendant asserts that his decision to remain silent after being advised of his rights in the cruiser, then later to admit to consuming alcohol, did not constitute a valid waiver of his rights, particularly because Krynski had failed to ask the defendant explicitly whether he elected to waive his rights. We are not persuaded.

Because the defendant was subject to custodial interrogation, "any statements made by the [defendant] in response to the questioning will be suppressed unless, prior to the questioning, the [defendant] [was] advised" of his rights under *Miranda*; *State* v. *Mangual*, supra, 311 Conn. 185 n.1; and the defendant waived those rights. "[T]he accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [his *Miranda*] rights when making the statement." (Internal quotation marks omitted.) *State* v. *Christopher S.*, 338 Conn. 255, 278, 257 A.3d 912 (2021).

"To be valid, a [*Miranda*] waiver must be voluntary, knowing and intelligent. . . . The state has the burden of proving by a preponderance of the evidence that the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights. . . . Whether a purported

his rights in the cruiser, and the video recording from the booking area, which documented Krynski and the defendant in the booking area, communicating at various points. In response to questions by the court, Krynski confirmed that, while in the booking area, he advised the defendant of his rights, then subsequently questioned the defendant.

waiver satisfies those requirements is a question of fact that depends on the circumstances of the particular case." (Internal quotation marks omitted.) *State* v. *Andino*, 173 Conn. App. 851, 861, 162 A.3d 736, cert. denied, 327 Conn. 906, 170 A.3d 3 (2017). "Although the issue [of whether there has been a knowing and voluntary waiver] is . . . ultimately factual, our usual deference to fact-finding by the trial court is qualified, on questions of this nature, by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Cushard*, 164 Conn. App. 832, 838–39, 137 A.3d 926 (2016), aff'd, 328 Conn. 558, 181 A.3d 74 (2018).

"There is no requirement in our law that a valid *Miranda* waiver must be evidenced by a written waiver. [T]he state must demonstrate: (1) that the defendant understood his rights, and (2) that the defendant's course of conduct indicated that he did, in fact, waive those rights. . . . In considering the validity of [a] waiver, we look, as did the trial court, to the totality of the circumstances of the claimed waiver." (Internal quotation marks omitted.) *State* v. *Andino*, supra, 173 Conn. App. 861. "[A]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case . . . [and] in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (Internal quotation marks omitted.) *State* v. *Cushard*, supra, 164 Conn. App. 839. For instance, a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver," may indicate that a defendant has

waived his rights. (Internal quotation marks omitted.) *State* v. *Wilson*, 183 Conn. 280, 284, 439 A.2d 330 (1981).

Our review of the record indicates that the court properly determined that the defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. To start, the court properly concluded that the defendant understood his rights. See *State* v. *Andino*, supra, 173 Conn. App. 861. After Krynski initially advised the defendant of his rights and asked him if he understood his rights, the defendant remained silent, from which it reasonably can be inferred that he understood his right to do so. See *State* v. *Hafford*, 252 Conn. 274, 296, 746 A.2d 150 (concluding that defendant's refusal to talk indicated defendant's understanding of right to remain silent), cert. denied, 521 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Upon arrival at the station, the defendant once again was advised of his rights. He also was advised as to the consequences of refusing a Breathalyzer test, which he acknowledged. Each of these actions indicates the defendant's understanding of the rights he enjoyed. The defendant's prior criminal history further supports the court's conclusion that he understood the rights he maintained while under arrest. See *State* v. *Griffin*, 339 Conn. 631, 688, A.3d (2021) (noting that defendant's prior experience in criminal justice system indicated defendant's "[full] underst[anding] [of] the nature of his *Miranda* rights and the consequences of waiving (or never invoking) them"). As the record reflects, the defendant previously was arrested for OUI on two separate occasions, on February 1 and October 4, 2008. Accordingly, the totality of the circumstances indicate that the defendant understood his rights.

Additionally, the court properly determined that the defendant's course of conduct reflected a waiver of his rights. See *State* v. *Andino*, supra, 173 Conn. App. 861.

The defendant voluntarily answered multiple questions concerning his whereabouts and his consumption of alcohol on May 31, 2017. The defendant was provided with, and declined, the opportunity to contact an attorney and, instead, answered the questions he was asked. "By speaking, the defendant has chosen unambiguously not to assert his right to remain silent." (Internal quotation marks omitted.) *State* v. *Silva*, 166 Conn. App. 255, 285, 141 A.3d 916, cert. denied, 323 Conn. 913, 149 A.3d 495 (2016), cert. denied, U.S. , 137 S. Ct. 2118, 198 L. Ed. 2d 197 (2017). Considering the totality of the circumstances, the court properly concluded that the defendant implicitly waived his rights prior to volunteering his statements in response to questioning.

For the foregoing reasons, we are not persuaded by the defendant's claim that he did not voluntarily, knowingly, and intelligently waive his rights under *Miranda* prior to responding to the postarrest interview form questions. Accordingly, we conclude that the court properly denied the defendant's motion to suppress the statements he made in response to police interrogation while in custody.

II

The defendant next claims that the court improperly denied a motion in limine in which he sought to preclude the trial testimony of Krynski and Quagliaroli or, alternatively, an instruction permitting the jury to draw an adverse inference against the state because Krynski intentionally had turned off his body microphone for a period of time during the traffic stop. According to the defendant, Krynski's action prevented the audio recording of a conversation between Krynski and Quagliaroli that the defendant contends was potentially exculpatory. The state responds that the defendant's claim fails because Krynski's brief muting of his micro-

phone did not constitute a failure to preserve evidence or the destruction of evidence as argued by the defendant.[7] We agree with the state that the defendant has failed to establish the factual predicate for a due process violation under either the state or federal constitution arising out of the alleged deprivation of potentially exculpatory evidence and that the court did not abuse its discretion by denying the motion in limine.

The following additional facts, as found by the court in its ruling on the motion in limine, and procedural history are relevant to this claim. The mobile video/audio recording device, or MVR, in Krynski's cruiser was first activated when he turned on his cruiser's lights to initiate the traffic stop of the defendant. The recording—the entirety of which was admitted into evidence at trial with minor redactions[8]—captured both video and audio of the officers' interactions with the defendant, including the initial traffic stop, the administration of the field sobriety tests, and his subsequent arrest. Just prior to placing the defendant under arrest at the scene, however, Krynski deactivated his body microphone for approximately forty-eight seconds, during which time he and Quagliaroli walked away from the defendant to have a conversation. Because Krynski's body microphone provided the audio for the video recording captured by the cruiser's dashboard camera, the audio portion of the conversation between Krynski and Quagliaroli was not recorded. The video portion

[7] Alternatively, the state argues that any error was harmless because the court provided the defendant with an unfettered opportunity to cross-examine the officers at trial about the content of the unrecorded conversation and the purpose for turning off the microphone. Furthermore, it argues that the entirety of the video recording—which continued even during the time the microphone was muted—was available for review by the jury and constituted a complete recording of the defendant's interaction with the troopers at the scene.

[8] The video was redacted only with respect to certain statements that were made by both the defendant and the officers regarding the defendant's prior OUI history.

of the recording, however, continued and showed that the conversation between the officers took place away from the defendant.

Prior to trial, the defendant filed a motion in limine that sought to preclude Krynski and Quagliaroli from testifying at trial because, according to the defendant, Krynski's deactivation of his body microphone while at the scene was contrary to existing state police regulations or directives and deprived the defendant of potentially exculpatory evidence in violation of his right to due process.[9] In addition to asking the court to preclude the testimony of both officers, the defendant alternatively asked the court to instruct the jury that it was permitted to draw an adverse inference against the state regarding the missing audio—namely, that it would have been unfavorable to the state.

The court conducted a hearing on the motion in limine. The defendant presented testimony from a single witness, Michael Mebane, a communication engineer with the state police. The purpose of Mebane's testimony was to establish that the cruiser's recording equipment was functioning properly at the time of the defendant's arrest and, thus, that the lack of audio resulted from Krynski's intentional decision to turn off his body microphone.[10] In his motion in limine and argument to the court, the defendant failed to point to any

[9] Quagliaroli, who arrived at the scene after Krynski requested an additional trooper, indicated that his cruiser also was equipped with a mobile video/audio recording device but that he never activated his cruiser's lights and was unaware whether his vehicle had recorded anything. Although Quagliaroli's failure to initiate recording at the scene was also raised as a basis for the motion in limine, that ground was abandoned at the hearing on the motion after defense counsel had an opportunity to speak with Quagliaroli.

[10] Mebane testified that his responsibilities included the installation and maintenance of all recording devices used by the state police and that all troopers were obligated to ensure that any recording devices in a cruiser they were using were operational and, if not, to report any problems. Mebane indicated that he was unable to find any requests by Krynski for maintenance of the recording equipment used at the time of the defendant's arrest.

then existing statutory or regulatory requirements that imposed on the state police a duty to capture both audio and video recordings of the entirety of an OUI traffic stop. Rather, the defendant cited only to a portion of the state police's Administration and Operation Manual (AOM) that contains general guidelines instructing troopers to record continuously "all traffic stops."[11] After hearing argument by counsel, the court indicated that it would issue a decision after it had reviewed the record, including the audio/video recording of the traffic stop.

Prior to trial, the court made an oral ruling denying the motion in limine. Significantly, in its oral ruling, the court emphasized that the defendant's account in his motion regarding what had transpired during the period of time that Krynski turned off his body microphone was not accurate based on the court's review of the recording. Although the defendant stated in the motion in limine that the officers had failed to record "oral conversations with the defendant" and that the state was unable to "furnish a complete copy of the [officer's] interactions with the defendant," the court made the following contrary findings on the basis of its review of the video recording: "The video shows a conversation between . . . Krynski and Quagliaroli many feet away from the defendant. The defendant is not part of the conversation. Although the defendant is not saying anything, he's constantly being recorded. In fact, there's one view that he's laying his head on the roof of the vehicle."[12]

[11] The defendant submitted only a single page of the referenced operational manual into evidence. Krynski testified at trial that troopers are provided with a digital copy of the AOM and that the manual contains guidelines regarding the recording by troopers of their interactions with members of the public. No other witness testified regarding the AOM guidelines.

[12] At a posttrial hearing on the defendant's motion for a new trial, in which he raised a similar argument to those made in the motion in limine, the court again corrected the defendant's characterization of what was depicted in the video recording. The court clarified that Krynski was not having a discussion with the defendant when he turned off his body microphone.

The court found that all interactions between the officers and the defendant properly were recorded and was not persuaded that the defendant had established the existence of any legal duty on the part of Krynski to record his conversation with Quagliaroli. The court nevertheless also explained that, even if it were wrong in that regard, it was not convinced that the failure to record the conversation equated to a destruction of evidence. For purposes of its analysis, however, the court chose to presume without deciding that the trooper's unrecorded conversation was destroyed or otherwise unpreserved evidence, and it applied the four factor balancing test set forth by our Supreme Court in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), for determining whether a due process violation under the state constitution had occurred. The court concluded that, on balance, the factors weighed in favor of the state.

The court also determined that the defendant had failed to establish bad faith on the part of Krynski necessary to sustain a federal due process violation, and the defendant had also failed to establish any violation of the confrontation clause. Although the court denied the motion in limine, it indicated that it would grant the defendant extra leeway in cross-examining the officers about the unrecorded conversation. The court later filed a posttrial written articulation of its ruling.[13]

Specifically, the court cautioned: "I want the record to be clear for any appellate review that this is the second time that counsel for the defendant . . . misstated the facts in a motion. It is not a slight misstep because the video records accurately and is not . . . consistent to counsel's representation. . . . The claim . . . that this recording was with the defendant and while [Krynski] was talking to the defendant shut off the [microphone] . . . is completely not accurate."

[13] The defendant later submitted a proposed jury instruction that would have informed the jury that it was permitted to draw an adverse inference from Krynski's having turned off his microphone. That proposed instruction provided: "If you find that any member of [the] Connecticut State Police, at any point in their investigation of [the defendant], failed to preserve any

Both Krynski and Quagliaroli testified at trial and were extensively cross-examined by the defendant. During cross-examination, defense counsel asked Krynski why he had turned off his body microphone. Krynski explained that he wanted to get a "second opinion" from Quagliaroli as to whether he should arrest the defendant and to confer about whether it was safe to leave the defendant's vehicle at the scene or it was necessary to call a tow truck. Krynski agreed with defense counsel that he had not wanted his conversation with Quagliaroli to "become part of the case in evidence."

During closing argument, defense counsel argued that Krynski's act of turning off his body microphone and his testimony that he did not want his consultation with Quagliaroli to become part of the evidence in the case raised reasonable doubt regarding the defendant's guilt. Specifically, defense counsel argued that Krynski, in needing to consult with Quagliaroli prior to initiating the arrest, clearly had some concern regarding whether the defendant had failed the sobriety tests, and, according to defense counsel, Krynski's doubt was enough for the jury also to find reasonable doubt.

"The scope of our appellate review depends upon the proper characterization of the rulings made by the trial

evidence, including, but not limited to, audio recordings derived from the [recording] equipment installed in the trooper's motor vehicle, you may infer that such missing evidence would have been *unfavorable* to the state and may further draw an inference that the unpreserved evidence was favorable to [the defendant]." (Emphasis in original.) During the charging conference, the defendant again pressed the court to provide an adverse inference instruction to the jury. The state argued that such an instruction was not justified given that no evidence was missing or destroyed and that the defendant was free to make any assertion to the contrary in its closing argument to the jury. The court agreed and declined to give the requested instruction, referring in part to its earlier ruling on the motion in limine and its conclusion that the officers properly "had the ability to shut off the [body microphone] if they were in consultations."

court." (Internal quotation marks omitted.) *State* v. *Fowler*, 102 Conn. App. 154, 159, 926 A.2d 672, cert. denied, 284 Conn. 922, 933 A.2d 725 (2007). "[A] trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Bruno*, 236 Conn. 514, 549, 673 A.2d 1117 (1996). To the extent that a ruling on a motion in limine turns on a legal determination, however, our review of that determination will be plenary. See *State* v. *Isabelle*, 107 Conn. App. 597, 604, 946 A.2d 266 (2008).

"[I]t is well established that there are two areas of constitutionally guaranteed access to evidence such that denying or foreclosing the defendant's access to that evidence may constitute a due process violation. . . . The first situation concerns the withholding of exculpatory evidence by the police from the accused. . . . The second situation . . . concerns the failure of the police to preserve evidence that might be useful to the accused." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Johnson*, 288 Conn. 236, 275–76, 951 A.2d 1257 (2008).

"Despite these constitutional concerns, it is not sufficient under the federal or state constitution for a defendant simply to demonstrate that the police or the state has failed to preserve evidence. With respect to a due process violation for failure to preserve under the federal constitution, the United States Supreme Court has held that the due process clause of the fourteenth amendment requires that a criminal defendant . . . show bad faith on the part of the police [for] failure to preserve potentially useful evidence [to] constitute a denial of due process of law. . . . Notably, in [*Arizona* v. *Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)], the court observed that it had adopted a higher burden for defendants seeking to demonstrate a due process violation for failure to preserve evidence

than that applicable to claims that the state has suppressed or withheld exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (not requiring defendant to show bad faith to demonstrate due process violation). The court in *Youngblood* explained that it was unwilling to read the fundamental fairness requirement of the [d]ue [p]rocess [c]lause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. . . .

"In [*State* v. *Morales*, 232 Conn. 707, 723, 657 A.2d 585 (1995)], [our Supreme Court] rejected the federal bad faith requirement for claims alleging a failure to preserve in violation of our state constitution. Rather, [it] maintained that, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the . . . balancing test [previously set forth in *State* v. *Asherman*, supra, 193 Conn. 724], weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the *missing* evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Johnson*, supra, 288 Conn. 276–77.

On appeal, the defendant does not assert a *Brady* violation premised upon the state's *withholding* of some existing evidence that is exculpatory in nature.[14]

[14] The defendant also has not raised or briefed any confrontation clause violation on appeal. Accordingly, we do not address that aspect of the court's decision.

Rather, the defendant frames his claim as one that challenges the state's alleged *destruction of or failure to preserve* evidence that he asserts was exculpatory. Specifically, the defendant argues that Krynski's decision to turn off his body microphone so that his conversation with Quagliaroli was never recorded is, in essence, the legal equivalent of the state failing to preserve or destroying evidence. For the following reasons, we disagree.

In *Johnson*, our Supreme Court was presented with an analogous claim, which it rejected. Id., 270–81. In *Johnson*, the defendant, who was appealing from a murder conviction; id., 238; claimed that the court improperly had denied a motion to dismiss in which he argued that his due process rights under the state and federal constitutions were violated because the investigating police officers had "failed to preserve the methods by which they interrogated" a key witness for the state by not recording the entirety of all of the interviews they conducted with the witness. Id., 270. The defendant also claimed that the court improperly had denied his request for an adverse inference instruction as an alternative remedy for the alleged due process violation. Id., 270–71. Our Supreme Court clarified that "[t]he defendant does not claim that the state withheld statements made by [the witness] or that the state failed to preserve the audiotaped statements that it created. Rather, the defendant claims that the investigating police officers had a duty to record the entirety of their interviews with [the witness] and that their failure to do so constituted a failure to preserve evidence within the meaning of *Morales* and *Youngblood*." Id., 278. Our Supreme Court disagreed with the defendant that the police's decision not to make recordings of what the police characterized as " 'preinterview[s]' "; id., 271; constituted a failure to *preserve* evidence that implicated his due process rights. Id., 279.

The court held that "the duty to preserve with which *Morales* and *Youngblood* are concerned depends on the government's *possession of evidence capable of being preserved*" and that the state's duty to preserve evidence does not encompass or implicate "the collection and creation of evidence." (Emphasis added.) Id. The court agreed with the state's contention that "the trial court properly declined to dismiss the charges because it correctly recognized the distinction between allegations that the police had failed to *preserve* exculpatory evidence and allegations that the police had failed to *create* evidence that might have been exculpatory." (Emphasis in original.) Id., 270. In other words, if the police failed to make a recording of something they had no legal obligation to record, a court cannot properly conclude that the police withheld the production of evidence or destroyed evidence, because, in fact, no such evidence existed.

The defendant does not address or attempt to distinguish the holding in *Johnson* in his appellate brief but, instead, cites to nonbinding and unpersuasive out-of-state authorities to advance his argument that Krynski's intentional act of turning off his body microphone to confer with another police officer should be treated as the equivalent of the destruction of evidence. One of the cases cited by the defendant, *People* v. *Strobel*, 14 N.E.3d 1202 (Ill. App. 2014), rather than supporting his argument, in fact, is consistent with our Supreme Court's decision in *Johnson*.

In *Strobel*, the state appealed from a trial court ruling granting a defendant's motion in limine and barring the state from presenting at trial dashboard camera video of the defendant's performance of field sobriety tests and subsequent arrest, or from offering testimony from officers regarding the same. Id., 1203. The video recording did not contain any audio because the arresting officer purportedly forgot to activate his cruiser's audio

device. Id. The Illinois appellate court reversed and remanded, holding that the trial court had abused its discretion by imposing discovery sanctions because the state promptly had turned over the video, which "contained no audio of the traffic stop because no audio was ever recorded." Id. Like in the present case, the defendant argued that the absence of audio on the video amounted to the destruction of evidence of what occurred during the traffic stop, and the state argued in response that, because no audio recording was ever made and in the possession and control of the state, the defendant's argument was without merit. See id. The appellate court agreed, stating that the record did not "support any inference or suggestion that the police or the prosecution *intentionally or inadvertently* destroyed any preexisting discoverable evidence."[15] (Emphasis added.) Id., 1205.

Here, just like in *Johnson* and *Strobel*, the evidence before the court showed that the police acted in a way that resulted in the failure to create an audio recording. Specifically, a state trooper intentionally chose not to record audio of a brief exchange with another trooper that, as found by the court, occurred away from the defendant, without his involvement or that of any other member of the public. In order to implicate due process under either the federal or state constitution, however, the defendant must first demonstrate that the police or prosecution failed to preserve or destroyed some evidence *that actually existed*. As the court in *Johnson*

[15] The defendant, in relying on *Strobel* to support his claim, suggests that it is fair to assume from the quoted language that the appellate court in *Strobel* would have reached a different conclusion if the record before it had established that the police officer *intentionally* had shut off the microphone, as Krynski did in the present case. We disagree. The court's statement draws no distinction between intentional and inadvertent conduct on the part of the police, mentioning both. Rather, the point the court appears to make is that, regardless of the level of culpability, in order for evidence to be withheld or destroyed it must be preexisting.

made clear, the due process clause is not implicated by a claim that, in the absence of an express legal duty to do so, the state failed to collect or create certain evidence.

Moreover, although the defendant asserts that the officers had a legal duty to record their conversation at the scene, the defendant fails to point to any duly enacted statute or regulation as the source of such a legal duty. Our research has revealed none directly applicable or in effect at the time of the defendant's arrest.[16] The defendant relies entirely on a single page taken from a state police AOM regarding MVR recording guidelines. The portion of the guidelines submitted into evidence provides in relevant part: "The following incidents must be recorded by sworn personnel who are provided with vehicles equipped with MVR *cameras*, regardless of their duty status: (1) All traffic stops, criminal enforcement stops, assists to motorists, and pedestrian contacts in their entirety . . . . In doing so, troopers will ensure that . . . MVR equipment is not deactivated until the enforcement action undertaken is completed . . . ." (Emphasis added.) Nothing in the record before us, however, supports a conclusion that the procedures set forth in the AOM are anything more than administrative directives or best practices, or that the AOM guidelines created any cognizable due process interest in the defendant as might be the case with a duly enacted statute or properly promulgated regulation.[17]

[16] We are aware that General Statutes § 29-6d contains various provisions discussing the use of body-worn recording equipment and dashboard cameras by the state police, and that a version of this statute was in effect at the time of the defendant's traffic stop. Although referenced by the trial court in its oral decision on the motion in limine, the defendant never relied on § 29-6d as supporting his claim before the trial court nor has he raised it or briefed its applicability, if any, on appeal. We accordingly decline to discuss the statute further.

[17] The procedures for promulgating administrative regulations are set forth in General Statutes § 4-168 of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. The UAPA defines the term "regulation" in relevant part: "[E]ach agency statement of general applicability,

Furthermore, the court made no determination, nor is it determinable from the record, that the guidelines on which the defendant relies were, in fact, actually violated by the troopers. Krynski never fully disengaged or deactivated the MVR equipment. The MVR's dashboard camera video recorded the entirety of the troopers' interactions with the defendant during the traffic stop.

In sum, in order to establish a due process violation premised on the state's destruction of or failure to preserve evidence, the defendant first must demonstrate the existence of some actual evidence that was within the control of the state. Here, the trooper's choice not to record audio of a consultation between himself and another law enforcement officer did not result in the creation of evidence that was capable of either preservation or destruction. Because this basic factual predicate underlying the alleged due process violation is missing, the court properly rejected the defendant's constitutional claim.[18] Accordingly, because this was the sole basis advanced in the motion in limine for the requested relief, the court did not abuse its discretion in denying the motion in limine.

without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term . . . does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings issued pursuant to section 4-176, or (C) intra-agency or interagency memoranda . . . ." General Statutes § 4-166 (16).

[18] As argued by the state, the court also concluded that, even if Krynski's failure to record the conversation between himself and Quagliaroli was the legal equivalent of the destruction of or the failure to preserve evidence of that trooper's conversation, a weighing of the *Asherman* factors militates against the finding of a due process violation under our state constitution. See *State* v. *Asherman*, supra, 193 Conn. 724. Because we conclude that the defendant's claim fails under the rationale in *Johnson*, we do not address this alternative basis for affirming the court's denial of the relief requested in the motion in limine.

## III

Finally, the defendant claims that the court improperly sustained the state's objection to questions defense counsel asked Krynski regarding a finding made by a Department of Motor Vehicles (department) hearing officer in an administrative proceeding that no probable cause existed to arrest the defendant. On appeal, the defendant appears to argue that the court should have admitted evidence of the hearing officer's finding of no probable cause in order to impeach the "credibility" of the arresting officers.[19] The defendant also appears to assert that the hearing officer's finding of no probable cause is relevant and admissible to show that there was no probable cause to arrest the defendant. We are not persuaded.[20]

The following additional facts and procedural history are relevant to our resolution of this claim. During cross-examination, defense counsel asked Krynski whether, at some point prior to trial, he had appeared before the department in a driver's license suspension proceeding and presented the recording of the defendant's arrest

[19] During his cross-examination of Krynski, defense counsel attempted to offer evidence of the hearing officer's finding of no probable cause, and the court ruled on the state's objection to defense counsel's offer outside of the presence of the jury. The state subsequently called Quagliaroli to testify, at which point the court had already precluded entry of the evidence through Krynski. On appeal, the defendant asserts that, had he been allowed, he would have attacked the credibility of *both* officers by using the hearing officer's no probable cause finding. Thus, although defense counsel did not offer the evidence a second time or attempt to again raise his argument during the cross-examination of Quagliaroli, we nonetheless conclude that the defendant is not precluded from making his argument, as it relates to Quagliaroli, on appeal.

[20] Throughout his brief on appeal, the defendant additionally appears to argue that the court's preclusion of the testimony was not merely evidentiary error but deprived him of a fair trial in violation of his constitutional rights. The defendant did not make this claim to the trial court. Because we conclude that the court properly excluded the testimony on well established evidentiary principles, we are unpersuaded that the defendant's right to a fair trial was violated.

to the department. The state objected, asked that the jury be excused, and requested an offer of proof. In response to the state's request for an offer of proof, defense counsel elicited testimony from Krynski that he had testified at a department hearing concerning the defendant's arrest. Krynski confirmed that, at some point following the department hearing, he had become aware of the hearing officer's findings. The hearing officer had concluded that, in her opinion, there was no probable cause to arrest the defendant because he had substantially passed the field sobriety tests, including by maintaining his balance on the one leg stand test for thirty-five seconds.

Defense counsel's claim to the court was that he had the right to cross-examine Krynski concerning the hearing officer's finding of no probable cause because Krynski's testimony regarding the finding could have helped the jury make a determination concerning his credibility, specifically with respect to his decision to arrest the defendant based on his performance of the field sobriety tests. On the basis of our review of the arguments advanced by the state, it is clear that the prosecutor perceived defense counsel's argument to be that the testimony concerning the hearing officer's finding of no probable cause was offered to attack the witness' credibility. The court's comments, likewise, reflect that it understood the defense counsel's argument to be that the testimony was admissible to impeach Krynski's credibility. The court provided defense counsel an opportunity to respond to the characterization of his purpose for offering the testimony as an attack on Krynski's credibility, and defense counsel did not contest this characterization. The court sustained the state's objection and concluded that the evidence was not helpful to the jury's evaluation of the credibility of the witness.

We begin by setting forth our standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law of evidence], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

A

The defendant first appears to argue that the testimony concerning the hearing officer's finding of no probable cause was admissible to impeach the testifying officers' credibility. We are not persuaded.

"The purpose of impeachment is to undermine the credibility of a witness so that the trier will disbelieve him and disregard his testimony." (Internal quotation marks omitted.) *State* v. *Valentine*, 240 Conn. 395, 411, 692 A.2d 727 (1997). Impeachment seeks to prevent any "inaccuracies [of a witness' testimony from] go[ing] unexposed and the truthfinding function of our trial system [from] be[ing] hindered." *State* v. *Graham*, 200 Conn. 9, 17, 509 A.2d 493 (1986); see id. (examining impeachment of party's own witness).

Prior findings by a third party concerning the credibility of a witness are generally inadmissible to impeach that witness' credibility in a later proceeding. See *Weaver* v. *McKnight*, supra, 313 Conn. 432–33; *Manson* v. *Conklin*, 197 Conn. App. 51, 62–63, 231 A.3d 254 (2020).[21] In *Weaver*, the mother of a stillborn infant brought a negligence action against her obstetrician/gynecologist and his medical group. *Weaver* v. *McKnight*, supra, 396; see also *Manson* v. *Conklin*, supra, 59. The trial court, over objection, permitted the defendants to impeach the credibility of the plaintiffs' expert witness using a censure that he had received from a voluntary membership medical organization, which contained a determination that the expert had violated the organization's code of professional ethics. *Weaver* v. *McKnight*, supra, 424–25.

On appeal, our Supreme Court determined that the court improperly had admitted the testimony concerning the organization's determinations in the censure for the purpose of impeachment because it constituted extrinsic evidence of a prior act of misconduct.[22] Id., 432. Our Supreme Court noted that "[c]ommentators and courts in other jurisdictions . . . generally have concluded that counsel should not be permitted to circumvent the [prohibition on extrinsic evidence] by tucking a third person's opinion about prior acts into a

[21] The defendant urges us to abandon the case law of this state and instead follow the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *White*, 692 F.3d 235, 248 (2d Cir. 2012), in which the Second Circuit determined that "witness[es] can be cross-examined based on prior occasions when [their] testimony in other cases had been criticized by [a] court as unworthy of belief." (Internal quotation marks omitted.) We decline to do so because it is not the province of this panel to disregard binding authority of our Supreme Court or to overturn a decision of another panel of this court.

[22] "[E]xtrinsic evidence is inadmissible to prove a witness' specific acts of misconduct evidencing a character for untruthfulness." *State* v. *Durdek*, 184 Conn. App. 492, 510, 195 A.3d 388, cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018).

question asked of the witness who has denied the act." (Internal quotation marks omitted.) *Manson* v. *Conklin*, supra, 197 Conn. App. 61, citing *Weaver* v. *McKnight*, supra, 313 Conn. 428. "Professor Colin C. Tait and Judge Eliot D. Prescott, in their treatise about Connecticut evidence law, also agree that a witness cannot be asked about the opinions of others regarding the alleged misconduct. C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 6.32.5, p. 362. They refer to [our Supreme] [C]ourt's decision in *State* v. *Bova*, [240 Conn. 210, 690 A.2d 1370 (1997)], as an example. In *Bova*, [our Supreme] [C]ourt upheld a trial court's decision to preclude a party from asking a police officer about another case in which a judge commented that another witness was more credible than the police officer. . . . Professor Tait and Judge Prescott [explain] in their treatise . . . [that] [mis]conduct . . . can be proved only by questions addressed to the witness, i.e., Did you lie in case X? If the witness denies such misconduct, the questioner must take the [witness'] answer and cannot introduce extrinsic evidence." (Citations omitted; internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 429–30.

As our Supreme Court noted, "[t]he reasons for prohibiting such questions are the same reasons for precluding extrinsic evidence in the first place. . . . The Third Circuit described the risk as follows: Allowing such a line of questioning not only puts hearsay statements before the jury, it injects the views of a third person into the case to contradict the witness. This injection of extrinsic evidence not only runs afoul of [the rules of evidence], but also sets the stage for a mini-trial regarding a tangential issue of dubious probative value that is laden with potential undue prejudice." (Citations omitted; internal quotation marks omitted.) Id., 430–31. Thus, our Supreme Court "conclude[d] that the prohibition on introducing extrinsic evidence to

contradict a witness who has denied the alleged prior misconduct extends to cross-examining that witness about the opinions of third parties regarding that misconduct and whether the witness suffered any consequences as a result."[23] Id., 432.

This court recently considered a similar issue in *Manson* v. *Conklin*, supra, 197 Conn. App. 51. In that case, the plaintiff brought a negligence and indemnification action against a police officer and a city after the plaintiff collided with the officer's cruiser while riding his dirt bike in the city. Id., 52–53. Prior to trial, the court precluded the plaintiff from impeaching the officer's credibility using the findings and conclusions contained in a series of internal affairs investigative reports created by the city's police department, which documented unrelated instances in which the officer had engaged in misconduct and dishonesty.[24] Id., 55–56.

Relying on *Weaver*, this court affirmed the court's decision and determined that "the conclusions and findings contained within the [internal affairs] reports constitute extrinsic evidence of alleged prior misconduct because they reflect the opinions of the department that [the officer] acted untruthfully. Although the plaintiff

[23] Our Supreme Court noted that it "d[id] not decide whether a witness may be asked about a determination by a judicial, state administrative agency, or licensing board, not resulting in a perjury conviction, that the witness testified untruthfully in a prior proceeding." *Weaver* v. *McKnight*, supra, 313 Conn. 432 n.9.

[24] This court acknowledged that "[t]he record is somewhat muddled regarding the precise evidentiary use the plaintiff hoped to make of these reports or the information contained in them." *Manson* v. *Conklin*, supra, 197 Conn. App. 56. This court determined that the plaintiff offered the report findings for one of two reasons: (1) to impeach the officer's credibility using specific instances of misconduct, or (2) to admit the actual findings to prove that the officer had engaged in misconduct and had lied about it. Id., 56–57. The trial court "appear[ed] to have understood [the plaintiff's] argument to be that he had a right to question [the officer] about the findings and conclusions of the [internal affairs division], rather than asking [the officer] directly whether he had engaged in misconduct." Id., 57–58.

would have been permitted to question [the officer] about his misconduct, he would have been precluded from offering extrinsic evidence of that misconduct if denied by [the officer]." Id., 62. Thus, "[t]he plaintiff could not circumvent these rules by questioning [the officer] about the conclusions and findings contained in the reports." Id.

In the present case, we conclude that the hearing officer's finding of no probable cause is inadmissible. If the trial court were to admit the hearing officer's finding to impeach the troopers' credibility, it would be tantamount to introducing extrinsic evidence to attack the troopers' credibility.[25] Although in the present case, unlike in *Weaver* and *Manson*, the hearing officer made her findings in the context of an administrative hearing and her findings did not contain an express finding of untruthfulness, we nonetheless conclude that the principles dictated in *Weaver* and *Manson* apply to the present case because the finding was offered by the defendant to impeach the credibility of witnesses on the stand. If a hearing officer makes a finding at a previous administrative hearing and a court admits that finding in a subsequent proceeding to allow a party to attack the credibility of a witness on the stand, the risk of "inject[ing] the views of a third person into the case to contradict th[at] witness" is patently present, and,

[25] We note that, even if the hearing officer's findings did not constitute inadmissible extrinsic evidence, offering evidence of the hearing officer's finding of no probable cause fails to impeach effectively the witnesses' credibility. The mere fact that a third-party hearing officer disagreed with the troopers' conclusion that probable cause existed to arrest the defendant does not necessarily mean that the hearing officer viewed the officers' testimony as untruthful. Indeed, the hearing officer may have concluded that the officers truthfully described the events surrounding the defendant's arrest, but that such facts, as a matter of law, did not create probable cause to arrest the defendant. Thus, even if the court's ruling was improper, it nonetheless would have constituted harmless evidentiary error for these reasons.

thus, we are obligated to invoke the principles articulated in the aforementioned cases to curtail that risk. (Internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 430–31. Defense counsel properly was permitted to, and did, cross-examine the arresting officers about their administration of the field sobriety tests to impeach their credibility. The court, however, properly did not admit the hearing officer's finding of no probable cause to permit defense counsel to impeach the witnesses' credibility.

B

The defendant also appears to argue that the court improperly excluded evidence of the hearing officer's finding of no probable cause because the evidence was relevant and admissible to show that there was no probable cause to arrest the defendant. We are not persuaded.

In his brief, the defendant asserted that the hearing officer's findings constituted "exculpatory evidence" that there was not probable cause to arrest him, which should have been admitted as evidence. During oral argument, however, counsel for the defendant stated that, although "ideally" he would have preferred that the hearing officer's finding of no probable cause be admitted for its truth, it would be inadmissible as hearsay for that purpose.

To the extent that the defendant maintains that the hearing officer's finding of no probable cause is relevant and admissible to prove that no probable cause existed to arrest the defendant, the defendant raises this argument for the first time on appeal and, thus, it is not preserved for review. "[T]his court is not required to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . . It is well established, however, that an unpreserved claim is reviewable under [*State* v. *Golding*, 213 Conn. 233, 239–

40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)] when (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Citations omitted; internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 673, 224 A.3d 129 (2020).

Upon review of the record, we conclude that the defendant's claim is not reviewable because it fails *Golding*'s second prong. See id. The defendant's claim is "purely evidentiary" in nature; see *State* v. *Ampero*, 144 Conn. App. 706, 721, 72 A.3d 435, cert. denied, 310 Conn. 914, 76 A.3d 631 (2013); and thus is not "of constitutional magnitude alleging the violation of a fundamental right . . . ." (Internal quotation marks omitted.) *State* v. *Turner*, supra, 334 Conn. 673.

Further, even if we were to reach the merits of the defendant's argument, we would also conclude that no constitutional violation exists because the hearing officer's finding, if offered to prove that there was no probable cause to arrest the defendant, is nonetheless inadmissible because it is not material. "A defendant . . . may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper . . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all

other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Citations omitted; internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 261–62, 796 A.2d 1176 (2002). "Relevant evidence . . . has a logical tendency to *aid the trier in the determination of an issue*." (Emphasis added; internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 674, 22 A.3d 611 (2011). The commentary to the § 4-1 of the Connecticut Code of Evidence explains that the code "expressly requires materiality as a condition to relevancy in providing that the factual proposition for which the evidence is offered must be material to the determination of the proceeding . . . . The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law." (Citations omitted; internal quotation marks omitted.) Conn. Code Evid. § 4-1, commentary. The jury, which is the "sole trier of the facts" in a jury trial; *State* v. *Morgan*, 274 Conn. 790, 802, 877 A.2d 739 (2005); ultimately "must find *every element* [of the charged offense] proven beyond a reasonable doubt in order to find the defendant guilty . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Gonzalez*, 311 Conn. 408, 419, 87 A.3d 1101 (2014).

Whether probable cause existed to arrest the defendant is not an element of either of the offenses on which the defendant was tried; see General Statutes §§ 14-222 and 14-227a (a) (1); and, thus, was not a material issue before the jury.[26] The jury, alone, was tasked with determining whether, considering all of the facts and circumstances before it, the prosecution proved beyond

[26] The defendant did not challenge the legality of his arrest before the trial court. At no point did the defendant move to dismiss the case on the basis of a lack of probable cause to arrest; see General Statutes § 54-56; or file a motion to suppress that raised a similar claim. See Practice Book § 41-12.

a reasonable doubt that the defendant operated a motor vehicle under the influence of alcohol or a drug. See General Statutes § 14-227a (a) (1). The hearing officer's opinion considering probable cause, a nonissue in the case, would not "aid the trier in the determination of" that, or any, issue in the case. (Internal quotation marks omitted.) *State* v. *Pena*, supra, 301 Conn. 674. Accordingly, because the hearing officer's finding of no probable cause was not material to the jury's determination of the case before it, we conclude that the hearing officer's finding would have been inadmissible for its truth.

The judgment is affirmed.

In this opinion the other judges concurred.

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## BILLY WRIGHT *v.* COMMISSIONER OF CORRECTION (AC 43607)

Moll, Alexander and Vertefeuille, Js.

*Syllabus*

The petitioner, who had previously been convicted of murder, sought a writ of habeas corpus, claiming that he received ineffective assistance from his criminal trial counsel, S. The petitioner's first trial resulted in a mistrial following a hung jury, and, at the second trial, the jury found the petitioner guilty. Following a trial, the habeas court granted the petition for a writ of habeas corpus on the ground that, during the petitioner's second trial, S failed to present testimony from G, the petitioner's girlfriend at the time of the shooting, as an alibi witness. The court emphasized that there was a hung jury at the petitioner's first trial and that, although it was not possible to discern the individual jurors' credibility assessments, the only evidence contradicting the state's evidence at the first trial was G's testimony. The court reasoned that, therefore, one half of the first jury was unable to conclude that the state had met its burden of proof in light of G's testimony, and that G's testimony impacted the outcome of the first trial. From the judgment rendered thereon, the respondent, the Commissioner of Correction, on the granting of certification, appealed to this court. *Held* that the habeas court incorrectly determined that S rendered ineffective assistance by

failing to present an alibi defense: the court's determination was based on the improper assumption that the six jurors from the first trial who did not vote in favor of finding the petitioner guilty were influenced by G, and that G's testimony contributed to the jury's inability to conclude that the state had met its burden of proof beyond a reasonable doubt; moreover, although the jury requested playback of G's testimony, G was one of seven witnesses whose testimony was reviewed by the jury during deliberations; accordingly, the court's finding that S rendered deficient performance by failing to call G as an alibi witness was inextricably intertwined with its determination as to the reason for the hung jury in the petitioner's first trial, and because the reasons why there was a hung jury are not ascertainable, it would be guesswork for the court to attempt to determine such reasons.

Argued May 19—officially released December 7, 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, *Kwak*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

*Jonathan M. Sousa*, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellant (respondent).

*Adele V. Patterson*, senior assistant public defender, for the appellee (petitioner).

*Opinion*

ALEXANDER, J. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting the petition for a writ of habeas corpus filed by the petitioner, Billy Wright. On appeal, the respondent claims that the court incorrectly determined that the petitioner's criminal trial counsel had rendered ineffective assistance by failing to present an alibi defense. We agree and, accordingly, reverse the judgment of the habeas court.

The petitioner was originally tried in 2010 for the April 27, 2008 murder of Ronald Bethea in violation of General Statutes § 53a-54a (a). *State* v. *Wright*, 152 Conn. App. 260, 261, 96 A.3d 638 (2014), rev'd, 322 Conn. 270, 140 A.3d 939 (2016).[1] The murder occurred outside of the Cardinal's Club in New Haven at approximately 1:47 a.m. Id., 262–63. The trial court declared a mistrial after a hung jury, and a retrial took place in 2011. Id., 261–62. At the second trial, the jury found the petitioner guilty of murder, and the court imposed a sentence of sixty years of imprisonment. Id., 262.

The petitioner initiated this habeas action, and, on March 1, 2018, he filed an amended petition that contained four counts. Only the first count, in which the petitioner alleged ineffective assistance of his criminal trial counsel, Richard Silverstein, for, inter alia, failing to present an alibi defense at his second criminal trial, is relevant to this appeal.[2] With respect to this claim, the petitioner alleged that a "fundamental difference between the first and second trials was that [Silverstein] did not pursue an alibi defense and did not produce evidence which established an alibi defense which had been produced at the first trial. An inference can be drawn that, but for trial counsel's failure to produce an alibi defense and evidence in support of an alibi defense, the result of the petitioner's second trial would have been different."

A trial on the petitioner's habeas petition was held on July 12 and August 30, 2018, and January 11 and February 28, 2019. The petitioner presented multiple

[1] The petitioner filed a direct appeal from the judgment of conviction. *State* v. *Wright*, supra, 152 Conn. App. 260In that appeal, this court reversed the judgment of conviction and remanded the case for a new trial. Id., 282. Our Supreme Court granted certification and reversed this court's decision and remanded the case with direction to affirm the judgment of conviction. *State* v. *Wright*, 322 Conn. 270, 272, 291, 140 A.3d 939 (2016).

[2] Silverstein did not represent the petitioner in his first criminal trial.

witnesses. Stephanie Gonzalez, the petitioner's girlfriend at the time of the shooting and the mother of his child, testified in a manner consistent with her testimony at the petitioner's first criminal trial. She stated that, on the night the victim was shot, she got home between 11:30 p.m. and 12 a.m. after picking up their son from her grandmother's house. When she arrived home, the petitioner was asleep in their apartment. She further explained that she slept in the same bed as the petitioner and woke up a few times when her son woke up, "around 3, 4 then around, like, 6, 7 [o'clock] in the morning." Each time she woke up, the petitioner was still asleep in their bed. She further testified that she met with Silverstein about testifying at the petitioner's second criminal trial. When she arrived at Silverstein's office on the morning she planned to testify, however, he told her she would not have to testify because "[h]e felt like he had a strong case and he didn't need me . . . ."

Attorney Jeffrey Kestenband testified as a criminal defense expert. In this capacity, he opined "that reasonably competent trial counsel would have called . . . Gonzalez to testify as an alibi witness at the second trial." He explained that Gonzalez' testimony provided direct evidence that the petitioner had an alibi for the time of the crime. Further, Kestenband testified that the lack of a jury verdict in the first trial, as well as the fact that the jury in the first trial asked to have Gonzalez' testimony read back during its deliberations, suggested that at least some jurors credited her testimony. He emphasized the importance of the hung jury, stating that "[i]t was six to six,[3] which would tend to suggest

[3] Kestenband testified that he had reviewed the transcripts of the petitioner's first trial. Included in those transcripts was the following statement made by the court: "The court has received a note from the jury . . . . It reads as follows . . . we are unable to reach a unanimous decision, we are still six guilty, six not guilty." The court then declared a mistrial.

that the state had a hard time proving its case, and when you also consider the fact that [Gonzalez] not only provided evidence that, if credited, would have established that [the petitioner] was not guilty, but that she was the only witness called by the defense. That is really important information to consider when deciding how to defend [the petitioner] at the second trial." (Footnote added.) Kestenband also opined that there was a reasonable probability that a different outcome would have occurred in the petitioner's second trial if Silverstein had called Gonzalez and presented an alibi defense. On cross-examination, Kestenband admitted that it was possible that the jurors from the first trial did not credit Gonzalez' testimony, and, instead, found that the state had not proven its case beyond a reasonable doubt. However, he also stated that, "when I consider evidence as an expert and analyze it that way, I'm not really focusing on possibilities because almost anything is possible. I'm focused on reasonable probabilities, and while [I] acknowledge that it's possible, I find it unlikely that it's reasonably probable that that occurred."

Silverstein testified that his defense theory was to show that the police had conducted a flawed and incomplete investigation, and he stated that he "had to change it up" from the defense presented in the first trial because he was "not gonna try the same case that didn't result in a not guilty." Silverstein also attacked the state's identification evidence against the petitioner during the second criminal trial. He believed that the jury in the first trial had voted eleven to one or ten to two in favor of convicting, and stated that he had ordered the transcripts of the first trial only through closing arguments, because "anything after the closing argument I'm not interested in . . . ." After he was informed that the hung jury actually was divided six to six, Silverstein said that would not change how he

handled the petitioner's defense. Silverstein explained that he did not recall speaking to Gonzalez during the petitioner's trial but also testified that he reviewed her testimony from the first trial and "didn't find her credible and didn't think she'd do a good job, and I didn't think she did a good job during the first case . . . ." He believed that, if Gonzalez had been credible at the first trial, the jury would have returned a not guilty verdict. He further explained that he listed Gonzalez as a potential witness, served her with a subpoena, and informed the trial court that he intended to call her as a witness in order to keep the prosecutor "off balance as much as possible" even though he "had no intention of doing it . . . ."

On October 25, 2019, the habeas court issued a memorandum of decision granting the petition for a writ of habeas corpus on the ground that Silverstein rendered ineffective assistance of counsel when he failed to present an alibi defense.[4] It concluded that Silverstein rendered deficient performance when he did not call Gonzalez as an alibi witness and that this deficient performance prejudiced the petitioner. The court vacated the petitioner's conviction and remanded the case for a new criminal trial.

The court discussed the evidence presented at the petitioner's first and second trials, stating that there were "several notable differences," with one being that Gonzalez was not called as an alibi witness at the second trial. The court then addressed the testimony presented at the habeas trial. It discussed Gonzalez' testimony that the petitioner was asleep when she arrived home and remained there until morning, as well as the fact that Gonzalez was available to testify at the petitioner's

[4] The court rejected the petitioner's remaining claims of ineffective assistance of counsel, a violation of due process, and actual innocence. The petitioner has not challenged those aspects of the habeas court's decision.

second trial and had met with Silverstein the day he was scheduled to present the defense. The court found Gonzalez' testimony to be credible. The court noted Kestenband's testimony and found his "analyses to be persuasive." The court stated that Kestenband "concluded that reasonably competent trial counsel would have called Gonzalez as an alibi witness in the second trial. The impact that Gonzalez had on the first trial weighs in favor of calling her to discredit or negate Denard Lester's testimony in the second trial.[5] According to Kestenband, it was unreasonable for Silverstein to not call Gonzalez as an alibi witness because no one identified the petitioner as the shooter, but more than one witness placed the petitioner at the [Cardinal's] Club. Gonzalez' testimony would directly contradict the tenuous identification evidence that placed the petitioner at the club. . . . Thus, it was more important to call Gonzalez in the second trial when compared to the first trial." (Footnote added.)

In its decision, the court emphasized the hung jury in the petitioner's first trial and the jury's request for a playback of Gonzalez' testimony. The court stated that, "[a]lthough it is not possible to discern the individual jurors' credibility assessments, the only defense evidence that contradicted the circumstantial evidence . . . was the alibi supported by Gonzalez. Stated somewhat differently, all twelve jurors in the second trial found the tenuous circumstantial evidence sufficient to convict the petitioner, yet one half of the first jury was not able to conclude that the state had met its burden

[5] On the night the murder took place, video surveillance showed that, shortly before the shooting, Lester gave " 'dap,' " a brief hug and handshake, to a person who then shot the victim. *State* v. *Wright*, supra, 152 Conn. App. 278. At the petitioner's first trial, Lester testified that he knew the petitioner by the name " 'Wild Billy' " and identified the petitioner as the person to whom he gave " 'dap . . . .' " Id., 279. At the petitioner's second trial, however, Lester testified that on the night of the murder, the petitioner was not the individual to whom he gave " 'dap.' " Id.

of proof *in light of the alibi provided by Gonzalez. Clearly, Gonzalez had an impact on the outcome of the first trial.*" (Emphasis added.) The court found that Silverstein made his assessments about Gonzalez' testimony "without the knowledge that the jury was evenly divided in the first trial. Silverstein's oblique assessment of her alibi testimony was premised on Silverstein's overly myopic view that a hung jury and [a] mistrial are not a defense victory." The court discussed the variety of ways the defense can call into question identification evidence and noted that Silverstein challenged both the identification evidence and the police investigation. The court found that "attacking the identification procedures themselves or the reliability of eyewitness identifications may create reasonable doubt, *but not in the manner an alibi witness can*." (Emphasis added.)

The court stated that it "cannot determine any rational basis for Silverstein to not present Gonzalez' alibi testimony, even if the state attempted to show that she was biased because she was the petitioner's girlfriend and mother of their child." The court further stated that, "[a]lthough the jury in the first criminal trial theoretically may have been unable to reach a unanimous verdict solely because of disagreement as to the identification evidence, which would require completely negating or discounting Gonzalez' testimony, *the court does not find such a scenario plausible.* The fact that the jury requested playback of Gonzalez' testimony underscores that *her testimony influenced the deliberations and contributed to the jury being unable to conclude that the state had met its burden of proof beyond a reasonable doubt.*" (Emphasis added.)

The court concluded that Silverstein rendered ineffective assistance of counsel, stating: "Given all of the foregoing, the court concludes that [Silverstein] rendered deficient performance by not calling [Gonzalez]

as an alibi witness . . . [and] that this deficient performance prejudiced the petitioner. The jury did not hear alibi evidence *that previously had a discernible impact by contributing to an evenly divided jury and mistrial*." (Emphasis added.)

On October 31, 2019, the respondent filed a petition for certification to appeal, which the court granted. On appeal, the respondent argues that the habeas court incorrectly determined that the petitioner received ineffective assistance of counsel because Silverstein did not present Gonzalez as an alibi witness. Specifically, the respondent contends that the court improperly based its ruling on its determination that one "half of the first jury was not able to conclude that the state had met its burden of proof in light of the alibi provided by Gonzalez . . . ." (Internal quotation marks omitted.) We agree with the respondent and, therefore, we reverse the judgment of the habeas court with respect to the claim of ineffective assistance for failure to present an alibi defense.

We first set forth the legal principles relevant to our resolution of this appeal. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas 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. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That

requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–12, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

In the present case, the court erred in concluding that Silverstein rendered deficient performance when he did not call the alibi witness because its determination was based on the improper assumption that six jurors from the first trial were "influenced [in] deliberations" by the alibi witness and that the alibi testimony "contributed to the jury being unable to conclude that the state had met its burden of proof beyond a reasonable doubt." In concluding that Silverstein's performance was deficient, the court repeatedly referenced its finding that the alibi witness' testimony was the cause of the hung jury at the petitioner's first trial. The court determined that one "half of the first jury was not able to conclude that the state had met its burden of proof in light of the alibi provided by Gonzalez. Clearly, Gonzalez had an impact on the outcome of the first trial."

"It is a settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous. . . . A nonunanimous jury therefore cannot render any finding of fact. . . . The jury's inability to reach a unanimous verdict . . . does not shed any light on the jury's assessment of the merits of the evidence presented . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Covington*, 184 Conn. App. 332, 342,

194 A.3d 1224 (2018), aff'd, 335 Conn. 212, 229 A.3d 1036 (2020).

Furthermore, as this court noted in *Dieudonne* v. *Commissioner of Correction*, 141 Conn. App. 151, 162 n.6, 60 A.3d 385 (2013), appeal dismissed, 316 Conn. 474, 112 A.3d 157 (2015), "*Yeager* [v. *United States*, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed 2d 78 (2009)] warns against guesswork in ascribing reasons why the jury failed to reach a verdict . . . ." (Emphasis omitted.) Although decided in a different context, *Yeager* is instructive on this issue.[6] In *Yeager*, the United States Supreme Court held that, "[b]ecause a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps puts together the trial puzzle. . . . Unlike the pleadings, the jury charge, or the evidence introduced by the parties, there is no way to decipher what a hung count represents. . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork." (Citations omitted; footnote omitted.) *Yeager* v. *United States*, supra, 121–22; see also *United States* v. *Botti*, 722 F. Supp. 2d 207, 212 (D. Conn. 2010) ("[A] hung count means nothing in [posttrial] analyses. It cannot be made to mean anything."), aff'd, 711 F.3d 299 (2d Cir. 2013).

[6] In *Yeager* v. *United States*, supra, 557 U.S. 110, the United States Supreme Court had to determine the legal consequences of a hung jury on some counts and an acquittal on other counts for the purposes of issue preclusion and double jeopardy. The court concluded that, for double jeopardy and issue preclusion purposes, "courts should scrutinize the jury's decisions, not its failures to decide," and held that "the consideration of hung counts has no place in the [issue preclusion] analysis." Id., 122.

Although the habeas court correctly noted that "it is not possible to discern the individual jurors' credibility assessments," it then incorrectly determined that Gonzalez' testimony had a positive impact on the jury when it found that "[t]he jury did not hear alibi evidence *that previously had a discernible impact by contributing to an evenly divided jury and mistrial.*" (Emphasis added.)

Additionally, both the petitioner and the habeas court emphasized the fact that the jury requested playback of Gonzalez' testimony during their deliberations. Gonzalez was one of seven witnesses whose testimony was reviewed by the jury during deliberations. The petitioner cites a number of cases for the proposition that "a request by a jury may be a significant indicator of [its] concern about evidence and issues important to [its] resolution of the case." (Internal quotation marks omitted.) None of these cases, however, is directly on point.[7]

[7] The cases that the petitioner cites for this proposition each involve appeals based on evidentiary rulings. In *State* v. *Devalda*, 306 Conn. 494, 496, 50 A.3d 882 (2012), on appeal, the defendant argued, inter alia, that the trial court improperly omitted limiting language in its jury instructions regarding the statutory definition of kidnapping. During deliberations, the jury in that case sent a note to the court asking it to "reread the definitions of the laws," at which point the court repeated the instruction, including the improper omission. (Internal quotation marks omitted.) Id., 510. Further, the jury requested playback of witness testimony relating to crucial time periods relating to the kidnapping charge. Id., 510–11. Our Supreme Court concluded that it was reasonably possible that the improper instruction had the effect of misleading the jury. Id., 511. In *State* v. *Miguel C.*, 305 Conn. 562, 564, 46 A.3d 126 (2012), the defendant appealed his convictions of sexual assault in the first degree and risk of injury to a child, claiming that a portion of the complainant's testimony was improperly admitted and that, as a result, the verdict was substantially affected. In analyzing the risk of unfair prejudice to the defendant, our Supreme Court stated that it "need not speculate about the prejudicial effect . . . because the jury's note to the court during deliberations provides insight into the facts that the jury considered when it was reaching its verdict. . . . [B]y asking to rehear the portion of the testimony [that was stricken] . . . the jury evidenced its belief that the stricken testimony was significant." Id., 577–78.

In *State* v. *Carter*, 232 Conn. 537, 538, 656 A.2d 657 (1995), the defendant appealed from the trial court's failure to give a self-defense instruction to

After our thorough review of the record, we conclude that the habeas court's finding that Silverstein rendered deficient performance by failing to call Gonzalez as an alibi witness was inextricably intertwined with its determination as to the reason for the hung jury in the petitioner's first trial. The reasons why there was a hung jury are not ascertainable, and, therefore, it would be "guesswork" to attempt to determine such reasons. See *Yeager* v. *United States*, supra, 557 U.S. 122. Accordingly, the judgment of the habeas court must be reversed insofar as it was predicated on the court's improper assumption that one half of the members of the jury in the first trial voted for an acquittal due to the alibi testimony.

The judgment is reversed only with respect to the habeas court's determination that Silverstein provided ineffective assistance of counsel by failing to present an alibi defense and the case is remanded for a new trial as to that issue; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

the jury. In determining whether the trial court erred when it declined to give the instruction, our Supreme Court discussed the evidence presented at trial, as well as the jury's concern regarding the issue of self-defense, as evidenced by a note sent by the jury to the court during deliberations in which it asked if the court had addressed the issue of self-defense in its charge. Id., 549. The court stated that it has "recognized that a request by a jury may be a significant indicator of [its] concern about evidence and issues important to [its] resolution of the case." Id. The court concluded that there was sufficient evidence to raise the issue of self-defense, and that the instruction should have been given to the jury. Id., 549–50. Last, in *State* v. *Moody*, 214 Conn. 616, 617, 627, 573 A.2d 716 (1990), the defendant appealed his murder conviction, arguing, inter alia, that the trial court erred in denying his motion in limine and in permitting the state to present irrelevant and prejudicial evidence. After it determined that certain evidence had been admitted in error, our Supreme Court analyzed whether the error was harmful. Id., 629. During deliberations, the jury sent the court a question about the evidence that had been admitted in error, and our Supreme Court determined that the question showed that the jury found the piece of evidence important, that it had been misled by the evidence, and, therefore, that the error was harmful. Id., 629–30.

# STATE OF CONNECTICUT *v.* CARLTON BUTLER (AC 43812)

Prescott, Alexander and Bishop, Js.

*Syllabus*

The defendant, against whom the charges of the crimes of risk of injury to a child and breach of the peace in the second degree were dismissed following his completion of a statutory (§ 54-56*l*) two year, supervised diversionary program for persons with psychiatric disabilities, appealed from the judgment of the trial court granting the state's motion to open the judgment of dismissal. As a condition to his admission to the diversionary program, the defendant agreed that he would not have any contact with minors, which included volunteering or working with minors in any capacity and visiting any areas that were frequented by minors. After the trial court received a report stating that the defendant had successfully completed all of the counseling sessions required by the program, it held a hearing to address the dismissal of the charges. At that hearing, the state argued that the court should not grant a dismissal in light of a final progress report, issued by the Court Support Services Division, which stated that the defendant had not completed the program satisfactorily, and a letter from the defendant's probation officer, which was attached to the report and indicated that the officer had received information from an anonymous source that the defendant recently had volunteered for a YMCA trip that involved minors. The officer stated that he was unable to verify the accuracy of this claim but that the director of a local YMCA had informed him that the defendant had unsuccessfully applied for three employment positions as a camp counselor while he was enrolled in the diversionary program. Additionally, the officer's letter stated that the defendant had failed to report to probation for his last scheduled appointment. The state did not request a continuance or a stay to conduct further investigation into these allegations nor did it offer any testimony or other evidence to corroborate the defendant's purported lack of success in completing the program. In response to the state's argument, defense counsel informed the trial court that the defendant's father, who he claimed drove the defendant everywhere, confirmed that the defendant had not been on a YMCA trip and that he had not driven the defendant to the YMCA to apply for any jobs. The trial court dismissed the case and, the following day, the state filed a motion to open the dismissal, claiming that it had obtained additional information demonstrating that the defendant had not successfully completed the diversionary program, including video footage of the defendant working at a summer camp for children. The trial court granted the state's motion, concluding that the dismissal was erroneously granted because it was based on false information, and the

defendant appealed to this court. *Held* that the trial court could not properly entertain or grant the state's motion to open, as it lost subject matter jurisdiction once it dismissed all charges, and, accordingly, the state's only available means to overturn the trial court's decision was through the appeal process, which it elected not to pursue: in the absence of any overriding statutory or constitutional provision, a criminal court's common-law jurisdiction over a criminal proceeding ends after that court renders a final disposition of all charges contained in the information, and, in the present case, the trial court rendered a final judgment when it dismissed the charges against the defendant, and it failed to provide a legal basis for its exercise of power over the motion to open following such judgment; moreover, the statute (§ 52-212a) that provides that a judgment rendered in the Superior Court may be opened if a motion to open is filed within four months of the date on which the judgment was rendered is expressly limited to civil judgments, and our Supreme Court in *State* v. *McCoy* (331 Conn. 561) fully abrogated any suggestion by that court in *State* v. *Wilson* (199 Conn. 417) that the four month rule also applied in the context of final criminal judgments; furthermore, the state failed to satisfy the requirements of the civil rule that a court has intrinsic powers to open a judgment obtained by fraud, as the trial court did not find that defense counsel's representations were made with an intent to deceive and it did not indicate in granting the motion to open that it was doing so on the basis that the judgment of dismissal was obtained by fraud; additionally, the judgment of dismissal was not analogous to a new prosecution of a defendant on the same charges following a dismissal predicated on the entry of a nolle prosequi, as a judgment following a nolle prosequi is made without prejudice, and public policy did not support the opening of the judgment in the present case, as significant liberty and finality of judgment interests attached when the trial court granted an unconditioned judgment of dismissal and the defendant agreed to take on certain conditions and burdens associated with the program in exchange for the statutory assurance that, if he completed the program, the charges would be erased, and he lost those statutory rights when the trial court opened the judgment through a procedure outside of the statutory scheme.

(*One judge dissenting*)

Argued May 24—officially released December 7, 2021

*Procedural History*

Information charging the defendant with the crimes of risk of injury to a child and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, where the court, *Brown*, *J.*, granted

the defendant's application to participate in a statutorily authorized diversionary program; thereafter, the court, *McShane*, *J.*, rendered judgment dismissing the information; subsequently, the court, *McShane*, *J.*, granted the state's motion to open the judgment of dismissal, from which the defendant appealed to this court. *Reversed*; *judgment directed*.

*Kenneth Rosenthal*, for the appellant (defendant).

*Rocco A. Chiarenza*, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Rebecca A. Barry*, supervisory assistant state's attorney, and *Mary A. SanAngelo*, senior assistant state's attorney, for the appellee (state).

*Opinion*

PRESCOTT, J. This appeal requires us to determine, as a matter of first impression, whether a criminal court has the power to open a judgment of dismissal rendered by the court after concluding that a defendant satisfactorily has completed a statutorily authorized diversionary program. Specifically, the defendant, Carlton Butler, appeals from the judgment of the trial court granting the state's motion to open a judgment of dismissal that the court rendered following a determination that he satisfactorily had completed a two year, supervised diversionary program for persons with psychiatric disabilities in accordance with General Statutes § 54-56*l*.[1]

[1] General Statutes § 54-56*l* provides in relevant part: "(a) There shall be a supervised diversionary program for persons with psychiatric disabilities . . . .

* * *

"(e) Upon confirmation of eligibility and consideration of the treatment plan presented by the Court Support Services Division, the court may grant the application for participation in the program. . . . The person shall be subject to the supervision of a probation officer who has a reduced caseload and specialized training in working with persons with psychiatric disabilities. . . .

"(g) Any person who enters the program shall agree: (1) To the tolling of the statute of limitations with respect to such crime or violation; (2) to a waiver of such person's right to a speedy trial; and (3) to any conditions

The defendant claims that the trial court lacked the power to open the judgment of dismissal once rendered and that, by doing so, it violated important liberty and finality of judgment interests. The state responds that the trial court possessed both subject matter jurisdiction and the authority to open the judgment of dismissal because the state filed its motion to open the judgment "within four months [of rendering the judgment of dismissal] and the dismissal was predicated on a material misrepresentation made to the court." We agree with the defendant that the court lacked the power to grant the state's motion to open the judgment. Accordingly, we reverse the judgment of the trial court.

The procedural history relevant to our consideration of the present appeal is not in dispute. In June, 2017, the defendant was charged with risk of injury to a child in violation of General Statutes § 53-21 and breach of the peace in the second degree in violation of General Statutes § 53a-181. The charges arose from an incident that allegedly occurred at a McDonald's restaurant in Derby. According to the state, an employee of the restaurant entered the restaurant's public bathroom and discovered the defendant in a bathroom stall with a twelve year old boy. The employee observed that the boy had his pants down and that the defendant was

that may be established by the division concerning participation in the supervised diversionary program including conditions concerning participation in meetings or sessions of the program. . . .

"(i) If such person satisfactorily completes the assigned program, such person may apply for dismissal of the charges against such person and the court, on reviewing the record of such person's participation in such program submitted by the Court Support Services Division and on finding such satisfactory completion, shall dismiss the charges. . . . Except as provided in subsection (j) of this section, upon dismissal, all records of such charges shall be erased pursuant to section 54-142a. An order of the court denying a motion to dismiss the charges against a person who has completed such person's period of probation or supervision or terminating the participation of a person in such program shall be a final judgment for purposes of appeal. . . ."

standing behind and to the side of the boy with his own shorts down and his genitals exposed. When the defendant was contacted by the police, he initially denied being at the restaurant but later claimed that he was helping the boy go to the bathroom.

In August, 2017, the defendant filed an application to participate in the supervised diversionary program for persons with psychiatric disabilities as set forth in § 54-56*l*.[2] On October 2, 2017, on confirmation from the Court Support Services Division that the defendant was eligible for the program and after consideration of the recommended treatment plan, the court, *Brown*, *J.*, granted the defendant's application and referred the defendant to the Court Support Services Division for supervision in the program. Prior to granting the application, the court canvassed the defendant, who acknowledged that he understood that among the conditions that would be imposed on him if he was allowed to participate in the diversionary program was a requirement that he have no contact with minors, which included not volunteering or working in any capacity with any minors and not going to any areas frequented by minors. The defendant indicated that he was willing to abide by all conditions. The court continued the case until October 2, 2019.

Over the next two years, the defendant struggled with the counseling requirements under the program, which resulted in several additional court appearances. Specifically, on October 4, 2018, the defendant appeared before the court, *McShane*, *J.*, because he did not successfully complete a mental health program at Connections, Inc., and was discharged from the program. The defendant argued that the probation officer assigned

[2] According to the record, at the time he filed his application, the defendant already was participating in a supervised diversionary program in a separate case with respect to charges of larceny in the third and fourth degrees.

to oversee his case believed that a different program offered at the Sterling Center "would be a better fit for him in consideration of his mental health issues," and he asked the court to allow him to continue in the diversionary program. The court noted that the defendant otherwise appeared to be in compliance with the conditions imposed under the program but ordered that it would need to see a compliance report and to conduct a follow up hearing. Several follow up hearings ensued at which problems regarding the defendant's attendance at counseling sessions were discussed and, ultimately, resolved.

On June 24, 2019, the defendant returned to court, at which time the court indicated that it had received a report that the defendant successfully had completed all of his sessions at the Sterling Center. The court congratulated the defendant on the record, stating: "We get very few success stories here. When the lawyer brought out a letter and I saw it was a long one, I went, well, this isn't going to be good, but it's just the opposite. It was a great letter." The court continued the case to October 2, 2019, for possible dismissal.

The Court Support Services Division issued a final progress report dated September 25, 2019, which indicated that "[t]he [d]efendant has not satisfactorily completed the assigned program . . . ." Attached to the report was a letter from the defendant's probation officer. According to that letter, the probation officer had received information from an anonymous source at the end of August, 2019, that the defendant recently had volunteered for a YMCA trip that involved minors. The probation officer attempted to investigate but was unable to verify the accuracy of the information provided by the anonymous source. The officer nevertheless indicated in his letter that he had learned that the

defendant was not allowed to enter YMCAs in Waterbury and Torrington "due to separate undisclosed incidents" and that the director at the Plainville YMCA had informed him that the defendant "had unsuccessfully applied for three separate employment positions as a 'camp counselor' on [March 15, 2019]." The officer also stated in his letter that the defendant had failed to report to probation on September 18, 2019, as required, and that, as of the date of the letter, the defendant "has failed to contact this officer and his whereabouts are unknown."

At the October 2, 2019 hearing, the court began by noting that "[t]he case today is on for a potential dismissal date." The state, relying on the statements and unsubstantiated allegations contained in the letter attached to the final progress report as well as the factual allegations underlying the criminal charges pending against the defendant, argued that the court should not grant a dismissal of those charges.[3] The state

[3] The state argued at the hearing that at the time the program was granted in 2017, among the conditions imposed were that the defendant was "not to volunteer with minors, and not to go near schools and parks, that's to keep the defendant away from minor children." After recounting the factual allegations underlying the charges pending against the defendant, the state continued: "These are very serious allegations to which the defendant gets a dismissal. The complainant, the mother of the complainant wanted the defendant prosecuted to the fullest extent possible. This she said back in August of 2017, that this matter has significantly impacted the [complainant]. In hindsight, she said it was apparent that the defendant was grooming the [complainant] for sexual abuse. While the [complainant] has not disclosed sexual abuse, the mother of the [complainant] suspected that it had occurred or was about to occur, and she wanted to be informed with regards to any plea offers and dispositions with regards to this matter. She was also hoping that the defendant would not engage with any youth mentoring and/or work at the Boys and Girls Club.

"So that's the state's concern, and the letter that I got yesterday from Adult Probation in Waterbury was that on August 29th there was a call from an anonymous source. So I understand that Your Honor is going to take that into account that the source was anonymous, I get that, but the information was that the defendant had recently volunteered at a YMCA trip that involved minors. The person was not specific as to which YMCA was involved. Through the course of the investigation, the officer wasn't able

did not request a continuance or stay of the hearing to conduct a further investigation into the allegations in the report, and it offered no testimony, affidavits, or any additional documentary evidence to corroborate the defendant's purported lack of success in completing the diversionary program or his lack of compliance with conditions imposed by the court in granting the defendant's application for the program.

Defense counsel, in response to the state, argued that he also found the letter attached to the final report concerning "but for different reasons than the state." He continued: "[The defendant] does not own a driver's license. He does not own a car. His father drives him everywhere. His father is present here in the courtroom and is willing to come up and talk to Your Honor. Your Honor, I talked to [the defendant's] father who stated that [the defendant] has never gone on a YMCA trip as a volunteer. He's also indicated to me that he's never—they live in Waterbury. He's also indicated to me that he's never driven [the defendant] to the Plainville YMCA to apply for a job.

"Secondly, Your Honor, the reason why [the defendant] is not allowed at the YMCAs is because prior to

to verify this accusation because there was a limited amount of information, but the officer found that [the defendant] is not allowed to enter the Waterbury YMCA or the Torrington YMCA. The Plainville YMCA director was able to inform the officer that . . . this defendant had unsuccessfully applied for three separate employment positions as a camp counselor in March of this year. That's concerning. . . .

"The defendant was also directed to report to the Office of Adult Probation on September 18, 2019, and failed to do so. He is unlike someone who's been convicted and is on probation. We do see violation of probation warrants where a defendant is asked to report to the Office of Adult Probation and the warrant goes on for six pages saying how the defendant didn't report to Adult Probation. He's differently situated because [the defendant] gets a dismissal today if he's successful, and the state's claiming that he is not successful. Not only did he not report, but he wants to be a camp counselor. I don't want my kids going to the same camp as [the defendant] works . . . ."

this case—prior to the supervised Diversionary Program being granted, he was going to the YMCA. While the case was pending, he was going to the YMCA. At that point someone notified the YMCA of his arrest. They told him he was no longer allowed back. So I found it concerning in this letter that some of this information is very dated. Okay? And secondly, based on his father's own representation to me, false.

"It's true, [the defendant] will admit that he did not go to his last probation meeting on September [18, 2019]. [The defendant] forgot about it. After two years it's the one and only one he's ever missed. [The defendant] is attending Goodwin College, however I know [the defendant] likes to tell people he's living in East Hartford, but after speaking with his father, he still lives at home with his father. His father drives him to Goodwin College. I know in chambers, Your Honor, I had indicated that [the defendant] did apply for an adult counselor position, but that was through Easter Seals. That was not through the YMCA. So we don't even know if this YMCA application is [the defendant] himself. [The defendant's] father would probably tell Your Honor, because he's told me that he's never driven [the defendant] to the Plainville YMCA. To his knowledge, [the defendant] has never applied to be—through the YMCA for anything. He's never, to his knowledge, ever went on a trip with minors. [The defendant's] only mode of transportation is through his father. He's never taken his father's car without permission. [The defendant] doesn't own a car. He doesn't have a driver's license.

"So for those reasons, Your Honor, I find this letter very concerning because a lot of it—it's a lot of allegations that's refuted by [the defendant's] own father, who—I'll be honest with you, through the course of knowing [the defendant], he's a very honest man, would not lie on his son's behalf. Your Honor, so essentially the only thing that is a fact and is true is that [the

defendant] missed his last probation meeting on September 18, however the probation officer left a card for [the defendant] to go on October 1. [The defendant] showed up on October 1. [The defendant] went to the meeting with the officer, and the officer said that [the defendant] got agitated. Well, [the defendant] got agitated because his probation officer told him that he was going to send in a bad report, and that [the defendant] was not going to successfully complete the program.

"I think up to [this] point, Your Honor, [the defendant] has fulfilled everything on the Supervised Diversionary Program. He paid for the Sterling Center out of pocket. He's on disability. It was a financial hardship for him and his father. The allegations of him going to the YMCA during the pendency of him being on the Supervised Diversionary Program is unfounded, unfounded and refuted by the only person he can get a ride from. For those reasons, Your Honor, I think [the defendant] should have a successful dismissal on this program." Defense counsel did not call the defendant's father to testify on the record regarding the representations that he had made or offer any other evidence to the court at the hearing.

After hearing from the defense, the court asked whether the state had anything further to present. The state did not ask for an opportunity to question the father under oath regarding defense counsel's representations and, again, did not request a continuance of the hearing. The court, therefore, had no testimony from any witnesses under oath or any evidence introduced by the state to form a basis to sustain the objection to the dismissal. Rather, the state briefly responded: "I appreciate that counsel is arguing that there's no evidence that the defendant did what's alleged in the probation report, however I think that, as the court knows, while his father may be an honest person, that's all well

and good, but I'm sure [the defendant] can find his way around if need be. So my concern is, how did [the defendant] get to that McDonald's on the day in question. This goes back to June, 2017. My concern is for that young boy, who was there in the stall with [the defendant], and all the young boys out here. So I would ask Your Honor not to dismiss the charges." Rather than presenting evidence to support its objection to the dismissal, the state directed its objection at the argument of counsel and the nature of the offense.

After hearing from the state, the court immediately rendered the following oral ruling: "The court has considered the argument of counsel and actually, the state's argument, although very well articulated, is misplaced in that that objection, and I'm sure it was at the time, was forwarded or made by [the attorney] representing the [state] at that time, but nevertheless, the judge granted the program. The fact that the defendant switched to Sterling Program is actually in his favor. That is a much more difficult program and a much more—one of better reputation than the other program [that] was originally recommended.

"So what the court has before it is an individual who missed his last appointment, and the fact that this case has been pending since June of 2017, with no arrests certainly speaks in defendant's behalf. I certainly understand the state's concern with regards to the defendant working as a camp counselor, but I am concerned of the fact that this was an anonymous tip that was not looked into by the Office of Adult Probation other than just to receive it without making phone calls. It doesn't appear as though any of it is in fact true. The defendant had numerous appointments during the way, he had his bumps along the way and ended up making those. You know, it's something that he applied for back on October [2, 2017], with the understanding that if he did what he was supposed to do, it would be dismissed. He did what he was supposed to do. The case is therefore

dismissed." The state made no further statements on the record.[4]

The following day, the state filed a "motion to reopen dismissal." According to the state, information had

[4] We note that the state did not file a motion for permission to appeal the court's judgment of dismissal or, more importantly, indicate any intent to appeal the court's ruling on the record. "[P]ursuant to General Statutes § 54-96, the permission of the trial court is a prerequisite to the right of the state in a criminal case to appeal . . . ." *State* v. *Bellamy*, 4 Conn. App. 520, 522, 495 A.2d 724 (1985); see also General Statutes § 54-96 ("[a]ppeals from the rulings and decisions of the Superior Court, *upon all questions of law arising on the trial of criminal cases*, may be taken by the state, *with the permission of the presiding judge*, to the Supreme Court or to the Appellate Court, in the same manner and to the same effect as if made by the accused" (emphasis added)). Although the judgment of dismissal was not a result of a criminal trial, we will presume for the sake of this discussion that the state nevertheless had a right to appeal from the judgment of dismissal, although such a right is not expressly provided for in § 54-56*l*.

Following a judgment of acquittal, the state must indicate *at the time of judgment* whether it intends to seek permission to appeal "so that the accused shall not be forthwith discharged. The evil perceived in granting a tardy request of the state to appeal was *the injustice of dragging back into court a defendant who had reasonably assumed that his discharge meant that he was a free man no longer charged with a crime*." (Emphasis added; internal quotation marks omitted.) *State* v. *Ross*, 189 Conn. 42, 46, 454 A.2d 266 (1983), citing *State* v. *Carabetta*, 106 Conn. 114, 119, 137 A. 394 (1927). "It is not necessary that the prosecutor shall at the moment of judgment reach a final determination that he will prosecute the appeal. It is necessary that he determine at the time of the judgment that he ought to ask the court for permission to take such appeal, so that the accused shall not be forthwith discharged; to that he is entitled unless the prosecutor shall move for such permission. If permission be granted, he will not be entitled to discharge until the appeal has been determined in his favor, or withdrawn." *State* v. *Carabetta*, supra, 119.

To the extent that following a final disposition of criminal charges in favor of a defendant, whether by acquittal or unconditional dismissal of charges, a criminal court arguably retains some jurisdiction to act postjudgment in the event that the state seeks permission to appeal, that jurisdictional window is a narrow one and necessarily closes if the state fails timely to invoke it. In the present case, because the state filed a "motion to reopen dismissal" and failed to signal any intent to appeal pursuant to § 54-96 at the time the court granted the judgment of dismissal, it is unnecessary at this juncture to determine either the scope or the duration of any continuing jurisdiction that might flow from such a request. Nonetheless, it must be noted that the "right of the [s]tate to appeal in criminal cases . . . did not exist at common law and was first given by the statute of 1886 [Public Acts 1886, c. XV], with the permission of the presiding judge . . . in the same manner and to the same effect as if made by the accused." (Internal quotation marks omitted.) *State* v. *Carabetta*, supra, 106 Conn. 115. Accordingly, there appears to be no basis for finding any continuing common-law jurisdiction flowing from the mere fact that the state had a right to appeal from the judgment.

come to the state's attention subsequent to the court having rendered the judgment of dismissal that demonstrated that the defendant had not completed the diversionary program successfully, and the state asked the court to open the case for further prosecution. In support of its motion, the state asserted that the court had relied on representations by defense counsel "that have proven false." It further asserted that "[t]here is footage of the defendant working at a summer camp in Massachusetts that was taken this summer." The state indicated that the Office of Adult Probation would provide the court with a "more detailed report as to the parties that describes the defendant's noncompliance with the court set conditions for [the diversionary program]." Finally the state asserted that the court "maintains authority to reopen this case based upon *State* v. *Johnson*, 301 Conn. 630, 643, 26 A.3d 59 (2011); *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 105, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015); [and] *State* v. *O'Bright*, 13 Conn. App. 732, 539 A.2d 161 (1988)."

The defendant filed an objection to the state's motion. He argued that the cases relied on by the state were inapposite to the court's consideration of whether it properly could open a dismissal of his criminal charges. The defendant took the position that such a dismissal could not be set aside except after review by an appellate court on appeal. The defendant also argued that the state's motion to open was "against public policy and a dangerous precedent." According to the defendant, the state was asking the court "to endanger all current and past defendants who used a diversionary program but are still within the statute of limitations for their alleged crimes." The defendant contended that opening a dismissal under these circumstances is particularly troublesome because a defendant must agree to the tolling of the statute of limitations in order to

participate in a diversionary program and never is advised that, after a dismissal of charges is obtained, the dismissal potentially could be opened at a later date and the charges reinstated.

The court held a hearing on the motion to open on October 15, 2019. At the hearing, the court entered as court exhibits (1) an "addendum" to the letter that was attached to the final report from the defendant's probation officer[5] and (2) a five page report dated October 4, 2019, from the probation officer to the supervisory assistant state's attorney detailing the officer's supervision of the defendant over the entire duration of the program and voicing the officer's concern that the defendant "continues to seek contact with minors and actively engages in deceptive behavior to conceal such contact." With respect to the new information contained in the report, the officer stated: "Unfortunately, this officer was unable to communicate this information to the court prior to the dismissal of the Supervised Diversionary Program due to the time frame of the information being confirmed."[6]

[5] The addendum confirmed the gravamen of representations that defense counsel made at the October 2, 2019 hearing in response to the probation officer's original letter indicating in part that the defendant had failed to appear for his final probation appointment and that probation was unaware of the defendant's whereabouts. Specifically, the addendum provided that the defendant met with the officer on October 1, 2019. At that time, the defendant explained that he had forgotten about the last appointment and reported that he was living in East Hartford and was attending Goodwin College. The addendum also indicated that the defendant had become "agitated and refused to have a civil conversation about the negative report submitted to the court," at which point, the officer asked the defendant to leave the office.

[6] The report contains a paragraph detailing the following new information that the officer claims he was able to confirm "on [October 2, 2019], through the investigative efforts of this officer . . . ." The defendant had worked as a camp counselor at Camp Onseyawa in upstate New York from August 12 to August 16, 2019. The camp's website provides in relevant part that the mission statement of the camp is to "provide a camping experience for 8-16 year old children with disabilities . . . ." The officer positively identified the defendant as attending a camp session from a video posted on the Internet in which the defendant was "surrounded by children and, at one point, he ha[d] a minor child on his back in a playful manner." A camp

Following argument, the court granted the state's motion to open. Although the court noted on the papers only that the "[d]ismissal was erroneous," it signed a copy of the transcript of the hearing at which it orally provided a more fulsome explanation for its ruling. In relevant part, the court stated: "[L]ook, I don't know a lot about subject matter jurisdiction. I know I looked at the cases that the state has provided with and *none of them seem to be quite on point*. But I also know what the right thing to do is. And *the right thing to do in this particular case is to reopen this case* and have the defendant—and I say and have the defendant face the charges. I say that because this dismissal was granted under erroneous grounds. The dismissal was false, with false information. And, [defense counsel], nobody has put any dispersions to you on there, but I—and I'm not going to ask for—elicit a response, but *it is wrong*. It is wrong the defendant received a dismissal. *Just as if it was a clerical error, I will say this was an error in that I had none of this information before me*. And, you know, *this isn't an operating under suspension*. The public policy, I mean, involved here is more significant to that."[7] (Emphasis added.) Although

director confirmed that he was an employee of the camp but was sent home for his "inappropriate behavior with campers." The director, in describing this behavior to the officer, purportedly indicated that the defendant " 'had trouble separating himself from behaviors of the campers' " and that " '[a]t one point he was frustrated and was screaming at the kids that he hated them.' "

[7] The court's complete ruling was as follows: "All right. The court is going to rule as following: I don't have every case in front of me right now. I just have [the defendant's]. And the court will indicate and put two things into exhibits at this time. One is a report dated October 1, 2019, from the Office of Adult Probation indicating the defendant missed an appointment. Also I have before me, and this is a five page letter from the Office of Adult Probation dated October 4, [2019], to Rebecca Barry, supervisory assistant state's attorney for the state's attorney's office at G.A. 5 in Derby. The defendant—it's a letter from the Office of Adult Probation indicating the defendant was told on repeated times not to have any contact with minors. And on August 29, [2019], the office received information from a reliable confidential source who indicated he had volunteered—the defendant had volunteered at a YMCA trip [for] minors. In fact, although it was represented

the court indicated that the dismissal was granted on the basis of erroneous information, the court made no express finding that the state had established by clear and convincing evidence any fraud on the court.[8]

to me that he had never—that he—that the defendant had applied for a YMCA job, it was for adults, this indicates the complete opposite, that is, the defendant applied for positions and did not get them with regards to camp counselor that involved minors.

"In addition, this has information with regards to the camp in which the defendant worked at in Geneva, New York. And I should say the camp's website is, the mission of the camp is to provide a camping experience for eighteen—eight to sixteen year old children with disabilities from the four county area and to foster independence, acceptance, and others through social, recreational, and educational aspects of life. I had received that day of the dismissal a film clip indicating the defendant worked at that particular camp.

"And I, look, I don't know a lot about subject matter jurisdiction. I know I looked at the cases that the state has provided with and none of them seem to be quite on point. But I also know what the right thing to do is. And the right thing to do in this particular case is to reopen this case and have the defendant—and I say and have the defendant face the charges. I say that because this dismissal was granted under erroneous grounds. The dismissal was false, with false information. And, counsel, nobody has put any dispersions to you on there, but I—and I'm not going to ask for—elicit a response, but it is wrong. It is wrong the defendant received a dismissal. Just as if it was a clerical error, I will say this was an error in that I had none of this information before me.

"And, you know, this isn't an operating under suspension. The public policy, I mean, involved here is more significant to that. The defendant was, specifically, was told that he could not work or be around minors, yet he worked for—at a camp that had in its mission statement to work with children between the ages of eight to sixteen with emotional or physical disabilities. So what the defendant did was just commit a complete lie upon this court and he should not benefit from that.

"Like I said, I'm not quite sure about where I stand subject matter jurisdiction-wise and an appellate or higher court may tell me otherwise. And, typically, I stand before groups and say I'm no trail blazer with regards to the law, but this is the right thing to do because I was provided all the wrong information at the very day that it was to be dismissed. So this could be placed on the jury list."

[8] The court stated at the start of the hearing that it believed it had dismissed the defendant's charges "under false pretenses that the defendant was in compliance when, boy, not only was he not in compliance, he couldn't have been any further away from compliance. . . . I'm a little angered because it really stings—it hurts that such a misrepresentation—*and, counsel, I'm not faulting you, you went with the information you had with you at the time*—but it was not even close to being accurate or truthful." (Emphasis

Rather, as reflected in the emphasized language, the court's decision to vacate the dismissal appears to turn on the serious nature of this offense and not whether the state's "motion to reopen" was the proper procedure. This appeal followed.[9]

The defendant claims on appeal that the trial court lacked the power to open and set aside the unconditional dismissal of his criminal charges following his completion of the diversionary program and, in so doing, deprived him of significant liberty and finality of judgment interests. The state responds that the trial court possessed both the subject matter jurisdiction and the authority to open the judgment,[10] and properly did so under the circumstances of this case. We agree

added.) It is implicit in the court's statement that the court did not believe that defense counsel intentionally provided inaccurate information to the court with the goal of perpetrating a fraud on the court. Because the court's focus was on the representations by defense counsel, it failed to acknowledge in its analysis that the state presented no evidence to contradict the arguments of defense counsel, did not ask to examine the defendant's father under oath, and failed to request a continuance to verify the anonymous information or produce additional evidence to support its objection to the dismissal. As a result, there was no evidence before the court to find that a fraud had been perpetrated on the court at the time of the dismissal on October 2, 2019.

[9] General Statutes § 54-56*l* (i) provides in relevant part that an order denying dismissal of criminal charges "against a person who has completed such person's period of probation or supervision" is "a final judgment for purposes of appeal." In the present case, by virtue of its granting of the state's motion to open, the court effectively denied dismissal of the defendant's criminal charges. Accordingly, we conclude that the present appeal is properly before us.

[10] We find no merit in the state's argument that the defendant failed to preserve his claim because he framed his argument before the trial court as one challenging the court's subject matter jurisdiction whereas, on appeal, he now challenges only the court's authority to act, which, according to the state, is an entirely new and distinct claim. We construe the defendant's claim before the trial court and this court to argue more generally that the court lacked any power to open the judgment of dismissal, whether for want of jurisdiction or lack of statutory authority. Accordingly, we are unconvinced that we should decline to review the defendant's claim on the ground that he failed to preserve it properly before the trial court.

with the defendant that the trial court lost subject matter jurisdiction in this matter once it rendered the judgment of dismissal. Accordingly, it improperly granted the state's motion to open and reinstated the criminal charges against the defendant.

We begin with our standard of review. Whether the trial court had the power to consider and grant the state's motion to open after the court had dismissed all charges pending against the defendant raises a question of law over which we exercise plenary review. See *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956 ("[a]ny determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary"), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013), and cert. denied, 309 Conn. 912, 69 A.3d 309 (2013).

As we previously indicated, the question before us is one of first impression. The existing legal landscape regarding the jurisdiction and authority of our criminal courts is limited primarily to discussions of the criminal court's power to act postconviction. Because there is scant authority discussing the criminal court's power to act on motions or otherwise following an outright dismissal of criminal charges, we look first to our existing jurisprudence as it pertains to the jurisdiction of our criminal courts generally. We then examine civil law analogs and their applicability in the criminal context. Next, we review relevant and persuasive authority from other jurisdictions. Finally, we turn to a policy discussion, including due consideration of the parties' varied legal interests. Ultimately, we conclude that the court improperly granted the state's motion to open because, in the absence of any codified authorization, either express or clearly implied, a criminal court cannot take further action in a criminal matter once there has been a complete and final resolution of all pending

charges, which would include the judgment of dismissal rendered in the present case.

## I
## GENERAL BACKGROUND

"This state has a unified court system. Thus, all criminal and civil matters, including juvenile matters, fall within the subject matter jurisdiction of the Superior Court." (Internal quotation marks omitted.) *State* v. *Fernandes*, 300 Conn. 104, 106 n.3, 12 A.3d 925, cert. denied, 563 U.S. 990, 131 S. Ct. 2469, 179 L. Ed. 2d 1213 (2011). "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*." (Emphasis added; internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 133–34, 49 A.3d 197 (2012). "The Superior Court's authority over criminal cases is established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding." (Internal quotation marks omitted.) *State* v. *Daly*, 111 Conn. App. 397, 401–402, 960 A.2d 1040 (2008), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009); see also *Reed* v. *Reincke*, 155 Conn. 591, 598, 236 A.2d 909 (1967) ("[a]rrest and detention are primarily for security purposes and not for the purpose of conferring jurisdiction").

At common law, "a trial court possesse[d] the inherent power to modify its own judgments during the term at which they were rendered. . . . During the continuance of a term of court the judge holding it ha[d], in a sense, absolute control over judgments rendered; that is, he can declare and subsequently modify or annul them. . . . Under the [common-law] rule, a distinction [was] drawn between matters of substance and clerical errors; the distinction being that mere clerical errors may be corrected at any time even after the end of the term. . . . But [i]n the absence of waiver or consent

of the parties, a court [was] without jurisdiction to modify or correct a judgment in other than clerical respects after the expiration of the term of the court in which it was rendered." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 199 Conn. 417, 436–37, 513 A.2d 620 (1986).[11]

Regardless, that particular rule is no longer part of our common law. Courts previously had "interpreted the word 'term' as used in the [common-law] rule that a judgment may not be modified in substance after the term at which it was rendered to mean 'sessions' of court as that period was defined in earlier enactments of General Statutes § 51-181. . . . The present version of . . . § 51-181, however, makes no reference to 'sessions' of court, and provides simply that '[t]he superior court shall sit continuously throughout the year, at such times and places and for such periods as are set by the chief court administrator.' " (Citations omitted.) Id., 437. Accordingly, even if once applicable in criminal cases, the common-law rule regarding a court's " 'absolute control over judgments' " during the continuance of the term in which the judgment was rendered; id., 436; has been superseded or rendered inoperable by statutory changes and, thus, does not factor into our consideration of the jurisdiction of the criminal court

[11] Whether this common-law rule applied equally in civil and criminal matters is not discussed in *Wilson*, although we note that the court's discussion of the rule cites only to civil cases. Moreover, the discussion in *Wilson* lacks clarity about whether the "jurisdiction" lost by the court at common law following the expiration of the term was subject matter jurisdiction or personal jurisdiction. *State* v. *Wilson*, supra, 199 Conn. 436–37. If the court lost subject matter jurisdiction, presumably the party could not resuscitate it through waiver or consent. See *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338 Conn. 651, 662, 258 A.3d 1244 (2021) ("a subject matter jurisdictional defect may not be waived . . . and . . . subject matter jurisdiction, if lacking, may not be conferred by the parties, explicitly or implicitly" (internal quotation marks omitted)). It is also possible that the term "jurisdiction" was used loosely as a means of describing only the court's authority to act rather than any real limit on its jurisdiction.

as it currently exists under our common law. See also *State* v. *Luzietti*, 230 Conn. 427, 432 n.6, 646 A.2d 85 (1994) (recognizing that criminal court's common-law jurisdiction to vacate judgment during " 'term' " in which it had been rendered "no longer has vitality in this state").

A bright-line rule exists regarding a criminal court's continuing jurisdiction in a criminal matter following a conviction. "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*." (Emphasis added; internal quotation marks omitted.) *State* v. *Waterman*, 264 Conn. 484, 491, 825 A.2d 63 (2003). This is because "[t]he jurisdiction of the sentencing court terminates when the sentence is put into effect, and that court may no longer take any action affecting the sentence unless it has been expressly authorized to act. . . . The legislature has granted the trial courts continuing jurisdiction to act on their judgments [in criminal matters] after the commencement of sentence under a limited number of circumstances." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id. For example, General Statutes §§ 53a-29 through 53a-34 authorize the court to modify the terms of probation even after a sentence is imposed. General Statutes § 52-270 grants the court jurisdiction to hear a petition for a new trial filed postsentence. General Statutes § 53a-39 allows courts, under prescribed circumstances, after a hearing, and for good cause shown, to reduce a sentence, to order a defendant discharged, or to place a defendant on probation or conditional discharge. See also id., 492. No statutory provisions exist, however, that expand the existing common-law jurisdiction of our criminal courts or expressly permit a court to reinstate criminal charges after it has dismissed them. In the absence of any overriding statutory or

constitutional provision, a criminal court's common-law jurisdiction over a criminal proceeding ends after that court renders a final disposition of all charges contained in the information, whether by an adjudication of the merits or by dismissal.[12] Moreover, although well delineated legal parameters do exist with respect to the opening of civil judgments, there are no analogous rules of practice or statutory provisions that delineate the scope of the court's power to open a judgment in a criminal case. Because the state argues that existing rules applicable to civil judgments nonetheless should govern the outcome of the present appeal, we turn to a discussion of these rules and their applicability.

## II
## CIVIL LAW ANALOGS

### A
### "Four Month" Rule

Under our common law, "[t]rial [c]ourts have an inherent power to open, correct and modify . . . [*a*]

[12] The dissenting opinion, rather than seeking to determine when, under our common law, a court's jurisdiction over a criminal matter ends, instead frames the issue as one "pertaining to the court's *retention* of jurisdiction . . . ." (Emphasis added.) The dissent seems to conclude that the common-law rule is that a court of general jurisdiction retains that jurisdiction indefinitely and that, because this purported rule has not been expressly superseded or abrogated by statute or decisional law, it remains applicable. *Sanford* v. *Sanford*, 28 Conn. 5, 14 (1859), the principal authority of our Supreme Court relied on by the dissenting opinion as support for the proposition that, under the common law, " 'jurisdiction continues to exist in full force' " and is somehow retained indefinitely, does not bear the weight that the dissenting opinion places on it. Indeed, the Supreme Court in *Sanford* explicitly stated that, to the contrary, a court retains jurisdiction over a cause only "until the case should be finally determined." Id. We read *Sanford* as supporting our conclusion that a court's jurisdiction over a criminal matter generally ends—or, in *Sanford*'s parlance, is "exhausted"; id.;—following a final disposition of the criminal charges. Moreover, *Sanford* is not a criminal case. It did not involve the question of whether, under the common law, a court exercising criminal jurisdiction retains that jurisdiction after it dismisses an action.

*civil judgment* . . . and, therefore, have general subject matter jurisdiction to adjudicate motions to open." (Emphasis added; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 468–69, 239 A.3d 272 (2020); id., 469 and n.12 (recognizing distinction between civil and criminal judgments). "[General Statutes §] 52-212a provides in relevant part: Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, *a civil judgment or decree* rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . . Practice Book § 17-43 contains similar language [limiting its applicability to civil matters]. Courts have interpreted the phrase, [u]nless otherwise provided by law, as preserving the common-law authority of a court to open a judgment after the four month period. . . . It is well established that [*c*]*ourts have intrinsic powers*, *independent of statutory provisions authorizing the opening of judgments*, *to vacate* [*or open*] *any judgment obtained by fraud*, *duress or mutual mistake*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 98–99, 168 A.3d 617 (2017).

We are unconvinced that these common-law " 'intrinsic powers' " to open a civil judgment; id., 99; necessarily existed with respect to criminal judgments or, if they did, that they have retained their viability. As previously stated in this opinion, it is a well settled rule that, "[i]n criminal cases . . . a trial court loses jurisdiction upon the execution of the defendant's sentence, unless it is expressly authorized to act."[13] (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, supra,

[13] The limited and continuing jurisdiction of criminal courts to hear postsentencing motions to correct an illegal sentence, as set forth in Practice Book § 43-22, arises from the common-law rule that a trial court has the power to modify a sentence, even after its imposition, if that sentence is invalid. See *State* v. *Lawrence*, 281 Conn. 147, 155, 913 A.2d 428 (2007).

335 Conn. 469 n.12. That well established rule, however, by its very terms, has no direct applicability with respect to a final disposition of a criminal case like the one before us. In the present case, the court completely disposed of the criminal matter before it, not by virtue of a judgment of conviction, but by rendering a judgment of dismissal of the criminal charges on October 2, 2019. If a court unconditionally dismisses all pending charges, then, as is the case with an acquittal, the need for sentencing or some other action by the court does not exist before the judgment may be deemed final. See *State* v. *Bemer*, 339 Conn. 528, 537, A.3d (2021) ("[t]he appealable final judgment in a criminal case is *ordinarily* the imposition of sentence" (emphasis added; internal quotation marks omitted)). It follows that in cases in which a court dismisses all charges set forth in an information unconditionally, such a court has rendered a final judgment, and, unlike in the case of a conviction, we see no compelling rationale for recognizing any continuing jurisdiction of the criminal court following such a disposition. As we have discussed, any common-law "absolute control" or continuing jurisdiction to vacate a criminal judgment during the "term" in which it was rendered is no longer viable, and we are not aware of any other surviving contradictory common-law rule conferring jurisdiction to a criminal court to act postjudgment.

The state, nevertheless, would have us reach a contrary conclusion, largely on the basis of our Supreme Court's decision in *State* v. *Wilson*, supra, 199 Conn. 436–37, the relevant holding of which was, at least in part, abrogated by *State* v. *McCoy*, 331 Conn. 561, 206 A.3d 725 (2019). Although the state acknowledges *McCoy*'s abrogation of *Wilson*, it argues for a very narrow construction of it. We conclude that the state's arguments are unconvincing and that *Wilson* properly cannot be read as expanding the common-law jurisdiction of the criminal court to permit the granting of a motion to open following a judgment of dismissal.

Before turning to our discussion of *Wilson*, however, we note that the state no longer relies on the case law that it cited in its motion to open in support of its assertion that "the [c]ourt maintains authority to reopen this case . . . ." See *State* v. *Johnson*, supra, 301 Conn. 643; *Tyson* v. *Commissioner of Correction*, supra, 155 Conn. App. 105; *State* v. *O'Bright*, supra, 13 Conn. App. 732. Although the state attached copies of all three opinions to its motion to open, it provided no written analysis of them nor mentioned them in its argument to the trial court at the hearing on the motion to open. Despite ruling in favor of the state, the trial court indicated in its oral decision that none of the cases cited by the state as favoring the granting of a motion to open the judgment "seem[s] to be quite on point." The state also has not discussed these cases in its brief to this court. In short, the record contains no argument by the state regarding how these cases are instructive and, without the benefit of such input, we are left to agree with the assessment of the trial court and the defendant that these cases are inapposite to the issue before us.[14]

[14] In *State* v. *Johnson*, supra, 301 Conn. 634, the defendant was charged in four separate cases, two involving misdemeanor charges, one involving a felony charge and the last involving a violation of probation. He was found incompetent to stand trial and not restorable to competency. Id. He subsequently filed a motion to dismiss the charges in all four cases, arguing with respect to the misdemeanor charges and the violation of probation case that, pursuant to General Statutes § 54-56d (m) (5), the court was required to dismiss " 'with or without prejudice, any charges for which a nolle prosequi is not entered when the time within which the defendant may be prosecuted for the crime with which the defendant is charged . . . has expired . . . .' " Id., 637–38. He further argued that, with respect to the felony charge, for which the statute of limitations had not yet run, he was entitled to a dismissal because of "[i]nsufficiency of evidence or cause to justify the bringing or continuing of such information or the placing of the defendant on trial . . . ." Practice Book § 41-8 (5); see also *State* v. *Johnson*, supra, 638. The trial court concluded that § 54-56d (m) (5) did not apply because "his crimes had not resulted in the death or serious injury of another person," but it granted the defendant's motion and dismissed all charges *without prejudice* on the alternative ground that it lacked personal jurisdiction over the defendant once he was found incompetent and not restorable to competency. *State* v. *Johnson*, supra, 635. Unlike in the present case, the state appealed the dismissal of the charges. Id.

In *Wilson*, the defendant appealed from a judgment of conviction of manslaughter, claiming in relevant part

In support of its motion to open, the state in the present case provided a pinpoint cite to a portion of the *Johnson* opinion analyzing the defendant's argument that the state was not aggrieved by the dismissal of the charges without prejudice and, thus, lacked standing to appeal. See id., 642–43. In *Johnson*, our Supreme Court agreed in part and rejected in part that argument, the resolution of which turned on whether the state could reinstitute the particular charges. Id., 643. The pinpointed portion of the analysis provides as follows: "A dismissal without prejudice terminates litigation and the court's responsibilities, while leaving the door open for some new, future litigation. . . . It is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim. . . . Accordingly, [t]he granting of a motion to dismiss without prejudice . . . does not preclude the state from charging the defendant in a new information with the same offenses within the applicable statute of limitations." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id. In other words, the issue in *Johnson* was the limits of the state's authority to bring new charges. Nothing in this analysis is germane to whether a criminal court has the power to entertain a motion to open a judgment of dismissal. Moreover, unlike the present case, the court's dismissal of the charges in *Johnson* was expressly without prejudice. Id., 638.

*Tyson* v. *Commissioner of Correction*, supra, 155 Conn. App. 97, was a habeas appeal in which the petitioner challenged the habeas court's dismissal of his habeas petition. The state in the present case, in citing to *Tyson* in support of it motion to open the judgment of dismissal, provided a pinpoint cite to a section of the opinion in *Tyson* in which the appellate court determined that it lacked subject matter jurisdiction over a portion of the appeal because the petitioner was not aggrieved by the habeas court's dismissal, which was effectively without prejudice. See id., 105. The pinpointed page contains a portion of the same boilerplate language quoted in *Johnson*. Id. Like *Johnson*, it is entirely unclear how the quoted language supports the position advanced by the state in the present case, particularly given the markedly distinct factual and legal postures involved.

Finally, *State* v. *O'Bright*, supra, 13 Conn. App. 733–34, was a case in which the trial court had dismissed an earlier information on the ground that the affidavit submitted in support of the arrest warrant failed to establish probable cause. The court did not expressly state whether that dismissal was with or without prejudice as it was required to do at the time under a rule of practice since repealed. Id., 734. After the state filed a new information, the court granted the defendant's motion to dismiss the new information with prejudice, concluding that the trial court's prior dismissal also had been intended to be with prejudice. Id. "The sole issue on appeal [was] whether a trial court order purporting to dismiss an information and discharge the defendant was a dismissal with prejudice that would preclude reprosecution . . . for the same offense." Id., 733. This court concluded that it did not bar reprosecution and reversed. Id., 735–36. Like *Johnson*, the opinion in *O'Bright* does not address a trial court's authority to set aside or open a judgment of dismissal but implicates only the limits of the state's authority to bring new charges following a dismissal, which is not the issue before us.

that the court improperly had denied a motion to suppress certain incriminatory statements that he made to the police during a station house interrogation. *State* v. *Wilson*, supra, 199 Conn. 419. Dispositive of the defendant's claim was whether the defendant ever invoked his right to counsel. Id., 426–27. Conflicting evidence on that issue was presented to the trial court at the suppression hearing. Id., 427. The trial court initially rendered an oral decision finding that the defendant never had asked for counsel. Id., 429–30. The court later filed a written memorandum in which it seemed to contradict its oral finding, stating that the defendant had expressed a desire to obtain a lawyer. Id., 430–32. Some three years after the defendant was sentenced, the state filed a motion for articulation asking the trial court for a definitive ruling as to whether the defendant had invoked his right to counsel. Id., 432. In response to the state's motion, the trial court filed an amended memorandum stating that it did not credit the defendant's testimony that he had requested counsel. Id., 433. The defendant filed a motion for review asking that the court's amended memorandum of decision be stricken. Id., 437–38. Our Supreme Court denied the motion without prejudice to its renewal on appeal. Id., 438. On later consideration, our Supreme Court concluded that "[t]he trial court was without jurisdiction to amend in matters of substance its original memorandum of decision more than four months after sentence had been imposed" and, accordingly, ordered the amended memorandum of decision to be stricken from the record. Id. Ultimately, the defendant was granted a new trial, which was to include relitigation of whether the defendant had requested counsel. Id., 445.

In addressing whether a criminal court, in response to a motion for articulation/rectification, could substantively alter or modify its ruling on a motion to suppress, the court in *Wilson* had occasion to discuss a criminal

court's power to open and modify a judgment. See id., 437. It recognized, as we already have stated, that "[n]either our General Statutes nor our Practice Book rules define the period during which a trial court may modify or correct its judgment in a *criminal* case. On the *civil* side, however, Practice Book § 326 [now § 17-4] provides that any civil judgment or decree may be opened or set aside within four months succeeding the date on which it was rendered or passed. We see no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that, for purposes of the [common-law] rule, a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final." (Emphasis in original; internal quotation marks omitted.) Id. Because it determined that the trial court, in response to the state's motion, had modified substantively its judgment more than four months after that judgment became final, it ordered those changes stricken from the record. Id., 438.

Subsequently, in *State* v. *Myers*, 242 Conn. 125, 698 A.2d 823 (1997), our Supreme Court, citing its decision in *Wilson*, held that a criminal court "retained jurisdiction" to entertain a motion for a new trial, even after sentencing, because "it could have opened the judgment." Id., 136. The Supreme Court reversed the decision of the criminal court, which had vacated its initial decision granting the defendant's motion for a new trial. Id., 139. Although the defendant had filed his motion prior to sentencing, the criminal court did not consider and decide the motion until after it imposed a sentence. Id., 129, 131. The criminal court had concluded that it improperly granted the motion for a new trial because (1) the defendant's claim of juror bias should have been raised by way of a petition for a new trial pursuant to § 52-270, and (2) "ruling on the defendant's motion after

imposing sentence was improper . . . .'' (Internal quotation marks omitted.) Id., 136. The Supreme Court agreed with the position of the state that the defendant's motion, which was filed in the confines of the existing criminal matter, could not properly be construed as a petition for a new trial over which the court had statutory authority to act postsentencing.[15] Id., 135–36. The court, however, also agreed with the defendant that a claim of juror bias properly could be brought either by way of a motion for a new trial or a petition for a new trial. Id., 134. The Supreme Court rejected without analysis the trial court's reasoning that it had lacked the power to act on a pending motion following sentencing. Id., 136.

More recently, however, our Supreme Court, in *State* v. *McCoy*, supra, 331 Conn. 574–89, abrogated its decisions in *Wilson* and *Myers* to the extent that each decision implied that the civil, four month rule created an exception to the common-law notion that the criminal court lost jurisdiction following sentencing. Part of the certified question in *McCoy* was whether the Appellate Court improperly had concluded that the trial court properly denied the defendant's motion for a new trial for lack of jurisdiction. Id., 564.

The defendant in *McCoy* was convicted of murder. Id. The relevant underlying procedural history was as follows: ''After the jury returned its verdict, but prior to the sentencing date, the defendant filed a motion for a new trial. . . . At the sentencing hearing, the defendant sought to have the motion heard by the trial court; however, the parties and the trial court subsequently agreed to go forward with the sentencing and to hear

[15] ''A petition for a new trial is properly instituted by a writ and complaint served on the adverse party; although such an action is collateral to the action in which a new trial is sought, it is by its nature a distinct proceeding.'' (Internal quotation marks omitted.) *State* v. *Myers*, supra, 242 Conn. 135.

the motion at a later date. . . . As a result, the sentencing hearing went forward, and the court sentenced the defendant to sixty years incarceration. . . .

"Months after the sentencing, the defendant attempted to have his motion for a new trial heard. Because the defendant's sentence already had been executed, however, the court denied the motion without a hearing on the ground that it had lost jurisdiction." (Citations omitted.) Id., 565.

In addressing whether a criminal court had any power to consider a motion for a new trial that, like in *Myers*, was filed but not acted on prior to the imposition of a sentence, the court revisited *Wilson*'s holding that the four month rule for opening judgments in civil cases applied equally to judgments rendered in criminal court as well as its subsequent reliance on *Wilson* in *Myers*. See id., 574–75, 580–81. After a lengthy discussion of the "jurisdiction of criminal courts relating to sentencing," the court abrogated its statement in *Wilson*. Id., 578, 586–87. It explained: "[G]iven 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." Id., 586–87. The court also suggested that *Wilson*'s co-opting of the four month rule in criminal matters was essentially dicta because, "[d]espite making this pronouncement [about the four month rule], [the court in *Wilson*] did not use the four month rule to find that the trial court had jurisdiction. Instead, this court concluded that the trial court in that case was *without jurisdiction* to modify the judgment

. . . explain[ing] that the judgment in this case became final when the defendant was sentenced . . . .'' (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 581. In other words, it was the finality of the judgment that caused the court to lose jurisdiction.

The state argues that *McCoy* abrogated only the four month rule in criminal matters in cases that have ended by the imposition of a sentence and, thus, if ''a defendant's case ends by some mechanism other than the execution of his sentence, the trial court retains its inherent common-law authority to modify its judgment within a four month period.'' We disagree with the state's reading of *McCoy* for the following reasons.[16]

First, the four month time period is not itself a creature of the common law; indeed, no such rule existed.

[16] The state and the dissenting opinion seek to establish different limitations on the power of the criminal court based on the manner in which a criminal matter terminates. We can conceive of no compelling rationale why the four month rule does *not* apply to a judgment that became final on imposition of a sentence but should apply to a judgment terminated by the dismissal of charges. In both instances, there has been a complete and final resolution of the information on which the criminal court's jurisdiction is founded. See *State* v. *Daly*, supra, 111 Conn. App. 401–402. The state's argument is no more persuasive than the one advanced by the defendant in *State* v. *Falcon*, 84 Conn. App. 429, 435, 853 A.2d 607 (2004), overruled on other grounds by *State* v. *Das*, 291 Conn. 356, 968 A.2d 367 (2009), which this court squarely rejected. The defendant in *Falcon*, who challenged the court's dismissal for lack of jurisdiction of his postsentencing motion to withdraw his plea, argued that the trial court never ''relinquished jurisdiction because he never was transferred to the custody of the [C]ommissioner of [C]orrection'' and a criminal court's jurisdiction ended only ''when a prisoner is taken into the custody of the [C]ommissioner of [C]orrection.'' *State* v. *Falcon*, supra, 430, 434–35. The court rejected the defendant's reasoning, noting that, if true, ''a final judgment would be limited to cases in which a defendant was sentenced to incarceration and would preclude finality with the imposition of a suspended sentence, probation, conditional or unconditional discharge, or the imposition of a fine. Such a construction would undermine the societal interest in the finality of judgments, and the defendant's position is therefore impracticable.'' Id., 435. This reasoning supports our recognition of a rule linking a criminal court's power to act to the *finality* of the judgment rendered rather than to the *type* of judgment rendered.

Rather, it is the result of legislation and court rule, both of which expressly limit its application to a "civil judgment or decree . . . ." General Statutes § 52-212a; Practice Book § 17-4. In other words, those enactments by their very terms do not apply to criminal matters.

Second, the court in *Wilson* provided absolutely no rationale for extending the four month rule to criminal judgments, except that it saw "no reason to distinguish between civil and criminal judgments in this respect . . . ." *State* v. *Wilson*, supra, 199 Conn. 437. *Wilson*, however, failed to address the significant liberty interests that arise in criminal matters that, generally speaking, are simply not at stake in civil litigation.

Finally, in abrogating the rule announced in *Wilson*, the court in *McCoy* did not attempt to make the distinction that the state asks us to draw. Rather, the court recognized that *Wilson* and *Myers* were legal "anomalies." *State* v. *McCoy*, supra, 331 Conn. 586. We construe *McCoy* as having fully abrogated in the context of final criminal judgments any application of the four month rule, which applies only in civil matters.

B

Judgments Obtained by Fraud

In the civil context, in addition to the four month rule, it has long been recognized that a court has intrinsic power to open a judgment obtained by fraud. As our Supreme Court has stated: "The power of the court to vacate a judgment for fraud is regarded as inherent and independent of statutory provisions authorizing the opening of judgments; hence judgments obtained by fraud may be attacked at any time." (Internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 218, 595 A.2d 1377 (1991). It is unnecessary to decide at this juncture, however, whether this particular civil

rule applies equally in the criminal context[17] because, even assuming without deciding that it does, we are unconvinced that the record in the present case would support a finding that a fraud, as opposed to a negligent misrepresentation, was perpetrated on the court. Moreover, the state never asked the court to make such a finding.

"[If] a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud, and that there is clear proof of that fraud." *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). Neither prong of this test is met in the present case. "[A] fraudulent representation . . . is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010). In other words, to constitute a fraud on the court, a factual misrepresentation by a party must be made with an intent to deceive.

Here, there is no basis on which to conclude that a lack of good faith by counsel existed in relying on information provided by the defendant's father or that the defendant had admitted to him that he had had contact with minors. The court never found that defense counsel's representations to the court at the October 2, 2019 hearing, even those that ultimately were determined to be untrue, were made with any intent to

[17] The dissenting opinion incorrectly states that "[t]he majority does appear to recognize that the court could exercise jurisdiction if its judgment had been procured by fraud but dismisses this possibility on the basis that the court did not find that its judgment had been fraudulently procured." We do not. We, in fact, leave any such recognition for another day and merely assume arguendo that it applies, having found no case in which the fraud on the court exception has been applied in the criminal context. The dissenting opinion cites to none.

deceive the court.[18] More importantly, the court, in granting the motion to open, never indicated it was doing so on the basis that the judgment of dismissal was obtained by fraud, specifically noting to defense counsel that "nobody has put any dispersions to you . . . ."

## III
## DISMISSALS WITHOUT PREJUDICE/ NOLLE PROSEQUI

Additionally, the state appears to argue that a court necessarily must have the power to consider and grant a motion to open a judgment of dismissal because a new criminal prosecution of the same defendant on the same charges following a dismissal predicated on the entry of a nolle prosequi is permissible. A dismissal following a nolle prosequi, however, which effectively is rendered without prejudice to the filing of a new action if otherwise permitted by law, is markedly different from the judgment of dismissal rendered in the present case.

Although our rules of practice formerly authorized a criminal court to designate a dismissal as entered " 'without prejudice,' " that rule has since been repealed. *State* v. *Talton*, 209 Conn. 133, 140 and n.10, 547 A.2d

[18] The dissenting opinion acknowledges that the court made no explicit finding of fraud or any intent to deceive. Nevertheless, it states that the "record does support a determination that in granting the [state's] motion [to open] the court made *a unilateral mistake induced by the misrepresentations of counsel*." (Emphasis added.) We are not clear what standard the dissenting opinion is invoking by this statement. Nevertheless, it remains that the representations made by counsel to the court, even if they later proved to be factually inaccurate in whole or in part, cannot properly be labeled "misrepresentations" without a finding that counsel had some intent to deceive or obfuscate, a factual finding that is not a part of the record and cannot be made by this court on appeal. If a mistake was made in this case, it was the failure of the state, prior to dismissal, to seek to put on evidence of the defendant's alleged noncompliance with the terms of the diversionary program or to request a continuance to investigate further.

543 (1988). Presumably, any dismissal of charges by the court is now presumptively deemed "with prejudice" unless reinstatement or refiling of charges is otherwise provided for by law. As former Chief Judge Lavery explained in his dissenting opinion in *Cislo* v. *Shelton*, 40 Conn. App. 705, 719–20, 673 A.2d 134 (1996), rev'd, 240 Conn. 590, 692 A.2d 1255 (1997): "There was no practical difference between a dismissal without prejudice and a nolle. Practice Book § 727 [now § 39-31], in discussing nolles prosequi, provides: The entry of a nolle prosequi terminates the prosecution and the defendant shall be released from custody. If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated. In *State* v. *Talton*, [supra, 141 n.11], and *State* v. *Gaston*, 198 Conn. 435, 440–41, 503 A.2d 594 (1986), our Supreme Court recognized that the only difference between a dismissal and a nolle is the time of erasure. Under General Statutes § 54-142a (b), the records of an arrest are immediately erased on a dismissal, whereas, when a nolle is entered, the records of the arrest are erased thirteen months after its entry. General Statutes § 54-142a (c)." (Internal quotation marks omitted.)

"A nolle prosequi is a declaration of the prosecuting officer that he will not prosecute the suit further at that time. . . . [T]he effect of a nolle [prosequi] is to terminate the particular prosecution of the defendant without an acquittal and without placing him in jeopardy. . . . Therefore, the nolle [prosequi] places the criminal matter in the same position it held prior to the filing of the information. Indeed, no criminal matter exists until, and if, the prosecution issues a new information against the defendant. . . . If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated. . . .

"Until the enactment of General Statutes [§ 54-56b] in 1975 . . . the power to enter a nolle prosequi was

discretionary with the state's attorney; neither the approval of the court nor the consent of the defendant was required. . . . The principles that today govern the entry of a nolle prosequi place some restrictions on the prosecuting attorney's formerly unfettered discretion. Although the decision to initiate a nolle prosequi still rests with the state's attorney, the statute and the rules now permit the defendant to object to a nolle prosequi and to demand either a trial or a dismissal except upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or been destroyed and that a further investigation is therefore necessary." (Citations omitted; internal quotation marks omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 682–83, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018). In the absence of an objection by the defendant, a nolle prosequi essentially results in a resolution of the matter without prejudice, meaning the state may refile the same charges provided it does so within any applicable statute of limitations. Accordingly, it would be improper to analogize a judgment of dismissal following a nolle prosequi to the judgment of dismissal in the present case rendered after the completion of a statutory diversionary program.

## IV

## DECISIONS OF OTHER JURISDICTIONS

Neither party has brought to our attention any case law from other jurisdictions addressing the power of a trial court to open or set aside a dismissal of criminal charges following the completion of a pretrial diversionary program. Our own research reveals that there are no decisions that are on all fours with the present case. We have identified a number of decisions addressing whether a court, following the state's entry of a nolle prosequi, has the ability to restore the criminal case to

the docket, particularly in cases in which the state could otherwise commence an entirely new prosecution. Given the decidedly different procedural posture of these types of cases as well as the different statutory overlays that exist in other jurisdictions, these cases are readily distinguishable and further discussion of them would be unhelpful.

We nonetheless do find at least one sister state decision instructive with respect to the issue before us. Specifically, the issue before the court in *Smith* v. *Superior Court*, 115 Cal. App. 3d 285, 287, 171 Cal. Rptr. 387 (1981), is notably similar to the one now before us: "[W]hether a trial court may reconsider and vacate an order dismissing a prosecution where there is an allegation that extrinsic fraud or mistake has taken place and that new facts would alter the court's decision." The California Court of Appeals concluded that, "at least where no actual fraud has been perpetrated upon the court, a criminal court has no authority to vacate a dismissal entered deliberately but upon an erroneous factual basis." Id.

The facts underlying the court's dismissal in *Smith* were as follows. The defendant successfully appealed his conviction of embezzlement of a rental car, arguing that certain evidence admitted against him was the byproduct of an illegal search. Id. The appeal was decided by the intermediate appellate court and California's Supreme Court denied the state's request to appeal. Id. On remand, defense counsel and the prosecutor met with the judge in chambers to discuss the possibility that the prosecution should be dismissed because, without the excluded evidence, the prosecutor believed he would be unable successfully to retry the defendant. Id. "The prosecutor and the court were under the impression that there were no pending appellate matters in the case, defense counsel having so represented. The court entertained and granted the

prosecution's motion to dismiss." Id., 287–88. Soon afterward, however, the prosecutor learned that the state was in the process of filing a petition for certiorari in the United States Supreme Court and had, in fact, filed an application for a stay pending its preparation and filing of that petition. Id., 288. Although the public defender's office also was aware of the pendency of the petition, neither of the trial attorneys apparently was informed by his respective office. Id. When the prosecutor learned about the pending proceedings, he moved the court to vacate its order of dismissal. Id. Following a hearing, the trial court granted the motion to vacate and reinstated the charges. Id. The defendant appealed. Id.

On appeal, the court noted that "the limits of a criminal court's power to reconsider a ruling and vacate an order or judgment, though referred to in passing, have to some extent been left open by the California Supreme Court." Id. After noting conflicting language in its existing case law, the court rejected the state's argument that the court had "inherent equity powers," as recognized in civil matters, to set aside a judgment that was obtained by fraud or mistake. Id., 292. The court took note of prior precedent that had distinguished a court's inherent power to correct clerical errors necessary to make its records reflect the true judgment of the court and judicial error, or error made in rendering a judgment properly reflected in the record. Id., 290–91. The court stated that "[a]ny attempt by a court, under the guise of correcting clerical error, to revise its deliberately exercised judicial discretion is not permitted." (Internal quotation marks omitted.) Id., 290. The court further stated: "Even granting that criminal courts have inherent powers which they may exercise in various contexts, a large step must be taken before concluding that a criminal judgment or an order dismissing a prosecution can be disturbed because of a mistake in the

presentation of the operative facts." Id., 292–93. We find these same admonitions persuasive and relevant to our consideration of the matter before us because the cases invoke many of the same policy considerations.[19]

## V

## POLICY CONSIDERATIONS

As we have indicated, we agree with the defendant that the court's judgment dismissing the criminal charges in the present case effectively was a judgment of dismissal "with prejudice." This is because, by statute, the court's determination that the defendant satisfactorily completed the program meant that "all records of such charges shall be erased pursuant to section 54-142a." General Statutes § 54-56*l* (i). In other words, unlike when a case is resolved by a nolle prosequi or the court dismisses an information under circumstances in which the state may refile charges, the dismissal of pending criminal charges following the determination by the court that the defendant successfully has completed a diversionary program as authorized by § 54-56*l* results in a complete erasure of the charges that led to the defendant's participation in the program,[20]

[19] The dissenting opinion suggests that policy considerations have no valid place in our consideration of the jurisdictional question before us. We disagree. In ascertaining whether the court had jurisdiction in the present case to open the judgment of dismissal, we are required to analyze existing common-law precedent and relevant statutes and provisions of our rules of practice, none of which clearly answers the question posed by this case. Policy considerations, therefore, are relevant in interpreting the scope and significance of these legal authorities. In other words, just as we would consider existing public policy in framing or ascertaining common-law rules; see *Demond* v. *Project Service, LLC*, 331 Conn. 816, 848, 208 A.3d 626 (2019); it is appropriate for this court to consider relevant public policy interests, including those underlying our finality of judgment jurisprudence, particularly in a criminal case.

[20] Significantly, the erasure statute provides not just for the erasure of records but that "[a]ny person who shall have been the subject of such an erasure shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath." General Statutes § 54-142a (e) (3).

without the risk that such charges could be revived or reinstated at a later date.

By applying to participate in the supervised diversionary program and being permitted by the court to do so, the defendant gave up his right to defend against the allegation leveled by the state and agreed to be subject to numerous conditions in excess of those imposed by the court as conditions of his release. The defendant also took on burdens he would not have otherwise had, including the time and costs associated with his participation in various program requirements. As one example, the record indicates that the defendant paid for his counseling at the Sterling Center. He agreed to do so in exchange for the statutory assurance that, if he completed the program, his charges would be erased, meaning he would no longer face any legal jeopardy associated with those charges. In other words, his participation in the program came with certain statutory rights that he lost when the court opened the judgment of dismissal by a procedure that was not part of the statutory scheme.

Furthermore, it is indisputable that significant liberty and finality of judgment interests also attach by virtue of the court's granting of an unconditioned judgment of dismissal. "A great deal is at stake in a criminal trial. The interests involved go beyond the private interests at stake in the ordinary civil case. They involve significant public interests. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . Indeed, the criminal jury trial has a role in protecting not only the liberty of the accused, but also the entire citizenry from overzealous or overreaching state authority." (Citation omitted; internal quotation marks omitted.) *State* v. *Myers*, supra, 242 Conn. 140.

Although we are cognizant that the state "has a valid and weighty interest in convicting the guilty"; id., 140–41; and that the court has an interest in ensuring that justice is done and that the public is protected, the unique situation that the court found itself in in this case was largely the result of the state's handling of the initial October 2, 2019 hearing. Here, an anonymous tip came to the attention of the probation officer at the end of August, 2019. Between that time and the October 2, 2019 hearing, probation alerted the state of the information it had, and, if necessary, the state could have asked the court for a continuance of the hearing to investigate further and confirm the allegations. That did not happen. Instead, the state, in opposing the dismissal of the defendant's charges, chose to rely solely on the negative final report and the letter appended thereto, which contained only unsubstantiated allegations of potential contacts with minors and one admitted failure to report as the sole basis to support the contention that the defendant unsatisfactorily completed the diversionary program. The state did not provide affidavits from the various YMCA employees who had provided information to the probation officer. It did not obtain or submit copies of the employment applications allegedly executed by the defendant or other corroborating evidence. It did not request the opportunity to question under oath the witness relied on by defense counsel in his argument and who was present in the courtroom during the October 2, 2019 hearing. Moreover, the state has not lost its ability to prosecute the defendant with respect to any actions that he took while participating in the program that may constitute violations of his terms of release or new crimes.

## VI

## CONCLUSION

On the basis of the preceding discussion and our consideration of the arguments of the parties, we conclude that once the criminal court rendered a final judgment dismissing all charges in the present case it lost

jurisdiction over the matter and could not properly entertain, let alone grant, a motion to open and restore the matter to the criminal docket. Rather than attempting to provide a legal basis for its exercise of power over the state's motion to open, the court indicated that it was opening its prior dismissal because it believed it was simply "wrong" that it had relieved the defendant of criminal liability on the basis of erroneous information. Such an outcome, however, is always a possibility in the adjudication of criminal matters. There is always a possibility that a defendant will be acquitted or have charges dismissed following which the state may uncover new information or previously uncovered proof, or the court may receive information that a witness gave false testimony or that material facts were other than what were presented to the court or a jury. Such possibilities do not in and of themselves confer jurisdiction on a court once that jurisdiction is lost following a final disposition of a criminal matter.

Similarly misguided was the court's suggestion that its ruling was akin to a clerical error for which it had the inherent authority to correct. A "clerical error" is an error in the recording of the judgment such that the judgment recorded does not reflect the judgment that the court actually rendered. Here, there is no question that, on the basis of the facts as presented, the court intended to grant a judgment of dismissal, and the record duly reflects that exact judgment. Any error existing in the present case was not "clerical" in nature but instead involved how the matter was adjudicated before the court.

The court made a reasoned determination on the facts presented that, contrary to the opinion of the Court Support Services Division and the state, the defendant had completed satisfactorily the diversionary program. It did so on the basis of the evidence before it and the arguments presented by the parties, including

the representations made by defense counsel that went unchallenged despite later proving to be, at least in part, untrue. In accordance with § 54-56*l*, the court dismissed all the pending criminal charges and the defendant was discharged unconditionally. The state never indicated on the record any intention to appeal the court's decision, and, therefore, the defendant left the hearing with a well-founded belief that his interactions with the criminal court regarding this case had concluded. The fact that the state later came into possession of better or more convincing evidence that, if presented to the court at the October 2, 2019 hearing, likely would have changed the court's calculus and, therefore, its decision did not confer power on the court to entertain a motion to open the judgment of dismissal.

At the time the motion was filed, the court had disposed of the criminal matter and the defendant had been discharged from his obligations under the program with the understanding that his criminal charges were no longer hanging over his head. The only available means for the state to overturn the court's decision was through the appeal process, which it elected not to pursue. Because we conclude that the court lacked the power to consider the state's motion to open, the judgment granting the motion must be reversed.[21]

The judgment is reversed and the case is remanded with direction to dismiss the state's motion to open.

In this opinion, ALEXANDER, J., concurred.

[21] To the extent that the dissenting opinion's final footnote implies that the majority takes "a dim view of the wisdom and discretion of the trial bench," that is certainly not the case. To the contrary, we recognize that the trial bench generally, and certainly the judge in this particular case, attempts to exercise its authority in a reasoned manner with the interests of the parties and justice in mind. Whether a court has jurisdiction to act under a given set of circumstance, however, does not turn on the seriousness of the underlying charges but on whether the court has authority to act.

BISHOP, J., dissenting. In reversing the judgment of the trial court opening its judgment of dismissal, my colleagues in the majority conclude: "[T]he court improperly granted the state's motion to open because, in the absence of any codified authorization, either express or clearly implied, a criminal court cannot take further action in a criminal matter once there has been a complete and final resolution of all pending charges, which would include the judgment of dismissal rendered in the present case." In coming to this view, the majority acknowledges that it is deciding a case of first impression. Indeed, there is neither statutory nor common-law precedent to support the majority's conclusion. Because I believe the court had both the power and the authority to open the judgment of dismissal, I respectfully dissent.

At the outset, I acknowledge that the majority has accurately set forth the procedural and factual underpinnings to this appeal as well as our standard of review. My disagreement lies in the majority's legal reasoning and the conclusion it draws from its analysis.

I begin my analysis by noting our jurisprudence regarding the jurisdiction of the Superior Court. "The Superior Court of this state as a court of law is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all others cognizable by any law court of which the exclusive jurisdiction is not given to some other court." *State ex rel. Morris* v. *Bulkeley*, 61 Conn. 287, 374, 23 A. 186 (1892); see also *State* v. *Das*, 291 Conn. 356, 361, 968 A.2d 367 (2009) ("[t]he Superior Court is a constitutional court of general jurisdiction" (internal quotation marks omitted)); *State* v. *Luzietti*, 230 Conn. 427, 431, 646 A.2d 85 (1994) (same). "Article fifth, § 1 of the Connecticut constitution proclaims that '[t]he powers and jurisdiction of the courts shall be defined by law,' and General Statutes

§ 51-164s provides that: '[t]he [S]uperior [C]ourt shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute.' " *State* v. *Carey*, 222 Conn. 299, 305, 610 A.2d 1147 (1992). Additionally, because the Superior Court is a constitutional court of general jurisdiction, "[i]n the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law." (Internal quotation marks omitted.) *State* v. *Das*, supra, 361; see also *State* v. *McCoy*, 331 Conn. 561, 577, 206 A.3d 725 (2019) (explaining that, in absence of legislative or constitutional provisions governing when trial court loses jurisdiction, issue is governed by common law).

The Superior Court's general jurisdiction includes jurisdiction over criminal cases. "The Superior Court has subject matter jurisdiction to hear criminal matters from its authority as a constitutional court of *unlimited* jurisdiction. . . . The Superior Court's authority in a criminal case becomes established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Pompei*, 52 Conn. App. 303, 307, 726 A.2d 644 (1999).

Further, at common law, "a trial court possesse[d] the inherent power to modify its own judgments during the term at which they were rendered. . . . During the continuance of a term of court the judge holding it ha[d], in a sense, absolute control over judgments rendered; that is, he can declare and subsequently modify or annul them. . . . Under the [common-law] rule, a distinction [was] drawn between matters of substance and clerical errors; the distinction being that mere clerical errors [could] be corrected at any time even after the end of the term. . . . But [i]n the absence of waiver

or consent of the parties, a court [was] without jurisdiction to modify or correct a judgment in other than clerical respects after the expiration of the term of the court in which it was rendered." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 199 Conn. 417, 436–37, 513 A.2d 620 (1986).

In a venerable opinion, our Supreme Court opined that "[t]he jurisdiction continues to exist in full force, to be exercised whenever a proper occasion shall require it. A *suspension* of the jurisdiction of a court . . . is a solecism. Jurisdiction is either exhausted or retained. It can never be properly said to be in a state where it is *suspended* and can be *revived*. The exercise of it by the court possessing it may be and often is suspended, but it still continues to exist, and only awaits the determination of the court as to when and how it shall be called into action." (Emphasis in original.) *Sanford* v. *Sanford*, 28 Conn. 5, 14 (1859). Additionally, the teaching of our decisional law is that "[t]he question of whether the court has . . . jurisdiction . . . must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction." (Internal quotation marks omitted.) *State* v. *Mack*, 55 Conn. App. 232, 235, 738 A.2d 733 (1999).

Finally, as to general principles pertinent to our inquiry, our decisional law is clear that when determining whether a statute has abrogated or altered the common law, the construction of the statute "must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope." (Internal quotation marks omitted.) *Caciopoli* v. *Lebowitz*, 309 Conn. 62, 70, 68 A.3d 1150 (2013). The teaching of our Supreme Court in *Caciopoli* could not be clearer: "Interpreting a statute to preempt a common-law cause of action is appropriate only if the language of the legislature plainly and unambiguously

indicates such an intent. [W]hen a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction. . . . In determining whether or not a statute abrogates or modifies a [common-law] rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope. . . . Although the legislature may eliminate a common-law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed. . . . We recognize only those alterations of the common law that are clearly expressed in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated. The rule that statutes in derogation of the common law are strictly construed can be seen to serve the same policy of continuity and stability in the legal system as the doctrine of stare decisis in relation to case law." (Citations omitted; internal quotation marks omitted.) Id., 70–71.

With these principles in mind, I turn next to the circumstances at hand. There can be no question that the Superior Court acquired jurisdiction over the defendant, Carlton Butler, and the case once the criminal charges against him were brought to court. The question for our decision is whether the court lost jurisdiction once it rendered the judgment of dismissal after finding that the defendant had successfully completed a two year, supervised diversionary program pursuant to General Statutes § 54-56*l*.

My analysis of this issue requires an examination of the common law pertaining to the court's retention of jurisdiction and then of whether the common law in this regard has been superseded or abrogated by statute.

As our Supreme Court has noted, on the criminal side, "[n]either our General Statutes nor our Practice Book rules define the period during which a trial court may modify or correct its judgment in a *criminal* case." (Emphasis in original.) *State* v. *Wilson*, supra, 199 Conn. 437. Accordingly, I turn to our judicial decisions to determine what limitations on the court's jurisdiction have been promulgated by decisional law.

In my review of our judicial decisions, I have found only two limitations that affect the common-law rule regarding the retention of jurisdiction by a criminal court. First, a criminal court loses jurisdiction over a matter once a sentence has been imposed and a defendant is committed to the Commissioner of Correction. *State* v. *McCoy*, supra, 331 Conn. 581–82 ("the court loses jurisdiction over [a] case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence" (internal quotation marks omitted)). "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." (Internal quotation marks omitted.) *State* v. *Das*, supra, 291 Conn. 361–62. Although there is a bright-line, common-law rule regarding a criminal court's power to modify or vacate a criminal judgment when a sentence has been imposed, there is no such rule where, as here, a criminal judgment has been dismissed.

Second, where no sentence has been imposed, a criminal court's jurisdiction to modify its judgment ends after a period of four months following judgment. See *State* v. *Wilson*, supra, 199 Conn. 437. In a much debated opinion, our Supreme Court in *Wilson* held that "[n]either our General Statutes nor our [rules of practice]

define the period during which a trial court may modify or correct its judgment in a *criminal* case. On the *civil* side, however, [our rules of practice provide] that any civil judgment or decree may be opened or set aside within four months succeeding the date on which it was rendered or passed. We see no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that, for purposes of the [common-law] rule, a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final." (Emphasis in original; internal quotation marks omitted.) Id. Although the specific holding of *Wilson* that the court had continuing jurisdiction of a matter even after a defendant had been sentenced so long as the court's subsequent action took place within four months of sentencing was later abrogated by our Supreme Court in *McCoy* on the basis that once a defendant has been sentenced the court loses jurisdiction over a criminal matter, the portion of *Wilson* that supports a court's continuing jurisdiction during the court's session before sentencing and committal to the Commissioner of Correction remains unchallenged. See *State* v. *McCoy*, supra, 331 Conn. 586–87 ("we take this opportunity to clarify and reiterate, as we have consistently done . . . that a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority").

In its analysis, the majority opines that the common-law rule regarding the court's continuing jurisdiction is no longer part of our common law because it "has been superseded or rendered inoperable by statutory changes and, thus, does not factor into our consideration of the jurisdiction of the criminal court as it currently exists under our common law." It is apparent from the majority's opinion that, in coming to this conclusion, my col-

leagues are referring to General Statutes § 51-181[1] and, respectfully, I believe the majority reaches well beyond the confines of that statute in making the sweeping assertion that statutory law has now replaced the common law regarding the retention of jurisdiction of a criminal court. In further support of its view, the majority cites to *Luzietti* for the proposition that the criminal court's common-law jurisdiction to vacate a judgment during the " 'term' " in which it had been rendered "no longer has vitality in this state." *State* v. *Luzietti*, supra, 230 Conn. 432 n.6. Respectfully, however, I believe that the majority's citation to *Luzietti* is inaccurate. Indeed, the court in *Luzietti* explained, in the cited passage, that, "[a]t common law, the trial court's jurisdiction to modify or vacate a criminal judgment was also limited to the 'term' in which it had been rendered. . . . Since our trial courts no longer sit in 'terms,' that particular [common-law] *limitation* no longer has vitality in this state." (Citation omitted; emphasis added.) Id. This properly cited passage reveals that the court in *Luzietti* was discussing the elimination of the limitation of a trial court's jurisdiction over its judgments to the term

[1] As stated previously, at common law, a court had the power to modify a judgment during the term in which the judgment was rendered. *Morici* v. *Jarvie*, 137 Conn. 97, 104, 75 A.2d 47 (1950); *Wilkie* v. *Hall*, 15 Conn. 32, 37 (1842). "The word 'term' as used in the common-law rule that a judgment may not be opened after the term at which it was rendered has been interpreted to mean 'sessions' of court as defined in § 51-181 . . . ." (Footnote omitted.) *Snow* v. *Calise*, 174 Conn. 567, 571, 392 A.2d 440 (1978). General Statutes (Rev. to 1977) § 51-181 provides in relevant part: "The superior court shall be deemed continuously in session with four sessions, except as otherwise provided in sections 51-180, 51-182 and 51-185, held on the first Tuesday of September, January and April and the first Tuesday following July fourth annually, in each of the several counties and judicial districts of the state, at such times and places and for such duration of time as is fixed and determined by the chief judge of the superior court annually, with the approval of the chief court administrator, except as otherwise provided by law . . . ." The present version of General Statutes § 51-181 makes no reference to "sessions" of court and provides that "[t]he Superior Court shall sit continuously throughout the year, at such times and places and for such periods as are set by the Chief Court Administrator . . . ."

of the court. Accordingly, *Luzietti* does not stand for the proposition advanced by the majority but, rather, for a contrary interpretation of the development of common law and one consistent with the court's exercise of jurisdiction in this matter. Accordingly, in my view, no decisional law has altered the common-law rule regarding the court's continuing jurisdiction.

The majority takes a different approach to this issue regarding the durability of common law. In reaching its conclusion that the trial court lost jurisdiction over this matter, the majority states that "[n]o statutory provisions exist . . . that expand the existing common-law jurisdiction of our criminal courts or expressly permit a court to reinstate criminal charges after it has dismissed them." In expressing this view, I believe, respectfully, that the majority has failed to acknowledge the continued viability of common law unless is has been expressly abrogated or superseded by statutory or decisional law. The majority's view ignores the basic jurisprudence that common law persists unless it has been supplanted or abrogated by statute or judicial decision. In my view, because the court is a constitutional court of general jurisdiction, and there are no statutory or constitutional provisions delineating the jurisdiction of a criminal court after a judgment of dismissal, we must look to the common law to determine if any limitations on the court's jurisdiction exist. If there are no common-law limitations on the court's jurisdiction to open a judgment after dismissal in a criminal case, then arguably "this case does not . . . require us to *expand* the court's jurisdiction, as the majority suggests. Rather, the question is whether the court inalterably *lost* jurisdiction it unquestionably had . . . ." (Emphasis in original.) *State* v. *McCoy*, supra, 331 Conn. 607 (*D'Auria*, *J.*, concurring).

The question, therefore, is not whether any statute or decision permits the court to exercise continuing

jurisdiction but, rather, whether any act of the legislature or judiciary has altered the common law regarding the jurisdiction of a criminal court. As stated, I have found no such enactment.

The majority does appear to recognize that the court could exercise jurisdiction if its judgment had been procured by fraud but dismisses this possibility on the basis that the court did not find that its judgment had been fraudulently procured. Indeed, our Supreme Court has stated that "[c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment obtained by fraud, duress or mutual mistake."[2] *In re Baby Girl B.*, 224 Conn. 263, 283, 618 A.2d 1 (1992); see also *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980) ("[t]he power of the court to vacate a judgment for fraud is regarded as inherent and independent of statutory provisions authorizing the opening of judgments; hence judgments obtained by fraud may be attacked at any time").

I agree that the court made no explicit finding of fraud; however, the record does support a determination that in granting the motion the court made a unilateral mistake induced by the misrepresentations of defense counsel. The court's comments during the hearing before the judgment was opened reflect the court's belief that it was grossly misled by the representations defense counsel had made to the court at the time the dismissal was rendered.[3] Although it is clear that the

[2] "The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." *Billington* v. *Billington*, 220 Conn. 212, 217, 595 A.2d 1377 (1991).

[3] For sure, the court did not fault defense counsel for the misrepresentations that had been made when the motion to dismiss had been argued, but the court, nonetheless, found that the dismissal had been rendered on the basis of misrepresentations. The court stated that "the court based its decision to dismiss [the case] on information that was incorrect, was totally

court did not point the finger at defense counsel for the statements he made to the court in support of his motion to dismiss, it is equally apparent that the court determined that the gist of defense counsel's comments were based on material misrepresentations. That the court was wrongly induced into an erroneous decision is plain from the court's comments.

Finally, I note the majority makes a public policy argument in favor of its view that the judgment in this matter should not have been opened. At the outset, I do not believe that the underlying question of jurisdiction implicates public policy.[4] The question is not whether the court should have granted the state's motion to open the judgment but, rather, whether the court had the power or authority to act as it did. As such, this case presents a legal issue of the proper understanding of the common law on this topic and whether the common law has been altered by legislative enactment or judicial decision making.

Furthermore, to the extent public policy has any role in this discussion, although I recognize the liberty interests of the defendant implicated in this matter, so, too, I appreciate the role of the court in punishing the guilty

contradictory to his [diversionary program] and I would assert—well, I'm the judge, so I can—that I did it under false pretenses. I dismissed this under false pretenses that the defendant was in compliance when, boy, not only was he not in compliance, he couldn't have been any further away from compliance. . . . As you can see, I'm a little angered because it really stings—it hurts that such a misrepresentation—and, counsel, I'm not faulting you, you went with the information you had with you at the time—but it was not even close to being accurate or truthful."

[4] In response to my assertion that public policy should play no role in a correct assessment of whether the trial court retained jurisdiction in this matter, the majority now cites to *Demond* v. *Project Service, LLC*, 331 Conn. 816, 848, 208 A.3d 626 (2019) for the contrary proposition. I disagree. As I read *Demond*, the court there was discussing the public policy that a common-law rule embraced and not whether policy considerations could be utilized to understand the common law. As such, I believe, respectfully, that *Demond* is inapplicable to the issue at hand.

and protecting victims of crime and the general public from criminal behavior. Given the allegation of criminal behavior that was the basis of the initial charges—finding the defendant with his shorts down to his ankles and his genitals exposed while standing behind a twelve year old juvenile male who also had his pants down—the state has a heightened interest in the protection of the child-victim as well as the prevention of the recurrence of such abhorrent behavior for the protection of all minors and society in general.

For the foregoing reasons, I respectfully dissent.[5]

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## UNITED PUBLIC SERVICE EMPLOYEES UNION, COPS LOCAL 062 *v.* TOWN OF HAMDEN ET AL.
## (AC 43739)

Prescott, Moll and Suarez, Js.

*Syllabus*

The plaintiff union sought to enjoin the defendants from proceeding with a disciplinary hearing against E, a police officer represented by the plaintiff and employed by the defendant town, until the completion of a pending criminal prosecution against E. Following a hearing, the trial court rendered judgment granting the plaintiff's application for a temporary injunction. The named defendant appealed to this court, claiming that the court used an incorrect legal standard in granting the plaintiff's application. *Held* that the trial court improperly reviewed the plaintiff's application for a temporary injunction pursuant to the standard for adjudicating a motion for a stay of civil proceedings; moreover, unlike

[5] It may be argued that the implications of acknowledging the court's jurisdiction to act as it did after the dismissal of a criminal matter following the purported successful completion of a pretrial diversionary program are that no dismissals should be treated as final and that a judge may open a judgment at any time and for any reason the court may deem appropriate. I do not take such a dim view of the wisdom and discretion of the trial bench. In the case at hand, the prosecutor moved to open the judgment just one day after the matter had been dismissed and the court's action was based on material misrepresentations made to it during the hearing on the motion for a dismissal.

the decisions erroneously relied on by the court, *Lee* v. *Harlow, Adams & Friedman, P.C.* (116 Conn. App. 289) and *Tyler* v. *Shenkman-Tyler* (115 Conn. App. 521), which involved motions to stay proceedings before the court, this case involved the court attempting to enjoin a separate proceeding conducted by another government entity, thus, the court erred in applying a balancing of the equities test; furthermore, pursuant to *Nosik* v. *Singe* (40 F.3d 592), the proper standard to apply in a case involving a request to enjoin ongoing administrative disciplinary proceedings is the standard for adjudicating a temporary injunction, and, as the court made no findings as to whether the plaintiff would suffer irreparable harm in the absence of injunctive relief, the case was remanded for the court to apply the correct standard and to make the requisite findings.

Argued April 5—officially released December 7, 2021

*Procedural History*

Action, inter alia, seeking to enjoin the defendants from proceeding with a disciplinary hearing of a police officer, brought to the Superior Court in the judicial district of New Haven, where the court, *Hon. Jon C. Blue*, judge trial referee, granted the plaintiff's application for a temporary injunction, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

*Glenn A. Duhl*, with whom were *Adam J. Lyke*, and, on the brief, *Jason R. Stanevich* and *Maura A. Mastrony*, for the appellant (named defendant).

*John M. Walsh, Jr.*, for the appellee (plaintiff).

*Opinion*

SUAREZ, J. The defendant town of Hamden[1] appeals from the decision of the trial court granting the application for a temporary injunction filed by the plaintiff,

[1] We refer in this opinion to the town of Hamden as the defendant. The Hamden Board of Police Commissioners (board) was also a defendant in this case, but it did not appeal. "Although Connecticut recognizes the general rule that a nonappealing party is bound by the decision of the lower court, we also have recognized that there are times when a nonappealing party can benefit from an appellate court's determination even though that party did not participate in the appeal. . . . [W]hen the rights of all the parties are interwoven or when the erroneous legal decision of the lower court forms the basis for all of the parties' rights, the nonappealing party is entitled

United Public Service Employees Union, Cops Local 062. Specifically, the defendant was enjoined from proceeding with a disciplinary hearing concerning Devin Eaton, a police officer in its employ, until a pending criminal prosecution of Eaton is concluded. On appeal, the defendant claims that the court utilized the incorrect legal standard in determining whether to grant the plaintiff's application for a temporary injunction.[2] We agree, and, accordingly, we reverse the decision of the trial court and remand the case for further proceedings in accordance with this opinion.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Eaton is a member of the plaintiff union. On April 16, 2019, Eaton, while on duty, was involved in an incident in which he discharged his service weapon at unarmed civilians, injuring one civilian (April 16, 2019 incident). Another police officer at the scene was also injured as a result of Eaton having discharged his service weapon. On April 26, 2019, the Hamden Police Department Ethics and Integrity Unit, directed by Acting Chief of Police John Cappiello, initiated an internal affairs investigation into Eaton's conduct during the April 16, 2019 incident. New Haven State's Attorney Patrick J. Griffin also authored a report concerning the April 16, 2019 incident and Eaton's use of deadly force. The report, dated October 17, 2019, concluded that, "[u]nder circumstances evincing an extreme indifference to human life, [Eaton]

to the benefit of the appellate court determination." (Internal quotation marks omitted.) *Mierzejewski* v. *Brownell*, 152 Conn. App. 69, 83 n.5, 97 A.3d 61 (2014). This exception to the general rule is applicable in the present case.

[2] The defendant also claims in this appeal that, even if the standard that the court applied was legally proper, the court improperly found that Eaton's interests in his continued employment and protecting his right against self-incrimination outweighed the defendant's interest in resolving the disciplinary proceeding. Because we conclude that the court utilized the incorrect standard in granting the injunction, it is unnecessary for us to reach the merits of this claim.

recklessly engaged in conduct which created a risk of death, and thereby caused serious physical injury to [a civilian]." Following Attorney Griffin's recommendation, on October 21, 2019, Eaton was arrested and charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (3) and two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63, all of which were related to the April 16, 2019 incident. Eaton's criminal case is currently pending in the New Haven Superior Court.

On November 15, 2019, Acting Chief Cappiello brought formal disciplinary charges against Eaton. The matter was referred to the Hamden Board of Police Commissioners (board) for adjudication with a recommendation for termination. On November 21, 2019, the board notified Eaton, through his legal counsel, that a hearing would be held on December 6, 2019, to determine what discipline, if any, would be taken against him as a result of the April 16, 2019 incident. Notice and an opportunity for a hearing were provided in accordance with the requirements of the collective bargaining agreement that governs the relationship between the plaintiff and the defendant.[3]

On December 2, 2019, the plaintiff filed a complaint and an application seeking temporary injunctive relief to prevent the board from proceeding with the disciplinary hearing for Eaton while his criminal prosecution remains pending. See *State* v. *Eaton*, Superior Court,

[3] The plaintiff and the defendant are parties to a collective bargaining agreement governing their relationship during the term of July 1, 2014 through June 30, 2022. Pursuant to article 46, § 46.1 of the agreement, "[n]o employee shall be discharged, demoted or disciplined in any matter except for just cause." Article 46, § 46.3 (A) provides: "If any disciplinary action is to be taken as a result of said complaint, the Police Commission shall notify the employee allegedly involved, in writing, of the charges, and said Commission shall schedule a hearing no later than thirty (30) calendar days after said notification and not earlier than one (1) week after said notification of hearing."

judicial district of New Haven, Docket No. CR-19-0224774-T. In support of its application for a temporary injunction, the plaintiff asserted that Eaton has a constitutional property interest in his continued employment with the defendant. The plaintiff argued that Eaton cannot be deprived of this interest without due process of law pursuant to the fourteenth amendment to the United States constitution. Further, the plaintiff asserted that Eaton also has a constitutional right against self-incrimination pursuant to the fifth amendment to the United States constitution. The plaintiff ultimately argued that if the defendant were allowed to proceed with the disciplinary hearing scheduled for December 6, 2019, while the criminal case against Eaton was pending, Eaton would be "compelled to make a choice between his fourteenth amendment right to due process and his fifth amendment right against self-incrimination." The plaintiff further argued that such a choice would cause Eaton to suffer "substantial and irreparable harm" because he would be deprived of the rights guaranteed to him under the United States constitution.

On December 13, 2019, a hearing was held on the plaintiff's application for a temporary injunction. During the hearing, the court specifically acknowledged the difference between the standards for adjudicating an application for a temporary injunction and a motion for a stay of civil proceedings. The court explained that, in determining whether to grant injunctive relief, the court's focus would be on the issue of irreparable harm. In determining whether to grant a stay of proceedings, however, the court's focus would be on the competing interests of the parties. The court asserted that the case law relevant to the present case "does not talk about irreparable harm . . . ." The court distinguished the present case from a civil case in which one party seeks to enjoin another party from "open[ing] [a] rendering

plant or . . . build[ing] [a] [b]all field . . . .'' The court further asserted that, ''unlike the usual case of an order for [a] temporary injunction,'' because the present case contemplates the staying of an administrative proceeding while a criminal proceeding is pending, the court's analysis must focus on the competing interests of the parties.

In its oral decision, the court explained that it was required ''to balance some ponderable weights on each side.'' The court weighed the interests of both parties as well as the interest of the public. The court cited *Securities & Exchange Commission* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1375–76 (D.C. Cir.), cert. denied, 449 U.S. 993, 101 S. Ct. 529, 66 L. Ed. 2d 289 (1980), asserting that the strongest case for deferring civil proceedings until after the completion of criminal proceedings is when a party that has been indicted for a criminal offense is required to defend a civil or administrative action involving the same matter.

The court identified that the officer had two interests in the present matter—''a property interest in his continued employment . . . and . . . an interest in exercising or not exercising his fifth amendment right . . . .'' The court also stated that the defendant and the public had several interests in the present matter. First, the defendant had an interest in ''getting this officer off the street,'' which had already been accomplished at the time of the hearing. Second, the defendant had an interest in not paying Eaton. The court acknowledged that Eaton was on unpaid leave, and, although the defendant continued to pay $1100 per month for Eaton's insurance, the court asserted that this cost was ''relatively de minimis in the more global context of this action.'' Third, both the defendant and the public had an interest in the quick resolution of the case given the legitimate public concern about Eaton's conduct. The court suggested that this interest would be more significant, however, if Eaton were still working as a police officer and

ultimately determined that the public's demands for an immediate resolution did not outweigh Eaton's substantial legal interests. The court also noted that the fact that Eaton had been arrested for assault and other criminal charges created a considerable deterrent effect for other officers. Although the immediate firing of Eaton "would doubtless have an additional deterrent effect," according to the court, "the marginal utility of that would be relatively small . . . ."

After setting forth the foregoing reasoning, the court concluded that Eaton's interests in obtaining a stay outweighed the defendant's interests in obtaining a quick resolution of the case.

At the conclusion of the hearing, the court granted the plaintiff's application for a temporary injunction, announcing its decision orally.[4] This appeal followed.[5] Additional facts will be set forth as necessary.

On appeal, the defendant raises a claim of legal error. Specifically, it claims that the court incorrectly adjudicated the plaintiff's application for a temporary injunction pursuant to the standard for deciding whether to

[4] Subsequently, the court filed a signed transcript of its decision in accordance with Practice Book § 64-1 (a).

[5] We conclude in this opinion that the court's ruling constituted the granting of temporary injunctive relief. We briefly note that, although a temporary injunction is not normally considered a final judgment for purposes of an appeal; *Rustici* v. *Malloy*, 60 Conn. App. 47, 52, 758 A.2d 424, cert. denied, 254 Conn. 952, 762 A.2d 903 (2000); this appeal is jurisdictionally proper. "General Statutes § 31-118 . . . authorizes any party aggrieved by a decision of the court on an application for a temporary injunction in a labor dispute to appeal from the final judgment thereon. . . . [S]uch an appeal lies if, but only if, the injunction was granted in a case involving or growing out of a labor dispute." (Citation omitted; internal quotation marks omitted.) Id. General Statutes § 31-112 (c) defines " 'labor dispute' " to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment or concerning employment relations, or any controversy arising out of the respective interest of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

issue a stay of civil proceedings instead of the standard for issuing a temporary injunction. We agree.

We begin by setting forth the standard of review that governs the defendant's claim. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 196, 219 A.3d 378 (2019). "[O]ur analysis of whether the court applied the correct legal standard is a question of law subject to plenary review." *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 598, 930 A.2d 768, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007).

We also set forth the legal principles relevant to this claim. "The standard for granting a temporary injunction is well settled. In general, a court may, in its discretion, exercise its equitable power to order a temporary injunction pending final determination of the order, upon a proper showing by the movant that if the injunction is not granted he or she will suffer irreparable harm for which there is no adequate remedy at law. . . . A party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor. . . . The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation. . . . Moreover, [t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." (Citations omitted; internal quotation marks omitted.) *Aqleh* v. *Cadlerock Joint Venture*

*II, L.P.*, 299 Conn. 84, 97–98, 10 A.3d 498 (2010). Further, "[a] party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. The allegations and proof are conditions precedent to the granting of an injunction. . . . These elements are so crucial that a party's failure to allege and prove them is sufficient ground for sustaining the refusal to grant an injunction, even where a court's conclusions on the merits are erroneous." (Citations omitted.) *Hartford* v. *American Arbitration Assn.*, 174 Conn. 472, 476–77, 391 A.2d 137 (1978).

A distinct standard applies to the court's evaluation of a motion seeking a stay of civil proceedings. To adjudicate a motion for a stay of civil proceedings, courts must apply a balancing of the equities test. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 459–60, 493 A.2d 229 (1985). In describing this test, our Supreme Court has stated that "[i]t is not possible to reduce all of the considerations involved in stay orders to a rigid formula . . . ." Id., 458. The court, however, did note that "[a]mong the 'equities' to be placed on the scales . . . are the general equitable considerations which are involved in the issuance of a temporary injunction to preserve the status quo pendente lite." Id., 460.

This court has elaborated on the standard for evaluating a motion seeking a stay of civil proceedings. "In determining whether to impose a stay . . . the court must balance the interests of the litigants, nonparties, the public and the court itself. . . . The factors a court should consider include: [1] the interests of the plaintiff in an expeditious resolution and the prejudice to the plaintiff in not proceeding; [2] the interests of and burdens on the defendants; [3] the convenience to the court in the management of its docket and in the efficient use of judicial resources; [4] the interests of other persons not parties to the civil litigation; and [5] the interests of the public in the pending civil and criminal

actions." (Internal quotation marks omitted.) *Tyler* v. *Shenkman-Tyler*, 115 Conn. App. 521, 529, 973 A.2d 163, cert. denied, 293 Conn. 920, 979 A.2d 493 (2009). "In the absence of a statutory mandate, the granting of an application or a motion for a stay of an action or proceeding is addressed to the discretion of the trial court . . . . [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." (Citation omitted; internal quotation marks omitted.) *Lee* v. *Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 311–12, 975 A.2d 715 (2009).

We begin our analysis of the claim by clarifying what standard the court applied. During the hearing, the court stated that the temporary injunction standard applies in situations that differ from the present matter, such as when one party seeks to prevent another party from "open[ing] [a] rendering plant or . . . build[ing] [a] [b]all field . . . ." The court further asserted that, because the present case contemplates the staying of an administrative proceeding while a criminal proceeding is pending, the court's analysis must focus on the competing interests of the parties. According to the court, unlike the typical application for a temporary injunction, the real question in the present case is "what are the competing interests of the respective players in proceeding right away as distinct from some time down the road." The court's decision, insofar as it distinguishes the present case from cases in which the court believed that the standard for a temporary injunction *does* apply, demonstrates that the court declined to apply the standard for a temporary injunction in the present case.

In addition to making this distinction, the court, during the hearing and in its decision, repeatedly referred to weighing the interests of the parties, which reflects that it utilized the standard for adjudicating a motion for a stay of civil proceedings, as set forth previously. At the beginning of the hearing, the court stated that "the question before [the court], it seems pretty clear, rest[s] on . . . a weighing of the competing interest[s] involved . . . the interest in fact of those respective tribunals and of course of . . . Eaton himself . . . ." Throughout the hearing, the court continued to make reference to and inquire about the "competing interests" of the parties. Additionally, as the court announced its decision, it stated that "this is a case where the court has to balance some ponderable weights on each side." The court then went on to identify, in its decision, the competing interests of the parties and ultimately determined that the interests of Eaton outweighed the interests of the defendant. This analysis mirrors the balancing of the equities test adopted in *Griffin Hospital*, which applies to the evaluation of a motion seeking a stay of civil proceedings rather than an application for a temporary injunction. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, supra, 196 Conn. 459–60.

Further establishing that the court did not apply the standard for a temporary injunction is the fact that the court made no finding as to irreparable harm, a finding that is integral in the adjudication of an application for a temporary injunction. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. The allegations and proof are conditions precedent to the granting of an injunction." *Hartford* v. *American Arbitration Assn.*, supra, 174 Conn. 476. Nevertheless, the court stated that the "case law on this particular issue does not talk about irreparable harm . . . ." Counsel for the

defendant specifically reminded the court that it was required to make a finding of irreparable harm, noting that the cases cited by the court "had to do with a stay of proceedings and . . . the weight of the discovery. It's different in this case. This is an injunction case, not a stay of civil proceedings, so I think irreparable harm absolutely is a factor that has to be reviewed . . . ." Despite these contentions, the court did not make a finding as to irreparable harm. Because the court did not make a finding as to irreparable harm, proof of which is a "[condition] precedent to the granting of an injunction"; *Hartford* v. *American Arbitration Assn.*, supra, 476; it did not apply the standard for adjudicating an application for a temporary injunction.

We conclude that the court undertook an incorrect legal analysis. The standard for a motion to stay proceedings does not apply in the present case because the court attempted to enjoin a separate proceeding conducted by another governmental entity, rather than staying a proceeding before it. In reaching its decision, the court erroneously relied on *Lee* v. *Harlow, Adams & Friedman, P.C.*, supra, 116 Conn. App. 289, which is distinguishable from the present case. The court, quoting from *Lee*, asserted that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and [for] litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." See *Lee* v. *Harlow, Adams & Friedman, P.C.*, supra, 312. The stay of proceedings at issue in *Lee*, however, involved the court's staying of proceedings in a legal malpractice action pending on *its own docket*. Id., 309. In that case, the plaintiff brought a legal malpractice action against a law firm arising out of the firm's representation of the plaintiff in several foreclosure actions. Id., 290–91.

Both the foreclosure actions and the malpractice action were pending before the court. Id., 294. In rendering its decision, this court held that the court's power to stay proceedings "is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . ." (Internal quotation marks omitted.) Id., 311.

In the present case, the court also cited *Tyler* v. *Shenkman-Tyler*, supra, 115 Conn. App. 528–29. In *Tyler*, the plaintiff and the defendant were parties to a marital dissolution action. Id., 523. Before the dissolution trial began, there was a structural fire at a vacation property owned by the parties, and, after an investigation, the defendant was arrested and charged with arson related to the fire. Id. The defendant then filed a motion to stay the marital dissolution trial that was pending before the court until after the disposition of his criminal case. Id. The court asserted that, in order to determine whether to grant a stay, it must "balance the interests of the litigants, nonparties, the public and the court itself." (Internal quotation marks omitted.) Id., 529. One factor to be considered was "the convenience to the court in the management of its docket . . . ." (Internal quotation marks omitted.) Id.

Both *Lee* and *Tyler* are inapplicable to the present case because they involve motions to stay proceedings pending before the court. See *Lee* v. *Harlow, Adams & Friedman, P.C.*, supra, 116 Conn. App. 311–12; *Tyler* v. *Shenkman-Tyler*, supra, 115 Conn. App. 528–29. As we have stated, the requested "stay" in the present case did not involve an action pending on the court's docket but a disciplinary hearing pending before the board, an independent administrative agency. The court's reliance on *Lee* and *Tyler*, therefore, was misplaced.

We further find instructive a decision of the United States Court of Appeals for the Second Circuit, which

utilized the standard for granting a temporary injunction under an analogous set of facts.[6] See *Nosik* v. *Singe*, 40 F.3d 592, 595 (2d Cir. 1994). In *Nosik*, the plaintiff, a school psychologist who worked for the Danbury Board of Education, was arrested for allegedly defrauding car insurance companies by submitting false repair bills. Id., 594. Subsequently, the Danbury School Administration (administration) suspected that the plaintiff had fraudulently obtained employee health insurance benefits for her boyfriend by claiming that he was her husband. Id. When the plaintiff refused to submit proof of her marriage, the administration suspended her and initiated an investigation into both of the suspected fraudulent acts. Id. Following the investigation, the administration recommended that the board of education terminate the plaintiff for moral misconduct. Id. The board of education commenced termination proceedings against the plaintiff. Id. The plaintiff then requested that the board of education stay the proceedings until the criminal proceedings against her concerning the car insurance fraud were resolved. Id. When the board of education declined to do so, the plaintiff brought an action in the United States District Court for the District of Connecticut seeking the issuance of a preliminary injunction in the form of a stay of the termination proceedings, arguing that "the hearings would give prosecutors a preview of her criminal defense," and that "if she invoked her right against self-incrimination during the hearings, she would be fired." Id. The District Court evaluated the request for a stay of the termination proceedings under the standard applicable to an application for temporary injunctive

[6] Although decisions of the Second Circuit are not binding on this court; *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000); "[f]ederal case law, particularly decisions of the United States Court of Appeals for the Second Circuit . . . can be persuasive in the absence of state appellate authority . . . ." (Citation omitted.) *Duart* v. *Dept. of Correction*, 116 Conn. App. 758, 765, 977 A.2d 670 (2009), aff'd, 303 Conn. 479, 34 A.3d 343 (2012).

relief,[7] and the District Court denied the plaintiff the relief sought. Id., 594–95. On appeal, the Second Circuit upheld the District Court's ruling because the plaintiff had failed to demonstrate irreparable harm or that she was likely to prevail on the merits of her claim. Id., 595.

The plaintiff in the present case, just as in *Nosik*, filed an application for a temporary injunction seeking to enjoin the defendant from continuing with the disciplinary proceedings against Eaton until the criminal proceedings are resolved. Both *Nosik* and the present case involve requests to enjoin ongoing administrative disciplinary proceedings—matters that were not pending on the court's own docket—premised entirely on the existence of parallel criminal proceedings pending in court. According to the Second Circuit, the proper standard to apply in such a case is the standard for adjudicating a temporary injunction. See id.

For the foregoing reasons, we conclude that the court improperly reviewed the plaintiff's application for a temporary injunction pursuant to the standard for adjudicating a motion for a stay of civil proceedings. The court should have applied the familiar standard that governs an application for a temporary injunction. Application of the proper standard involves factual determinations that must be made by the trial court, such as whether the plaintiff will suffer irreparable harm in the absence of injunctive relief. The court made no such finding in the present case. Thus, the proper remedy is to reverse the judgment and remand the case

[7] The standard used to evaluate an application for a preliminary injunction in federal court is similar to the standard used to evaluate an application for a temporary injunction in our state courts. Under the federal preliminary injunction standard, the plaintiff "bears the burden of showing that she will suffer irreparable harm without [the injunction]. . . . She must also demonstrate either (1) that she will likely prevail on the merits or (2) that sufficiently serious questions go to the merits and the balance of hardships weighs decidedly in her favor." (Citation omitted.) *Nosik* v. *Singe*, supra, 40 F.3d 595.

to the trial court for further proceedings in which the court applies the correct standard and makes the requisite findings.

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

In this opinion the other judges concurred.

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## HOWARD AUSTIN, JR. *v.* COIN DEPOT CORPORATION ET AL.
## (AC 44135)

Bright, C. J., and Alvord and Norcott, Js.

*Syllabus*

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner finding that the defendant nonprofit entity, created pursuant to the Connecticut Insurance Guaranty Association Act (§ 38a-836 et seq.), discharged its obligations under a provision (§ 31-307a (c)) of the Workers' Compensation Act (§ 31-275 et seq.) that entitles certain injured employees to cost of living adjustments to their disability benefits. The plaintiff sustained a compensable injury and, thereafter, entered a voluntary agreement with his employer, the named defendant. Following the insolvency of the named defendant's insurer, the defendant assumed responsibility for the payment of the plaintiff's disability benefits, and C was assigned to administer his claim. Thereafter, C identified that the plaintiff was entitled to a prospective cost of living adjustment (COLA) and a retroactive lump sum COLA payment, and C set up weekly prospective COLA payments and mailed a check for the retroactive lump sum COLA payment to the plaintiff's attorney. Upon being informed by the plaintiff that he had not received the check, C immediately began an investigation, and the defendant's head of accounting opened an investigation with the drawing bank, which determined that the proper party had endorsed the check. Subsequently, the plaintiff's attorney admitted to C that he had received the check and had given it to the plaintiff's father, Howard Austin, Sr. At the hearing before the commissioner, the plaintiff testified that the signature on the check was his father's signature. Although the plaintiff maintained that his legal name is Howard Austin, Jr., and that he uses that name on all legal documents, the COLA check, his weekly compensation checks and the agreement with his employer all bore the name Howard Austin. The plaintiff filed a claim seeking an order requiring the defendant to reissue

the retroactive lump sum COLA payment, asserting that he was never paid as required by § 31-307a (c). In support of his claim, the plaintiff cited, inter alia, the negotiable instruments provisions of the Uniform Commercial Code. The commissioner denied the plaintiff's claim, concluding that the defendant had discharged its obligations under § 31-307a (c) by mailing the COLA check to the plaintiff's attorney and, thereafter, promptly investigating the matter upon receiving information that the plaintiff never received the check. In reaching his decision, the commissioner declined to apply the Uniform Commercial Code. The plaintiff thereafter appealed to the board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Held* that the board did not err in determining that the commissioner properly concluded that the defendant had discharged its obligations under § 31-307a (c): the commissioner's decision was supported by the facts, including that the defendant followed standard practice in mailing the COLA check to the plaintiff's attorney, that making the check payable to Howard Austin was consistent with the weekly compensation checks sent to the plaintiff, that, when the check was presented at the drawee bank to transfer the funds to the holder, there were sufficient funds in the defendant's account and the check was negotiated without delay, and that, even though any alleged issue with the transfer of funds must have occurred after the check left the defendant's control and was delivered to the plaintiff's attorney, the defendant, when notified of an issue with the plaintiff's receipt of the funds, conducted an investigation into the alleged issue, which resulted in the determination that the proper payee benefited from the funds; moreover, the board correctly concluded that the commissioner properly declined to apply the Uniform Commercial Code, as its application was not incidentally necessary to the commissioner's resolution of the plaintiff's claim.

Argued October 18—officially released December 7, 2021

*Procedural History*

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District finding that the defendant Connecticut Insurance Guaranty Association discharged its obligations to the plaintiff for certain cost of living adjustment benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

*Andrew S. Knott*, with whom, on the brief, was *Robert J. Santoro*, for the appellant (plaintiff).

*Joseph J. Passaretti, Jr.*, with whom, on the brief, was *Robert A. Skolnik*, for the appellee (defendant Connecticut Insurance Guaranty Association).

*Opinion*

ALVORD, J. The plaintiff, Howard Austin, Jr., appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner) finding that the defendant Connecticut Insurance Guaranty Association[1] discharged its obligations under General Statutes § 31-307a (c)[2] of the Workers'

[1] Coin Depot Corporation, the plaintiff's employer, was also named as a defendant but is not a party to this appeal. We therefore refer in this opinion to Connecticut Insurance Guaranty Association as the defendant.

The defendant is a nonprofit unincorporated legal entity created pursuant to the Connecticut Insurance Guaranty Association Act, General Statutes § 38a-836 et seq. All insurance companies licensed to issue insurance "shall be members of said association as a condition of their authority to transact insurance in [Connecticut]." General Statutes § 38a-839; see also General Statutes § 38a-838 (7) (defining term " '[m]ember insurer' " as used in Connecticut Insurance Guaranty Association Act). In the event that a member insurer becomes insolvent, it is the defendant's responsibility to take over the insolvent insurer's accounts. See General Statutes § 38a-841 (a).

Under General Statutes § 31-340 of the Workers' Compensation Act, General Statutes § 31-275 et seq., "employers are statutorily mandated to insure, or self-insure, to the full extent of all benefits to which a claimant is entitled under that act." *Franklin* v. *Superior Casting*, 302 Conn. 219, 228, 24 A.3d 1233 (2011). Under this section, the insurer becomes directly liable to the employee. See General Statutes § 31-340.

[2] General Statutes § 31-307a (c) provides in relevant part: "[T]he weekly compensation rate of each employee entitled to receive compensation under section 31-307 as a result of an injury . . . which totally incapacitates the employee permanently, shall be adjusted as provided in this subsection as of . . . the October first following the injury date . . . and annually on each subsequent October first, to provide the injured employee with a cost-of-living adjustment in his or her weekly compensation rate as determined as of the date of injury under section 31-309. . . . The cost-of-living adjustments provided under this subdivision shall be paid by the employer without any order or award from the commissioner. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with . . . the October first next succeeding the date of injury . . . . [W]ith respect to any employee who was adjudicated to be totally incapacitated permanently subsequent to the date of his or her injury or is totally

Compensation Act (act), General Statutes § 31-275 et seq. On appeal, the plaintiff claims that the board erred in determining that the commissioner properly concluded that the defendant fulfilled its statutory duty to the plaintiff regarding his retroactive lump sum cost of living adjustment (COLA) payment without considering certain provisions of the Uniform Commercial Code (UCC), General Statutes § 42a-1-101 et seq. We affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. In November, 2001, the plaintiff sustained an injury compensable under the act. In 2003, the plaintiff and his employer entered into a voluntary agreement that documented a 30 percent permanent partial disability of the plaintiff's cervical spine. Initially, Kemper Services was the insurer responsible for payments; however, the defendant assumed responsibility in 2013 when Kemper Services became insolvent. At that time, Marjorie Corbett, who is an employee of the defendant, was assigned to administer the plaintiff's claim.

In July, 2015, Corbett identified that the plaintiff was entitled to both a prospective COLA and a retroactive lump sum COLA payment in the amount of $27,059.46. Consequently, she set up prospective weekly COLA payments, and, in August, 2015, she mailed to the plaintiff's

incapacitated permanently due to the fact that the employee has been totally incapacitated by such an injury for a period of five years or more, such benefit shall be recalculated . . . to the date of such adjudication or to the end of such five-year period, as the case may be, as if such benefits had been subject to recalculation annually under the provisions of this subsection. The difference between the amount of any benefits which would have been paid to such employee if such benefits had been subject to such recalculation and the actual amount of benefits paid during the period between such injury and such recalculation shall be paid to the dependent not later than . . . thirty days after such adjudication or the end of such period, as the case may be, in a lump-sum payment. . . ."

attorney, Enrico Vaccaro,[3] a check for $27,059.46, the retroactive lump sum COLA payment. In December, 2017, the plaintiff called Corbett to inquire about the calculation of his current COLA. During the conversation, Corbett mentioned the retroactive lump sum COLA payment, at which point the plaintiff informed Corbett that he had not received the check. Corbett immediately began an investigation, ordered copies of the original check, and examined the endorsement on the check. Subsequently, the defendant's head of accounting opened an investigation with the drawing bank (defendant's bank). Following its investigation, the defendant's bank determined that the proper party had endorsed the check.[4] In December, 2017, Attorney Vaccaro admitted to Corbett that he had received the retroactive lump sum COLA check and had given the check to the plaintiff's father, Howard Austin, Sr.[5] At the formal hearing before the commissioner, the plaintiff testified that the signature on the back of the retroactive lump sum COLA check was that of his father.

Although the plaintiff maintained that his legal name is Howard Austin, Jr., and that he uses that name on all legal documents, the retroactive lump sum COLA check, the recurring weekly compensation checks,[6] and the original agreement between the plaintiff and his employer regarding the workers' compensation benefits all bear the name "Howard Austin." At the formal hearing, Corbett testified that, at no point since the defendant took over administration of the plaintiff's claim in

[3] Attorney Vaccaro represented the plaintiff from July, 2009, through the appeal to the board.

[4] The defendant's bank reached out to the drawee bank—the bank where the check was deposited—which determined that the correct payee benefited from the funds.

[5] Corbett immediately memorialized her conversation with Attorney Vaccaro.

[6] From April, 2013, onward, the plaintiff received weekly compensation payments by checks made payable to "Howard Austin."

2013, had she been informed that there was any issue with the weekly checks, all of which were made payable to "Howard Austin."

The plaintiff sought an order requiring the defendant to reissue the retroactive lump sum COLA payment of $27,059.46,[7] claiming that he was never paid as required by § 31-307a. The defendant maintained that delivery of the COLA check to the plaintiff's attorney—his authorized representative—equated to delivery to the plaintiff and completely discharged its duties under § 31-307a (c). The plaintiff argued that the defendant had not discharged its duties because the check was endorsed improperly, and, therefore, the benefits never were paid properly. The plaintiff cited "the [UCC], the law of negotiable instruments and commercial paper, and [presented] other arguments, incursions, allegations and remedies . . . all outside of the confines of [the act]" in aid of his argument that he was never paid as required by § 31-307a. In essence, the plaintiff argued that payment did not occur because the wrong person endorsed the check and, even though the defendant delivered the check to Attorney Vaccaro, who was the plaintiff's agent, that was not sufficient to constitute payment under § 31-307a and the law of negotiable instruments provisions in article 3 of the UCC.

The commissioner found that "it was customary and appropriate for the [defendant] to send the COLA check to Attorney Vaccaro in [the plaintiff's] stead"[8] and that the defendant's "responsibilities . . . were satisfied when [it] placed payment in the possession of the [plaintiff's] legal representative, and, when learning of a

[7] The plaintiff also sought reimbursement of attorney's fees and costs.

[8] In making this finding, the commissioner relied on the statements of Corbett and two seasoned workers' compensation attorneys, all of whom testified that it was common industry practice to send large lump sum payments, such as retroactive COLA payments, to the claimant's legal counsel rather than directly to the claimant.

claimed irregularity, [it] initiated an investigation and followed it through to its conclusion." Further, because the defendant had issued checks payable to "Howard Austin" for years without ever receiving a request to change the name on the checks and because several legal documents in the original workers' compensation claim bore the name "Howard Austin," the commissioner determined that it was reasonable for the defendant to make the retroactive lump sum COLA check payable to "Howard Austin" rather than to "Howard Austin, Jr." Finally, the commissioner determined that the plaintiff's arguments involving the UCC were "beyond the jurisdiction of [the] tribunal to rule upon or to address . . . ." Thus, the commissioner "denied and dismissed" "[a]ny claims against [the defendant] [in] association with the lump sum five year retroactive COLA . . . ."

The plaintiff then filed a petition for review of the commissioner's order with the board.[9] On review, the board found no error and affirmed the commissioner's decision, noting that it had "no reason to challenge the accuracy of the [plaintiff's] recitation of the provisions contained in article 3 of the UCC" but that the Workers' Compensation "[C]ommission is 'not in a position to determine what happened to the [plaintiff's] COLA check after it was received by the [plaintiff's] attorney . . . .' " This appeal followed.

Before addressing the substance of the plaintiff's claim, we set forth the applicable standard of review. "[T]he principles that govern our standard of review in workers' compensation appeals are well established. . . .

[9] Prior to filing the petition for review, the plaintiff filed a motion to correct that the commissioner denied in its entirety on the ground that it was untimely filed. On appeal to the board, the plaintiff argued that the denial of the motion was an abuse of discretion, but the board disagreed. The plaintiff does not challenge the denial of the motion on appeal to this court.

The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review . . . of an appeal from the commissioner is not a de novo hearing of the facts. . . . [T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of decisions of the board is similarly limited. . . . 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. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it. . . . [Moreover, 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 review board." (Citation omitted; internal quotation marks omitted.) *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 362–63, 183 A.3d 670 (2018).

The plaintiff argues that the board erred in determining that the commissioner properly concluded that the defendant had discharged its statutory obligations by mailing the retroactive lump sum COLA check to the plaintiff's attorney and, thereafter, promptly investigating the matter upon receiving information that the plaintiff never received the check. Specifically, he contends

that "the [c]ommissioner must still determine the factual matter of whether . . . the [c]heck was properly negotiated [under the UCC]." The plaintiff does not contest the determinations that Attorney Vaccaro was his agent for the purposes of delivery of the check, delivery to Attorney Vaccaro as the plaintiff's agent was commensurate with delivery to the plaintiff, and delivering such check to a claimant's attorney is standard practice. In addition, he does not contest the commissioner's finding that it was reasonable for the defendant to make the check payable to "Howard Austin." He does, however, contend that delivery of a check is insufficient to constitute payment under § 31-307a. According to the plaintiff, in order to be paid as required by the statute, the funds must actually have been transferred to the plaintiff.[10]

In its consideration of the plaintiff's appeal, the board stated that "the role of the commissioner in the present matter was to determine whether the [testimonial] evidence demonstrated that [the defendant] had discharged its obligation to pay to the [plaintiff] his retroactive COLA benefits. In order to make that determination,

[10] Specifically, the plaintiff emphasizes that "a check is not itself a payment, but only a promise to pay." He cites General Statutes § 42a-3-104 (a) for the proposition that a check is "an unconditional promise or order to pay . . . ." His argument rests on a misapplication of General Statutes § 42a-3-403, which provides in relevant part: "[A]n unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of the person who in good faith pays the instrument or takes it for value. . . ." Despite the superficial relevancy of this section, the term "signature" applies to the name signed on the *front* of the check, which authorizes payment, and does not refer to the *endorsement* on the *back* of the check, which allows the bank to transfer the funds to the holder of the check (the person who endorsed the back of the check). See General Statutes §§ 42a-3-103, 42a-3-201 and 42a-3-401 through 42a-3-403.

In addition, the plaintiff cites *Hartford Accident & Indemnity Co.* v. *South Windsor Bank & Trust Co.*, 171 Conn. 63, 368 A.2d 76 (1976), to support his argument. That case, however, is patently inapplicable because it involved a conversion action and the question of an agent's authority to endorse a check under agency law. Id., 68–70.

it was therefore incumbent upon the commissioner to assess the credibility of the witnesses who had knowledge of the chain of custody of the COLA check, and that is the assessment which transpired over the course of three formal hearings." The board then summarized the evidence and the commissioner's credibility determinations, and decided that "[t]he commissioner ultimately concluded that by issuing the COLA payment in care of the [plaintiff's] attorney, and then launching an investigation when Corbett became aware of the [plaintiff's] contention that he had never received the check, [the defendant] had met its statutory obligations. We do not dispute that there remain a number of outstanding unresolved issues relative to what happened to the check after it was received by the [plaintiff's] counsel, but we are unequivocally persuaded that the resolution of those issues goes well beyond the proper scope of inquiry in this forum." We agree with the board's determination.

The commissioner's decision was supported by the following facts. The defendant followed standard practice in mailing the lump sum retroactive COLA check to the plaintiff's agent, Attorney Vaccaro. The commissioner specifically determined that making the check payable to "Howard Austin" was consistent with the recurring weekly compensation checks sent to the plaintiff over the course of the previous two years and was therefore reasonable. When the check was presented at the drawee bank to transfer the funds to the holder, there were sufficient funds in the defendant's account and the check was negotiated without delay. Even though any alleged issue with the transfer of funds must have occurred *after* the check left the defendant's control and was delivered to Attorney Vaccaro, the defendant, when notified of an issue with the plaintiff's receipt of the funds, conducted an investigation into the alleged issue, which resulted in the determination

that the proper payee benefited from the funds. In light of these facts, we conclude that the board properly determined that the commissioner properly concluded that the defendant satisfied its duties pursuant to § 31-307a.

Furthermore, we agree with the board's conclusion that the commissioner properly declined to consider the issues the plaintiff raised under the UCC. The plaintiff contends that the commissioner should not have declined to apply the negotiable instruments provisions of the UCC because analysis of the UCC was necessary to resolve his claim that the defendant "failed in its explicit duties under the act."[11] The plaintiff first relies on General Statutes § 31-278, which provides in relevant part that a commissioner "shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. . . ." Additionally, the plaintiff relies on case law that allows a commissioner to interpret other statutes when doing so is "incidentally *necessary*" to resolve a workers' compensation claim. (Emphasis added.) *Hunnihan* v. *Mattatuck Mfg. Co.*, 243 Conn. 438, 443 and n.5, 705 A.3d 1012 (1997); see also *Frantzen* v. *Davenport Electric*, 179 Conn. App. 846, 851, 181 A.3d 578, cert. denied, 328 Conn. 928, 182 A.3d 637 (2018). We are not persuaded.

On review, the board noted that, "while it is entirely possible that [the Workers' Compensation Commission]

[11] Before the commissioner, the plaintiff sought, inter alia, "an order requiring the [defendant] to pay the [plaintiff] the sum of $27,059.46 for COLA benefits . . . ." At oral argument before this court, the plaintiff's counsel asserted that, on remand, the commissioner could require the defendant to reissue the check, at which point the defendant could institute an action against one or both of the banks for reimbursement, or could determine that one of the banks was "on the hook" for issuing full payment to the plaintiff. Counsel's suggestion that the commissioner on remand could determine that one of the banks, a nonparty to the workers' compensation proceeding, was "on the hook," further demonstrates why the plaintiff's claim is outside the scope of the workers' compensation forum.

could theoretically be called upon to preside over a claim in which the interpretation of the UCC was 'incidentally necessary to the resolution of [the] case' . . . the admittedly unusual factual pattern in this appeal does not present us with that situation." (Citation omitted.) We agree with the board that, because application of the UCC was unnecessary to resolve the dispute between the parties, the commissioner properly did not apply it to resolve the dispute. Any dispute regarding events occurring after Attorney Vaccaro's receipt of the check presents a question outside of the scope of the claim submitted to the commissioner and should be raised in a separate legal action among the appropriate parties.

It is well established that "[a]dministrative agencies [such as the Workers' Compensation Commission] are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." (Internal quotation marks omitted.) *Del Toro* v. *Stamford*, 270 Conn. 532, 541, 853 A.2d 95 (2004). "[T]he jurisdiction of the [workers' compensation] commissioners is confined by the [a]ct and limited by its provisions. Unless the [a]ct gives the [c]ommissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct. . . . While it is correct that the act provides for proceedings that were designed to facilitate a speedy, efficient and inexpensive disposition of matters covered by the act . . . the charter for doing so is the act itself. The authority given by the legislature is carefully circumscribed and jurisdiction under the act is clearly defined and limited to what are clearly the legislative concerns in this remedial statute." (Internal quotation marks omitted.) *Stickney* v. *Sunlight Construction, Inc.*, 248 Conn. 754, 760–61, 730 A.2d 630 (1999). The

primary statutory provision establishing the subject matter jurisdiction of the Workers' Compensation Commission is § 31-278, which provides in relevant part that "[e]ach commissioner . . . shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of [the act]. Each commissioner shall hear all claims and questions arising under [the act] . . . ." The plaintiff maintains that his UCC arguments are "claims" for purposes of § 31-278 and, therefore, necessarily fall under the commissioner's jurisdiction. In framing his argument this way, the plaintiff confuses the issues. It is clear that the commissioner had jurisdiction to resolve the plaintiff's claim for benefits under § 31-307a (c);[12] however, this does not mean that the commissioner's resolution of the claim for benefits required application of the UCC.

The plaintiff's argument rests on the principle that a commissioner may interpret statutory provisions outside of the act when "such interpretations [are] *incidentally necessary* to the resolution of a case arising under [the] act." (Emphasis altered; internal quotation marks omitted.) *Stickney* v. *Sunlight Construction, Inc.*, supra, 248 Conn. 764 n.5. For example, in *Wonacott* v. *Bartlett Nuclear, Inc.*, No. 2237, CRB 4-94-12 (June 25, 1996), the board considered the federal income tax code (tax code) in order to determine an employee's wages for purposes of applying the act. The issue in that case involved a provision of the tax code that allowed an employee to deduct employer reimbursed living expenses from gross income. Id. The board determined that the commissioner had to take into account this tax provision in order to determine the amount of compensation owed to the employee because the employee had

[12] The plaintiff's claim for benefits is one that arises directly from the act and is between the plaintiff, his employer, and his employer's insurer. See General Statutes § 31-278.

reduced his reportable income as allowed by the tax code. Id.

In the present case, the commissioner did not need to apply the UCC to resolve the plaintiff's claim for benefits. It is undisputed that the defendant delivered the retroactive lump sum COLA check to the plaintiff's agent, and, at the time the check was negotiated, the defendant had sufficient funds in its account for the check to be honored. Unlike in *Wonacott*, the issue presented here—whether an employer's insurer complied with § 31-307a (c) when it issued a retroactive lump sum COLA check to an employee claimant—does not require consideration of the UCC. Indeed, as aptly noted by the board, the events occurring after the plaintiff's attorney received the retroactive lump sum COLA check were inconsequential to the commissioner's analysis under § 31-307a (c). Accordingly, because the commissioner was able to resolve the issue without looking to the law of negotiable instruments and because analysis of the UCC was not "incidentally necessary" to resolving the issue presented, the board correctly determined that the commissioner did not need to reach the plaintiff's UCC arguments.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

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## SOLOMON WHITE *v.* COMMISSIONER OF CORRECTION (AC 43988)

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

*Syllabus*

The petitioner, who had previously been convicted of various crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming ineffective assistance of his previous habeas counsel,

V. Following an evidentiary hearing, the habeas court denied the petition, concluding that the petitioner had failed to demonstrate that V had acted deficiently in failing to procure the appearance and testimony of two witnesses at his first habeas trial—D, who the petitioner claimed had perjured her testimony at his criminal trial, and S, whose testimony both allegedly supported the petitioner's claim that his trial counsel was ineffective and who could have impeached the testimony of eyewitnesses to the shooting at his criminal trial. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that the issues raised in his petition were debatable among jurists of reason, that a court could have resolved the issues in a different manner or that the questions were adequate to deserve encouragement to proceed further: the petitioner failed to demonstrate that V's decision not to call D as a witness at his first habeas trial was not reasonably competent or outside of the wide range of competence displayed by attorneys with ordinary training and skills, as V completed a reasonable investigation by reviewing D's testimony at the petitioner's criminal trial, sending his investigator to D's house and serving her with a subpoena, and V provided an adequate explanation for his decision not to call D as a witness, as D had testified against the petitioner at his criminal trial, V believed D's testimony at the criminal trial to be credible, D stated unambiguously that she would not testify at the habeas trial, and V had no idea of what D might say if he compelled her testimony because she had refused to speak to his investigator for longer than ten minutes; moreover, the petitioner failed to present affirmative evidence that D's testimony would have been helpful to his case, as D invoked her fifth amendment privilege and refused to testify at his second habeas trial; furthermore, the petitioner failed to establish that, had V called S as a witness at the first habeas trial, there was a reasonable probability that the outcome would have been different, as S was not present when the shooting took place and did not witness any of the events leading up to the shooting or the shooting itself, and S's testimony at the second habeas trial that he did not witness the petitioner and the victim arguing on the day of the shooting and that the petitioner and the victim were friendly would have had an isolated, trivial effect on the inferences that could be drawn from the evidence, as there was ample evidence in the record supporting the verdict in the petitioner's criminal trial, including the testimony of two witnesses that they saw the petitioner shoot the victim, which was corroborated by a third witness' testimony that D exclaimed immediately after the shooting that the petitioner shot the victim, the petitioner fled the scene of the shooting and thereafter evaded the police for approximately one month, and evidence that, while in prison, the petitioner wrote letters to a witness attempting to persuade

her not to testify at his probable cause hearing, to lie to the police and to encourage others to lie to the police.

Argued September 7—officially released December 7, 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; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*Naomi T. Fetterman*, assigned counsel, for the appellant (petitioner).

*Melissa E. Patterson*, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

SULLIVAN, J. The petitioner, Solomon White, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus, in which he claimed that his first habeas counsel rendered ineffective assistance. Because the petitioner has not demonstrated that the habeas court abused its discretion in denying the petition for certification, we dismiss the appeal.

The petitioner was charged with murder in violation of General Statutes § 53a-54a, criminal use of a firearm in violation of General Statutes § 53a-216 (a), tampering with a witness in violation of General Statutes § 53a-151 (a), conspiracy to commit tampering with a witness

in violation of General Statutes §§ 53a-48 and 53a-151 (a), bribery of a witness in violation of General Statutes § 53a-149 (a), and conspiracy to commit bribery of a witness in violation of §§ 53a-48 and 53a-149 (a).

The following facts were set forth by this court in the petitioner's direct appeal from his conviction. "On Saturday, August 27, 2005, a local church sponsored a 'Stop the Violence' block party on Vine Street in Hartford. Both the [petitioner] and Keith Carter, the victim, attended the block party, where they argued. After the block party, several people went to an apartment building located at 46-48 Vine Street. The [petitioner] lived in an apartment on the first floor of 46-48 Vine Street with his girlfriend, Latasha Drummond.

"Shortly after 9:15 p.m. that evening, several people were gathered in the common hallway on the first floor of 46-48 Vine Street. Drummond was in the apartment she shared with the [petitioner]. Drummond heard someone tell the victim to 'get out of [the petitioner's] face.' A neighbor, Dela Tindal, was in her apartment located across the hall from the apartment shared by the [petitioner] and Drummond. Tindal heard the [petitioner] and the victim arguing in the hallway. Tindal then heard the [petitioner] say, 'are you still talkin' shit? Don't make me go get my pistol,' and then Tindal heard the [petitioner's] apartment door open and close. Shortly thereafter, Tindal heard the [petitioner] say: 'You still talking shit.' Tindal then looked out of her apartment and saw the two men arguing, standing face-to-face. Tindal then saw the [petitioner] extend his hand and shoot the victim. Tindal could see sparks coming from the barrel of the gun, and the sound was 'like a . . . loud firecracker.' Upon hearing the gunshot, Drummond looked out into the hallway where she saw the victim fall to the floor and the [petitioner] with a gun in his hand. The [petitioner] then ran out of the

building. Drummond went back inside her apartment to get her keys and then ran out of the building.

"Outside of the building, Drummond encountered her neighbor, Courtney Croome. Drummond was crying and shaking and told Croome, 'He killed him. He killed him.'

"Following the incident, Drummond visited the [petitioner] at an abandoned apartment where he was hiding from the police. Drummond saw the [petitioner] wrap the gun he had used to shoot the victim in a diaper and throw it in the trash, claiming that the police could not charge him if they did not have the murder weapon. Drummond described the weapon as a 'black, old, rusty gun.'

"The [petitioner] was located and arrested approximately one month following the incident. While in prison, the [petitioner] wrote three letters to Tindal, asking that she not appear at his probable cause hearing, that she lie to the police and that she ask others to lie for him." (Footnote omitted.) *State* v. *White*, 127 Conn. App. 846, 847–49, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011).

Attorney William O'Connor of the Office of the Public Defender represented the petitioner during the criminal trial. Following a jury trial, the petitioner was convicted of all charges and sentenced to a total effective term of sixty years of imprisonment. This court affirmed the judgment of conviction on appeal. Id., 858.

The petitioner then filed his first petition for a writ of habeas corpus seeking to collaterally attack his conviction. In his first habeas petition, the petitioner alleged that O'Connor provided ineffective assistance during the petitioner's criminal trial. The petitioner was represented by Attorney Joseph Visone, assigned counsel by the Office of the Public Defender, throughout the proceedings associated with the first habeas petition.

The first habeas petition was denied following a trial on the merits, and this court dismissed the petitioner's appeal therefrom. *White* v. *Commissioner of Correction*, 168 Conn. App. 903, 149 A.3d 503 (2016), cert. denied, 325 Conn. 924, 160 A.3d 1067 (2017).

On July 12, 2018, the petitioner filed his second petition for a writ of habeas corpus, which is the subject of this appeal. In his amended petition for a writ of habeas corpus, the petitioner claimed that his first habeas counsel, Visone, provided ineffective assistance.[1] Specifically, the petitioner alleged that Visone rendered ineffective assistance by failing to procure the appearance and testimony of (1) Drummond to support the petitioner's claim that her testimony at the petitioner's criminal trial was perjured and (2) David Sims, the victim's nephew, to support the petitioner's claim, raised in his first habeas petition, that his trial counsel was ineffective for failing to call Sims as a witness during the petitioner's criminal trial to prove that the petitioner and the victim had been together and friendly with each other the entire day, including immediately before the victim was shot.

Following a trial on the merits, the habeas court concluded that the petitioner failed to prove his claims of ineffective assistance of prior habeas counsel and, accordingly, rendered judgment denying the petition for a writ of habeas corpus. Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus, wherein he claimed that the habeas court erred in failing to find that the petitioner proved ineffective assistance by trial and habeas counsel. The habeas court denied

[1] The petitioner also claimed in his amended habeas petition that the state violated his due process rights during his criminal trial by using perjured testimony from Drummond and Tindal. The petitioner has not raised this claim on appeal.

the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his petition for a writ of habeas corpus. We first set forth our standard of review and the law applicable to the claims on appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether

the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

The petitioner's underlying claim in the present appeal is that the habeas court improperly concluded that Visone did not provide ineffective assistance. "A claim of ineffective assistance of counsel as enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], consists of two components: a performance prong and a prejudice prong." (Internal quotation marks omitted.) *Figueroa* v. *Commissioner of Correction*, 202 Conn. App. 54, 63, 244 A.3d 149, cert. denied, 336 Conn. 926, 246 A.3d 986 (2021). "To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . 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." (Citation omitted.) *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 193, 19 A.3d 705, cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

"A petitioner's claim will succeed only if both prongs are satisfied. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . .

resulted from a breakdown in the adversary process that renders the result unworkable. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Internal quotation marks omitted.) *Figueroa* v. *Commissioner of Correction*, supra, 202 Conn. App. 64.

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992)." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 191 Conn. App. 238, 246, 214 A.3d 422, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019). "To prevail on a claim of ineffective assistance of habeas counsel that is predicated on the ineffective assistance of trial counsel, a petitioner must demonstrate that both trial and habeas counsel were ineffective. . . . [When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* [v. *Washington*, supra, 466 U.S. 687] standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . A petitioner who claims ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must satisfy *Strickland* twice; that is, he must show that his appointed habeas counsel and his trial counsel were ineffective." (Citations omitted; internal quotation marks omitted.) *Britton* v. *Commissioner of Correction*, 185 Conn. App. 388, 420, 197

A.3d 895 (2018), cert. denied, 337 Conn. 901, 252 A.3d 362 (2021). "We have characterized this burden as presenting a herculean task . . . ." (Internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 774, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal with respect to his claim that Visone provided ineffective assistance by failing, at the first habeas trial, to procure the testimony of Drummond, who, at the criminal trial, had testified that the petitioner shot the victim.[2] Specifically, he claims that the habeas court improperly concluded that he failed to prove that Visone rendered deficient performance by failing to procure the appearance of Drummond in support of the petitioner's claim that her testimony at the petitioner's criminal trial was perjured. The petitioner argues that Visone's decision not to attempt to compel Drummond's appearance as a witness was unreasonable and prejudiced him because his conviction rested, in large part, on her testimony. We disagree.

The following evidence and testimony were presented to the habeas court at the second habeas trial at which the petitioner was represented by Attorney Andrew Marcucci. When Visone was questioned at a deposition[3] as to why he did not call Drummond as a witness at the first habeas trial, Visone stated that when

[2] Although Drummond testified at the petitioner's criminal trial, she did not testify at the petitioner's first habeas trial. Visone subpoenaed Drummond and disclosed her as a witness but never called her to testify and did not seek a capias to compel her appearance.

[3] At the time of the habeas trial, Visone resided outside of Connecticut and did not actually testify at the habeas trial. The parties, however, stipulated to taking his deposition and allowing the transcript to be admitted as a full exhibit.

one of his investigators went to Drummond's house and gave her a subpoena, she threw him out and said, " 'I am not going to court.' " Visone explained that the fact that Drummond did not want to testify indicated to him that she was not going to change her story or recant her previous testimony.[4]

Visone further testified at the deposition that, even if Drummond had indicated a desire to recant, as an officer of the court, he "would have had to alert the judge to appoint counsel to her. And you know what happens after that." Visone also stated that, although credibility is a question for the finder of fact, it is also an issue attorneys must consider when making tactical decisions as to whether to put a witness on the stand. Visone explained why he believed that Drummond's testimony at the petitioner's criminal trial was credible and why he therefore decided not to compel Drummond's testimony in an attempt to prove that her original testimony was perjured: "The reason I believed . . . Drummond was not lying is because when she ran out of the building—and this is perfect excited utterance—she said, 'He shot him, he shot him.' . . . Liars would say '[The petitioner] shot him, [the petitioner] shot him, [the petitioner] shot him,' because they're making it up. . . . [T]hat, to me, was a very powerful indicia of reliability. Because she didn't use—she had to have . . . [Croome] get it out of her, 'Who are you talking about?' . . . It was her testimony that she said, '[The petitioner] shot him.' "

At the petitioner's second habeas trial Marcucci called Drummond to testify, and Drummond was placed

[4] At the petitioner's criminal trial, Drummond testified that, on the night of the shooting, she was in her apartment when she heard a noise in the hallway, which sounded like a firecracker. When she opened her apartment door, she saw the petitioner standing with a gun in his hand and the victim falling to the ground. Drummond testified that she ran outside and told Croome, "He killed him. He killed him."

under oath. Immediately thereafter, the court advised Drummond of her fifth amendment right against self-incrimination and that, if she indicated that she had previously testified falsely, she could expose herself to a perjury charge. Drummond then invoked her fifth amendment right.

Marcucci next called an investigator, Julio Ortiz, to the witness stand. Ortiz had been hired by Marcucci in connection with the petitioner's second habeas petition. Ortiz testified that he was instructed to locate and interview Drummond. According to Ortiz, he located Drummond and was able to speak with her for about ten minutes.[5] Ortiz described Drummond as guarded and apprehensive and stated that she seemed unwilling to cooperate with the investigation. When Ortiz asked Drummond where she was when the shooting occurred, according to Ortiz, Drummond stated that she was outside of her apartment, in the hallway of her apartment building. Drummond also stated that she had never seen the petitioner with a gun and that she did not see a gun at the time of the shooting. Ortiz also asked Drummond if she had ever told Croome, shortly after the shooting occurred, that the petitioner shot the victim, to which Drummond responded that Croome had lied. Ortiz further testified that Drummond claimed that the petitioner never told her that he shot the victim. Ortiz stated that Drummond also said she did not want to testify in this case.

The habeas court found the following facts, on the basis of the evidence, after the conclusion of the habeas

[5] After a hearsay objection from the respondent, the Commissioner of Correction, the court determined that Drummond was "unavailable" and allowed the petitioner to present statements allegedly made by her against her penal interest when interviewed by Ortiz. See Conn. Code Evid. § 8-6 (4); see also *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980) (witness asserting testimonial privilege is "unavailable" within meaning of rules of evidence).

trial. "In short, evidence of the statements allegedly made by [Drummond] were too unreliable to be given much credit. When speaking to the petitioner's investigator, she is alleged to have admitted that she was not in her apartment when the shooting occurred, but outside in front of the building, that she did not see a gun in the petitioner's hand at the time of the shooting, and denied that she made any statement about witnessing the shooting to . . . Croome. She also allegedly denied meeting the petitioner several days later where he allegedly admitted to the shooting. When speaking to the state's inspector, however, [Drummond] supposedly made contradictory statements, claiming that the petitioner's investigator 'wanted me to change my story, but I was not going to change my story.' . . . [Drummond] contradicting herself, and her general lack of credibility, is nothing new. . . . [Visone] testified that he sent his investigator out to speak with [Drummond], but she refused to speak with him and was adamant that she 'was not coming to court to testify.' Given her refusal to speak to his investigator, [Visone] presumed she was not going to be helpful to his client, and chose not to call her as a witness." (Citations omitted; footnote omitted.)

The habeas court held that Visone did not provide ineffective assistance because it was not "overtly unreasonable for . . . Visone to make the decision not to call a witness who testified against his client in the underlying trial, appeared to remain hostile to his cause, and where he had no idea what the witness might say." We agree with the habeas court's conclusion that, because Visone's failure to procure the testimony of Drummond was not unreasonable, the petitioner failed to satisfy the performance prong of the *Strickland* analysis.

To satisfy the performance prong of the *Strickland* analysis, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland* v. *Washington*, supra, 466 U.S. 688. Our Supreme Court has stated that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and that [j]udicial scrutiny of counsel's performance must be highly deferential." (Internal quotation marks omitted.) *Figueroa* v. *Commissioner of Correction*, supra, 202 Conn. App. 63. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 538–39, 198 A.3d 52 (2019); see also *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 632, 212 A.3d 678 (2019) (applying strong presumption that counsel's strategic decisions were reasonable).

When a petitioner alleges that counsel has provided ineffective assistance on the basis of counsel's failure to call a witness, "[d]efense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation *and without adequate explanation*, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it. . . . Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Emphasis in original; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 833, 234 A.3d 78 (2020),

aff'd, Conn. , A.3d (2021); see also *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 628 ("decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel" (internal quotation marks omitted)). Counsel does not engage in deficient performance by failing to "call witnesses to testify in instances in which jurors likely would have found the testimony unreliable, inconsistent, or unpersuasive in light of the state's evidence against the petitioner." *Jordan* v. *Commissioner of Correction*, supra, 868.

In the present case, Visone completed a reasonable investigation; see id., 833; by reviewing Drummond's testimony at the petitioner's criminal trial, sending his investigator to Drummond's house, and serving her with a subpoena. As determined by the habeas court, Visone also provided an adequate explanation for his decision not to call Drummond as a witness—Drummond had testified against the petitioner at his criminal trial, Visone believed her testimony at the petitioner's criminal trial to be credible, Drummond stated unambiguously that she would not testify at the habeas trial, and Visone had no way of knowing what Drummond might say if he was able to compel her testimony because she had refused to speak to his investigator for longer than ten minutes. See id. Furthermore, because Drummond invoked her fifth amendment privilege and refused to testify at the petitioner's second habeas trial, the petitioner has presented no affirmative evidence that Drummond's testimony would have been helpful to his case. See *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 681, 51 A.3d 948 (2012) ("[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense" (internal quotation

marks omitted)).[6] After considering all of the circumstances, we cannot conclude that Visone's decision not to call Drummond as a witness was unreasonable, as the decision concerned a matter "of trial strategy, which is typically left to the discretion of trial counsel . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 628.

Accordingly, because the petitioner failed to establish that Visone's decision not to call Drummond as a witness at the petitioner's first habeas trial was not reasonably competent or outside the wide range of competence displayed by lawyers with ordinary training and skills;[7] see *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 539; the petitioner has failed to demonstrate that the habeas court abused its discretion by denying his petition for certification to appeal with respect to this claim.

II

The petitioner also claims that the habeas court abused its discretion in denying his petition for certification to appeal with respect to his claim that Visone rendered ineffective assistance by failing to procure the testimony of Sims at the habeas trial in support of the

[6] The petitioner argues that the habeas court should have drawn an inference from Drummond's invocation of her fifth amendment right that she did so because she did not want to admit that she perjured herself at the petitioner's criminal trial. Although the habeas court was permitted to draw such an inference, it was not required to do so. *In re Samantha C.*, 268 Conn. 614, 665, 847 A.2d 883 (2004) (explaining that adverse inferences are ordinarily permissible in noncriminal proceedings).

[7] In light of our determination that the habeas court properly determined that the petitioner failed to establish that Visone's performance was deficient, we need not address the prejudice prong of the *Strickland* test. See *Fair* v. *Commissioner of Correction*, 205 Conn. App. 282, 294, 256 A.3d 163 ("[i]n its analysis, a reviewing court may look to the performance prong or to the prejudice prong [of the *Strickland* test], and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)), cert. denied, 338 Conn. 910, 258 A.3d 1280 (2021).

petitioner's claim that his trial counsel, O'Connor, was ineffective for failing to call Sims as a witness at his criminal trial. The petitioner claims that Visone's decision not to call Sims as a witness was unreasonable and prejudiced him because, according to the petitioner, Sims' testimony would have "contradicted and/or impeached the testimony of both . . . [Tindal and Drummond] and would have called into question any motive on the petitioner's part to cause the death of the [victim]." We disagree.

The following evidence and testimony were presented to the habeas court at the habeas trial. According to Sims' testimony at the second habeas trial, he was never subpoenaed and did not testify at the petitioner's underlying criminal trial, nor did he testify at the petitioner's first habeas trial. According to Visone's deposition, the petitioner told him that Sims would testify that Sims went to the Vine Street apartments around 10 a.m. on the morning of the shooting to visit his uncle, the victim, and that Sims did not witness any fighting or arguing between the petitioner and the victim.

Visone testified that his investigator went to Sims' house a total of seven times and spoke with him on the phone. Additionally, according to Visone, Sims' stepfather was given a subpoena at Sims' residence after he told the investigator: " 'Don't come here anymore because [Sims] doesn't want to talk to you.' " When Visone spoke with Sims on the phone, Sims said there was " 'nothing [he] could say at this trial that would be of any benefit to [the petitioner].' "

Visone subpoenaed and disclosed Sims as a witness at the petitioner's first habeas trial. However, Sims never appeared to testify. Visone testified: "I went to go look for him in the hallway because I told him it's a subpoena. It's a court order. 'You have to show up.' . . . But I knew that if he showed up, and I talked to him again,

and he said the same thing to me in the courthouse that he said to me on the phone, I'd have been a fool to put him on the witness stand."

Visone testified at his deposition that he did not consider requesting a continuance because "that would have been unethical. I knew what he was going to say. He was going to say that '[t]here's nothing I can say that's going to help the [petitioner],' and I would have to disclose that to the judge before the judge would take the extraordinary step of issuing an arrest or a capias on a witness." Visone was asked whether he believed that the petitioner "had a strong habeas case without [Sims'] testimony," to which Visone replied, "He had no case." When asked to clarify this statement on cross-examination, Visone stated: "[Sims], if he had testified, according to [the petitioner] what he would have testified to is that they met in the morning. It was somebody's birthday, and they were going to have a drink together. There was a block party, so there was a lot of drinking going on. And I believe I said to [the petitioner], 'Well, just because—you know, even if he said you weren't fighting in the morning, that's ten o'clock in the morning, the [victim] was shot at ten o'clock at night. People, after a lot of drinking, just because you're not arguing with somebody in the morning doesn't preclude you from arguing with them at night.' So, you know, in the scheme of things, it's you know . . . there's nothing there. . . . I mean, basically, it was two women who testified they were eyewitnesses to the shooting. They were both extensively cross-examined and impeached at trial by . . . O'Connor. I believe . . . Tindal was in the witness protection program for the state's attorney's office. She was impeached on that. So they were both thoroughly impeached. The fact that—again, very important, is that the jury knew that it took the police a month to find [the petitioner], because against his attorney's advice,

he took the witness stand and testified in the criminal trial. So the jury knew that he was gone for a month. Okay? And when you're gone for a month, and they can't find you, when they knew where he was living . . . which was Vine Street. That's where the murder happened. So they knew from day one he was on Vine Street, and then it takes a month to find him? That's because he's hiding."

Sims, however, did testify at the second habeas trial. According to Sims' testimony, in 2005, Sims was close with both the petitioner and the victim, who was his uncle. Sims also testified that he and the petitioner had been friends since childhood. On the day of the shooting, Sims testified that he, the petitioner, and the victim were together "[j]ust hanging out" and "were walking around [the] neighborhood." According to Sims, the three men met up at some point around 4 p.m. at the Vine Street apartment complex to celebrate Sims' birthday. Sims testified that he, the petitioner, and the victim were having drinks outside of the apartment complex for the majority of the evening, with the exception of a few trips to the package store. Sims stated that the petitioner and the victim were friendly toward each other and that he did not witness the two arguing or acting in a hostile manner toward each other while he was with them. Sims testified that he left the Vine Street apartments at around 7 or 8 p.m. Then, about three minutes after leaving the apartments, Sims received a call from his aunt, who told him that his uncle, the victim, had been shot. Sims testified that "[i]t was ridiculous. I'm around the corner. Seriously, around the corner."

The habeas court found the following facts, on the basis of the evidence, after the conclusion of the habeas trial. "Although [Sims] did testify before this court, it is not actually clear what significance the petitioner claims his testimony would have had to the outcome

of the original trial. While he was with the petitioner most of the day on the day the incident occurred, he and the petitioner separated prior to the shooting, and he did not witness any of the incidents directly related to the dispute the two men had in the hallway or the shooting. At best, his testimony, general background information that he had 'never seen the petitioner and [the] victim exchange harsh words,' and that the petitioner generally had a 'good demeanor,' could have been considered as character evidence, but was hardly significant enough that there is any real probability that including it would have resulted in a more favorable outcome for the petitioner."

Accordingly, the habeas court concluded that Visone's failure to call Sims as a witness did not prejudice the petitioner because Sims did not witness any of the incidents directly related to the shooting. We agree with the habeas court's conclusion that the petitioner failed to establish that he was prejudiced by Visone's failure to procure the testimony of Sims at the first habeas trial.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . In making this determination, a court hearing an ineffectiveness claim . . . must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence,

altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (Internal quotation marks omitted.) *Figueroa* v. *Commissioner of Correction*, supra, 202 Conn. App. 63–64.

Here, the petitioner has not established that, had Visone called Sims as a witness at the first habeas trial, there is a reasonable probability that the outcome of his first habeas trial would have been different. As the habeas court noted in its memorandum of decision, Sims was not present at the Vine Street apartments when the shooting took place. Although he allegedly had been with the petitioner and the victim for the majority of the day on which the incident occurred, he left the scene of the crime prior to its occurrence. Sims testified that he did not witness any of the events in the hallway leading up to the shooting or the shooting itself. Sims' testimony that he did not witness the petitioner and the victim arguing on the day of the shooting and his testimony that the petitioner and the victim were friendly does not create "a probability sufficient to undermine confidence in the verdict"; id., 63; considering the "totality of the evidence" that was before the jury. Id., 64.

In the petitioner's criminal trial, the verdict was supported by ample evidence in the record, including testimony—which the jury could have found credible—from Drummond and Tindal, who both claimed to have seen the petitioner shoot the victim. Drummond's testimony was corroborated by Croome's testimony that Drummond exclaimed immediately after the victim was shot that the petitioner did it. The jury also could have inferred the petitioner's guilt from his flight from the scene after the shooting and his subsequent evasion of the police for approximately one month. See *State* v.

*White*, supra, 127 Conn. App. 854–55. Furthermore, there was evidence that, while in prison, the petitioner wrote three letters to Tindal attempting to persuade her (1) not to testify at the petitioner's probable cause hearing, (2) to lie to the police, and (3) to encourage others to lie to the police. Given the totality of the evidence in the record, the testimony of Sims, at most, would have had an "isolated, trivial effect" on the inferences that could be drawn from the evidence. *Figueroa* v. *Commissioner of Correction*, supra, 202 Conn. App. 64. We therefore agree with the habeas court's conclusion that Visone's decision not to call Sims as a witness at the first habeas trial did not prejudice the petitioner's defense. We, thus, conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim concerning Visone's failure to call Sims as a witness.

Accordingly, we conclude that, with respect to both claims of ineffective assistance of prior habeas counsel raised on appeal, the petitioner has failed to show that the issues involved are debatable among jurists of reason, that a court could have resolved the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

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## JAMIE E. O'NEILL *v.* ANTHONY J. O'NEILL
## (AC 44070)

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

*Syllabus*

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain orders regarding the parties' finances and custody of the parties' five minor children. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in awarding periodic alimony and child support in amounts that he claimed would far exceed his net income: the support orders would not exceed his net income on the basis of the trial court's finding as to the defendant's net earning capacity, which amount was supported by certain evidence in the record; moreover, the trial court found the defendant's testimony about his finances to be not credible, and, although the summary prepared by the defendant's accountant indicated a lower figure for his average net income, the court was not required to base its orders on that figure as the accuracy of that figure as a predictor of the defendant's earning capacity was suspect, given that it reduced the defendant's net income by the penalties and interest he incurred for filing his tax returns late.
2. The trial court did not abuse its discretion in ordering the defendant to pay increased alimony once the plaintiff vacated the marital residence: although the plaintiff had no mortgage or rent expense while she remained in the marital residence, that residence was the subject of a foreclosure action and the plaintiff would incur additional housing expenses once she relocated.
3. The trial court did not abuse its discretion in precluding modification of the alimony award on the basis of the plaintiff's cohabitation with other adults: the court had the authority to award nonmodifiable alimony under the applicable statute (§ 46b-86), its decision to do so was supported by the record given the plaintiff's arrangement to provide care for her elderly father, and its order did not conflict with the cohabitation subsection, § 46b-86 (b).
4. The defendant's claim that the trial court improperly awarded the marital residence to the plaintiff without specifying that she would take the residence subject to any liens on the property was without merit: the court specified that the plaintiff was entitled to "any net equity" following the sale of the marital residence, which established that the plaintiff would be entitled only to the proceeds of the sale of the property in excess of claims or liens against it.
5. The trial court did not abuse its discretion in ordering that the plaintiff could relocate to a reasonable distance from Wilton or New York with the minor children: the court was not required to consider and apply the factors set forth in the statute (§ 46b-56d) governing postjudgment motions to relocate with a minor child, where, as here, the relocation matter was decided in the initial judgment dissolving the parties' marriage; moreover, the defendant did not claim that the trial court failed to consider the best interests of the children under the applicable statute (§ 46b-56 (c)), and evidence in the record supported the court's conclusion on that issue.
6. The defendant could not prevail on his claim that the trial court's order was ambiguous as to when alimony terminated: the order clearly stated

that alimony terminated ten years after the judgment of dissolution or when the plaintiff died or remarried.

Submitted on briefs September 14—officially released December 7, 2021

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Rodriguez, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

*Charles T. Busek* submitted a brief for the appellant (defendant).

*Jonathan E. Von Kohorn* and *Tara L. Von Kohorn* submitted a brief for the appellee (plaintiff).

*Opinion*

BRIGHT, C. J. The defendant, Anthony J. O'Neill, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Jamie E. O'Neill. On appeal, the defendant claims that the court abused its discretion by (1) ordering him to pay periodic alimony and child support in amounts that exceed his net income, (2) ordering that his alimony obligation would increase to $1000 per week after the plaintiff vacates the marital residence, (3) precluding modification of the alimony award on the basis of the plaintiff's cohabitation with other adults, (4) awarding the plaintiff the marital residence without specifying that the plaintiff takes the property subject to all mortgages and liens of record, (5) granting the plaintiff's request to relocate with the minor children, and (6) failing to order that alimony will terminate ten years after the date of the judgment. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff and the defendant were

married in Greenwich in 2003, and have five minor children together. While married, the parties resided in Wilton, and their children attended the Wilton public schools. In 2018, the plaintiff commenced an action to dissolve the parties' marriage, and the court, *Gould*, *J.*, accepted the parties' agreement providing, inter alia, that the defendant would pay pendente lite child support in the amount of $477 each week and pendente lite alimony in the amount of $288 each week. On December 4, 2019, the case was tried to the court, *Rodriguez*, *J.*, and both parties testified at trial. On February 21, 2020, the court issued its memorandum of decision dissolving the parties' marriage.

In its decision, the court made the following findings and issued the following orders. "The defendant's employment essentially consisted of the overseeing of residential construction and remodeling. The plaintiff worked full-time as a secretary prior to the birth of the parties' five children. Although [the defendant] claims that [the plaintiff] is capable of presently earning an annual income equal to about $38,000, the court is not persuaded and discredits his testimony with respect to this claim.

"Although [the defendant's] testimony and financial affidavits reference no earned income whatsoever, the court finds that he has an imputed earning capacity of at least $101,000 per year. This is largely based upon tax returns for the years 2013 through 2018. The existence of other assets which the defendant has or had in Ireland [suggests] that the defendant may very well have access to additional income from family members outside of the United States. However, based on the evidence presented, the court is not considering any possible assets of [the defendant] in Ireland in making its finding of his imputed earning capacity.

"The court credits [the plaintiff's] testimony that with help from her family and with part-time employment

and child support payments from [the defendant], she will be able to continue to reside in the marital residence and that she will be able to sell the residence without interference from [the defendant]. She has been receiving child support in the amount of $477 a week and, at the time of trial, [the defendant] was current in his child support payments. Most of the household expenses are paid by [the defendant] who manages construction jobsites. [The plaintiff] would like to leave the family residence as soon as possible but not until the foreclosure proceedings are resolved. . . .

"The marital residence . . . in Wilton . . . was purchased in May or June of 2004 and is the subject of a foreclosure proceeding. There were extensive renovations and improvements made to the property by [the defendant]. . . . [The plaintiff] is not named as a defendant in the foreclosure proceedings. Although the court ordered on June 6, 2019, that the property be sold, primarily due to the lack of cooperation by [the defendant], the property has not been sold. The court orders that [the plaintiff] shall exercise final decision making regarding any options in regards to the sale in light of the pending foreclosure action. So . . . the property is ordered sold and the net proceeds realized from the sale, if any, are awarded to [the plaintiff].

"[The defendant's] request that the court compel [the plaintiff] and the children to continue to reside at the marital home in Wilton . . . is rejected. Such a request is unwarranted, unreasonable and leads the court to conclude that [the defendant] has economic resources available to him which he has not disclosed to the court. However, and as previously noted, [the defendant] clearly has an earning capacity of $101,000, and the court has not considered this conclusion in its finding of [the defendant's] earning capacity. He is in good health and he is a self-employed individual. [The plaintiff], originally from Long Island, New York, is granted

her request to relocate her residence to a reasonable distance from Wilton or New York for necessary housing opportunities especially given the lack of anticipated reliable support from [the defendant].

"A stipulated child support guidelines worksheet has been reviewed by the court . . . and it does not correspond precisely to the financial affidavit of the defendant . . . which he submitted at the commencement of trial. However, [the defendant] consents to utilizing these child support guidelines with respect to his income notwithstanding that the most recent financial affidavits referenced . . . no earned income whatsoever.

"In addition to the five minor children of this marriage residing with [the plaintiff] at the marital residence . . . the plaintiff's father is also residing at the marital residence. [The plaintiff], who is in good health, provides care for her eighty-four year old father. Her father assists her financially with some of the household expenses. She is committed to continuing the care she provides for her father in the foreseeable future. Also, [the plaintiff] is fortunate to have childcare help available to her from her children who babysit for the younger ones when necessary. . . .

"There is a temporary order that [the plaintiff] and [the defendant] have joint legal custody with primary physical residence to [the plaintiff]. The court makes said temporary order a permanent order in its judgment herein and finds that it is in the best interests of the children that there be joint legal custody and that the primary residence continue to be with [the plaintiff]. She shall have final decision making over day-to-day decisions concerning the minor children.

* * *

"Child support is ordered to continue in the amount of $477 per week. The parties shall share any unreimbursed medical/dental expenses, including braces, and

qualified work-related childcare expenses with [the defendant] paying 75 percent and [the plaintiff] paying 25 percent. . . .

"The court orders that [the defendant] pay [the plaintiff] periodic alimony in the amount of $1000 per week for a period of ten years from the date of the judgment of dissolution. However, payments shall begin when [the plaintiff] vacates the marital residence . . . . Until [the plaintiff] vacates the marital residence, the current pendente lite order shall continue in effect so that [the defendant] continues to pay $280 per week in order to cover expenses of gas, oil, electric and landscaping as well as cell phones for the children. Alimony shall terminate upon the death or remarriage of [the plaintiff]. There shall be no change as to alimony based upon cohabitation by [the plaintiff] because it is expected that she will continue to live with other adults who will help her with her living expenses. . . .

"[The plaintiff] is awarded the marital residence free and clear of any claim by [the defendant]. [The plaintiff] shall sell the property and take control over the sale process in order to attempt to protect any net equity notwithstanding the foreclosure action. [The defendant] is ordered to cooperate in any sale or foreclosure process to facilitate such a sale. Any net equity shall remain the sole property of [the plaintiff]. [The plaintiff] shall continue to have sole possession and exclusive use of the property."

On March 9, 2020, the defendant filed a motion to open and reargue the decision, which the court denied on March 17, 2020. This appeal followed. Additional facts will be set forth as necessary.

We first set forth the standard of review for all of the defendant's claims on appeal. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion

or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

I

The defendant first claims that the court abused its discretion in awarding periodic alimony and child support in amounts that "would far exceed the net income resulting from $101,000 of gross earning capacity." The following additional facts are relevant to the defendant's claim.

The defendant filed his financial affidavit in November, 2019, stating that he had no income. At trial, he testified that he is a self-employed building contractor engaging in residential construction and remodeling through his limited liability company, Anthony O'Neill, LLC. He explained that he was working "[p]retty small" jobs for which he was getting paid "[v]ery small amounts . . . ." He also testified that he has "bids out

for probably like 7 or $800,000 worth of work. . . . So the profit on that would be maybe a $100,000. It all depends, maybe nothing."

During the marriage, the parties filed their tax returns separately, but the defendant failed to file his tax returns for the years 2013 through 2017, until January, 2019, which was after the plaintiff initiated the divorce proceedings. Consequently, he incurred penalties and interest in connection with his delinquent tax returns. At trial, the court admitted into evidence the defendant's federal tax returns for the years 2013 through 2018, and a two page summary prepared by the defendant's accountant setting forth his state and federal tax liabilities, his net business income, and his personal net income for those years. According to the summary, during that six year period, the defendant's average net income was $63,477.33 and his combined federal and state tax liability was $222,950, which included penalties and interest.

The plaintiff's counsel questioned the defendant regarding his net income in the following exchange:

"Q. . . . So, sir, you'd agree with me, wouldn't you, that if you were to make a representation about what your net income is, that . . . traditionally most people would think that would include your gross income less taxes. Is that—I just want to make sure we're using the same language.

"A. Yes.

"Q. Okay. And that if we were going to reduce that by one, two, three, four, five, six years of penalties and interest, that that would bring down your net income beyond what normal—normally someone would think of as what that net income would represent. Is that fair to say?

"A. Not really, no, because it depends when you've paid your taxes. If you've paid your tax on time you wouldn't have the penalties and interest.

"Q. Right, but you didn't, though.

"A. I know, but I'm just saying that you said that in a normal situation."

In its memorandum of decision, the court found that the defendant has an earning capacity of $101,000 but failed to specify whether that figure constituted the defendant's net or gross earning capacity. After this appeal was submitted on the briefs, this court ordered the trial court, pursuant to Practice Book § 60-5,[1] to articulate whether its finding as to the defendant's earning capacity constituted the defendant's net or gross earning capacity and to specify the evidentiary basis for its finding.

On October 1, 2021, the court issued an articulation, clarifying that, on the basis of the defendant's tax returns, it found that the defendant has a net earning capacity of $101,000. The court also explained that the defendant's "testimony regarding his income was evasive and somewhat not credible. Specifically, his testimony about his income and his financial affidavit dated November 26, 2019, that he had no income for the year 2019 are not credible. His responses regarding year to date earnings for 2019 are not credible, especially since his gross receipts in the year 2017 were $204,000. . . .

"[The defendant] also claimed to have bids for about $800,000 worth of work which would realize a profit of $100,000 . . . and has basically owned his own business for about twenty-five years."

In light of the court's articulation specifying that it found the defendant's net earning capacity is $101,000,

[1] Under Practice Book § 60-5, this court "may order a further articulation of the basis of the trial court's factual findings or decision."

the defendant's claim that the total amount due under the support orders would exceed his net income necessarily fails. Insofar as he is claiming that the court's finding as to his net earning capacity is clearly erroneous, we disagree.

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards . . . on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn . . . .

"Factors that a court may consider in calculating a party's earning capacity include evidence of that party's previous earnings . . . [l]ifestyle and personal expenses . . . and whether the defendant has wilfully restricted his earning capacity to avoid support obligations, although we never have required a finding of bad faith before imputing income based on earning capacity. . . .

"Whether to base its financial orders on the parties' actual net income or their earning capacities is left to the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *Buxenbaum* v. *Jones*, 189 Conn. App. 790, 799–801, 209 A.3d 664 (2019).

In the present case, the court based its support orders on the defendant's net earning capacity, which it determined was $101,000. This finding is supported by the evidence. First, the defendant's tax returns and the summary prepared by his accountant substantiate a net earning capacity of $101,000 per year. Although the defendant relies on the summary prepared by his accountant representing that his *average* net income

between 2013 and 2018 was $63,477.33, the court was not required to base its orders on that figure. See *Buxenbaum* v. *Jones*, supra, 189 Conn. App. 799 ("[i]t is well established that the trial court may . . . base financial awards . . . on the earning capacity of the parties rather than on actual earned income"). In fact, the accuracy of the net income in the accountant's summary as a predictor of earning capacity is suspect, given that the defendant's net income for each year was reduced by the penalties and interest he incurred for filing his tax returns late. Without question, it is proper for a court to ignore such self-inflicted reductions in income when determining a party's earning capacity. When the penalties and interests are removed from the defendant's presentation of his net income, the evidence supports the court's conclusion as to the defendant's earning capacity. Specifically, for tax year 2017, the summary prepared by the defendant's accountant states that his net business income was $160,882, that he owed $74,421 for federal and state income taxes, and that his net income was $86,461. The defendant's 2017 federal tax return, however, specifies that he owed $48,469 in federal income tax and $15,602 in penalties and interest. Significantly, if the defendant's purported "net income" of $86,461 was not reduced by $15,602 in penalties and interest, it would have been $102,063.

In addition, the court found that the defendant is in good health and has been operating his own business for almost twenty-five years. The court further emphasized that it found the defendant's testimony regarding his finances to be "evasive" and "not credible." Finally, the court noted in its articulation that the defendant testified that he had submitted bids for construction work that, if accepted, would be worth $100,000 in profit for him. On the basis of our review of the entire record, we cannot conclude that the court's finding that the

defendant has a net earning capacity of $101,000 is clearly erroneous.

II

The defendant next claims that the court improperly ordered him to pay $1000 per week in alimony beginning when the plaintiff vacates the marital residence. He argues that there is insufficient evidence to support the court's prospective alimony award because there was no evidence regarding the plaintiff's needs after she vacates the marital residence. We disagree.

"Time limited alimony is often awarded. . . . The trial court does not have to make a detailed finding justifying its award of time limited alimony. . . . Although a specific finding for an award of time limited alimony is not required, the record must indicate the basis for the trial court's award. . . . There must be sufficient evidence to support the trial court's finding that the spouse should receive time limited alimony for the particular duration established. If the time period for the periodic alimony is logically inconsistent with the facts found or the evidence, it cannot stand. . . . In addition to being awarded to provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency, time limited alimony is also appropriately awarded to provide interim support until a future event occurs that makes such support less necessary or unnecessary." (Internal quotation marks omitted.) *Radcliffe* v. *Radcliffe*, 109 Conn. App. 21, 29, 951 A.2d 575 (2008).

In the present case, the court found that, prior to the birth of the parties' five children, the plaintiff worked full-time as a secretary and that she "has had some college education but she has not been very active in the employment market since the birth of her five children. She is attempting to obtain employment at the

Wilton school system and/or the Danbury school system." The court rejected the defendant's claim that the plaintiff has an earning capacity of $38,000, and it found that the defendant is in good health, has an earning capacity of $101,000, and has paid for most of the household expenses. In addition, the court credited the plaintiff's testimony "that with help from her family, and with part-time employment and child support payments from [the defendant], she will be able to continue to reside in the marital residence . . . ." The court noted that the marital residence was the subject of a foreclosure action, and the plaintiff's financial affidavit indicated that she had no mortgage or rent expense.

On the basis of its findings, the court ordered that the defendant shall continue to pay the plaintiff $280[2] per week in alimony, to cover utilities, landscaping, and cell phones for the children, until she vacates the marital residence, at which point he shall pay her $1000 per week in alimony. Although the court did not make detailed findings with regard to its alimony award, we conclude that the record supports the award. The court structured its award so that the plaintiff would receive a reduced amount of alimony for the period of time that she remained in the marital residence and had no mortgage or rent expense. Further, the court knew from the evidence and its orders that the plaintiff would require a residence large enough to accommodate her five children and her father and that such residence would be within a reasonable distance from Wilton or New York. In light of these findings, it was reasonable for the court to conclude that the plaintiff would require additional support once she vacates the marital residence and incurs additional housing expenses. Accordingly, the court did not abuse its discretion in structuring the alimony award as it did.

[2] We note that, although the court ordered that "the current pendente lite order shall continue in effect so that [the defendant] continues to pay $280 per week" in alimony, the pendente lite order provided that the defendant

## III

The defendant's third claim is that the court abused its discretion in precluding modification of the periodic alimony award based on cohabitation under General Statutes § 46b-86 (b).[3] He argues that, under § 46b-86 (b), "the payor of alimony has a statutory right to pursue modification of alimony for cohabitation of the other party if the cohabitation alters the financial needs of the payee. However, our trial court erased that right, without any evidence as to identifying with whom she would cohabit, where, her needs and the benefit of a financial evidentiary picture when that occurred. In briefing this issue, I did not find any case where the trial court effectively eliminated the cohabitation statutory modification rights of the payor. The trial court orders in this regard are contrary to the rights outlined in that statute." We are not persuaded.

"[Section] 46b-86 (b), the so-called cohabitation statute, was enacted four years after § 46b-86 (a) to correct the injustice of making a party pay alimony when his or her ex-spouse is living with a person of the opposite sex, without marrying, to prevent the loss of support."

would pay the plaintiff $288 per week in alimony. Nevertheless, neither party has raised a claim regarding this discrepancy.

[3] General Statutes § 46b-86 (b) provides: "In an action for divorce, dissolution of marriage, legal separation or annulment brought by a spouse, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other spouse, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

(Internal quotation marks omitted.) *Wichman* v. *Wichman*, 49 Conn. App. 529, 532, 714 A.2d 1274, cert. denied, 247 Conn. 910, 719 A.2d 906 (1998).

"It is a well settled principle of matrimonial law that courts have the authority under § 46b-86 to preclude the modification of alimony awards. . . . Section 46b-86 (a) itself provides in relevant part that [*u*]*nless and to the extent that the decree precludes modification* . . . any final order for the periodic payment of permanent alimony . . . may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party. . . . This statute clearly permits a trial court to make periodic awards of alimony nonmodifiable." (Emphasis in original; internal quotation marks omitted.) *Brown* v. *Brown*, 148 Conn. App. 13, 24–25, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014). Furthermore, "[i]t is well established by our case law that the trial court, as a part of its right to award nonmodifiable alimony and its equitable powers, has the legal authority to order alimony that does not terminate even in the event of remarriage or cohabitation." (Internal quotation marks omitted.) *Sheehan* v. *Balasic*, 46 Conn. App. 327, 331, 699 A.2d 1036 (1997), appeal dismissed, 245 Conn. 148, 710 A.2d 770 (1998).

In the present case, the court found that the plaintiff "provides care for her eighty-four year old father. Her father assists her financially with some of the household expenses. She is committed to continuing the care she provides for her father in the foreseeable future." Recognizing this arrangement, the court, in making its alimony order, specifically addressed the nonmodification of alimony, stating: "There shall be no change as to alimony based upon cohabitation by [the plaintiff] because it is expected that she will continue to live with other adults who will help her with her living expenses."

Accordingly, because the court has the statutory authority to award nonmodifiable alimony and because the record supports its decision to do so, we conclude that the court's alimony order neither conflicts with § 46b-86 (b) nor constitutes an abuse of discretion.

IV

Next, the defendant claims that the court improperly awarded the marital residence to the plaintiff without specifying that she would take it subject to any liens on the property. The defendant misunderstands the court's order.

In its memorandum of decision, the court found that the marital residence is the subject of a foreclosure action and that there are several liens on the property, including federal and state tax liens. The court awarded the plaintiff the marital residence "free and clear of any claim by [the defendant]. [The plaintiff] shall sell the property and take control over the sale process in order to attempt to protect any net equity notwithstanding the foreclosure action. . . . Any net equity shall remain the sole property of [the plaintiff]."

The court's order specifies that the plaintiff is entitled to "any net equity" following the sale of the marital residence. "Equity" is defined as "the money value of a property or of an interest in a property in excess of claims or liens against it." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 423. Given this definition, the court's order establishes the very point that the defendant claims requires further specification—that is, that the plaintiff is entitled to the proceeds of the sale of the property in excess of claims or liens against it. Accordingly, the defendant's claim is without merit.

V

The defendant's fifth claim is that the court abused its discretion in granting the plaintiff the right to relocate

a reasonable distance from Wilton or New York without considering General Statutes § 46b-56d,[4] which provides several factors for a court to consider and apply when deciding a *postjudgment* motion to relocate with a minor child. The defendant argues: "Under [§ 46b-56d] the court is assigned the task of determining whether the move would have a substantial impact on an existing parenting plan. . . . [The court's] order is without additional evidence as to where [the plaintiff] is relocating or the impact on the existing parenting plan. The order effectively eliminates [the defendant's] rights under the relocation statute to identify the impact on the parenting plan and to have an evidentiary hearing on the issue." We are not persuaded.

Section 46b-56d provides in relevant part: "(a) In any proceeding before the Superior Court *arising after the entry of a judgment awarding custody of a minor child* and involving the relocation of either parent with the child, where such relocation would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a

[4] General Statutes § 46b-56d provides: "(a) In any proceeding before the Superior Court *arising after the entry of a judgment awarding custody of a minor child* and involving the relocation of either parent with the child, where such relocation would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child.

"(b) In determining whether to approve the relocation of the child under subsection (a) of this section, the court shall consider, but such consideration shall not be limited to: (1) Each parent's reasons for seeking or opposing the relocation; (2) the quality of the relationships between the child and each parent; (3) the impact of the relocation on the quantity and the quality of the child's future contact with the nonrelocating parent; (4) the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and (5) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements." (Emphasis added.)

legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child. . . ." (Emphasis added.)

By its plain language, § 46b-56d applies when the relocation issue arises after the entry of a judgment awarding custody of a minor child. Accordingly, § 46b-56d does not apply in the present case because the relocation issue was decided in the initial judgment dissolving the parties' marriage at the same time that the court was establishing the parenting plan. See, e.g., *Lederle* v. *Spivey*, 113 Conn. App. 177, 187 n.11, 965 A.2d 621 ("[t]he enactment of . . . § 46b-56d clearly changed the analysis and the burden allocation in *post-judgment* relocation cases, but there is no indication that the legislature intended it to apply to relocation matters resolved at the time of the initial judgment for the dissolution of a marriage" (emphasis added)), cert. denied, 291 Conn. 916, 970 A.2d 728 (2009). Indeed, this court has held that "relocation issues that arise at the initial judgment for the dissolution of marriage continue to be governed by the standard of the best interest of the child as set forth in [General Statutes] § 46b-56."[5] Id., 187.

[5] General Statutes § 46b-56 provides in relevant part: "(a) In any controversy before the Superior Court as to the custody or care of minor children, and at any time after the return day of any complaint under section 46b-45, the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . .

"(b) In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . .

"(c) In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, [sixteen enumerated] factors . . . . The court is not required to assign any weight to any of the factors that it considers . . . ."

In the present case, the defendant does not claim that the court failed to consider the best interests of the children under § 46b-56 (c) in deciding the relocation issue, and there is sufficient evidence in the record to support the court's conclusion on that issue. Accordingly, we conclude that the court did not abuse its discretion in granting the plaintiff's request to relocate with the minor children.

VI

Finally, the defendant claims that the court erred in failing to specify that his alimony obligation would terminate after ten years from the date of the dissolution judgment. The defendant argues that the court's order is ambiguous because it provides that alimony terminates upon the death or remarriage of the plaintiff, but it fails to specify that alimony also terminates after ten years from the date of dissolution. We disagree.

In its memorandum of decision, the court ordered "that [the defendant] pay [the plaintiff] periodic alimony in the amount of $1000 per week *for a period of ten years from the date of the judgment of dissolution*. However, payments shall begin when [the plaintiff] vacates the marital residence . . . . Until [the plaintiff] vacates the marital residence, the current pendente lite order shall continue in effect so that [the defendant] continues to pay $280 per week in order to cover expenses of gas, oil, electric and landscaping as well as cell phones for the children. Alimony shall terminate upon the death or remarriage of [the plaintiff]." (Emphasis added.)

As the quoted passage makes clear, the court ordered that alimony terminates ten years after the judgment of dissolution or when the plaintiff dies or remarries. Accordingly, we conclude that the court's order is not

ambiguous and does not constitute an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

# MEMORANDUM DECISIONS

## CONNECTICUT APPELLATE REPORTS

## VOL. 209

# MEMORANDUM DECISIONS

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## HELEN R. HAM JONES *v.* LAW OFFICES OF WILLIAM S. PALMIERI, LLC
(AC 44088)

Bright, C. J., and Cradle and DiPentima, Js.

Argued November 17—officially released December 7, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Wilson, J.*

Per Curiam. The judgment is affirmed.

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## A. D. *v.* B. R.
(AC 44219)

Elgo, Moll and Pellegrino, Js.

Submitted on briefs November 18—officially released December 7, 2021

Defendant's appeal from the Superior Court in the judicial district of Middlesex, *Diana, J.*

Per Curiam. The judgment is affirmed.

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## VIDA S. ANIM *v.* JOYCE D. DACOSTA
(AC 44112)

Cradle, Clark and Palmer, Js.

Submitted on briefs November 29—officially released December 7, 2021

Plaintiff's appeal from the Superior Court in the judicial district of Danbury, *Brazzel-Massaro, J.*

Per Curiam. The judgment is affirmed.

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CITY OF NORWICH *v.* NORWICH PROPERTIES REALTY, LLC, ET AL.
(AC 44303)

Cradle, Clark and Palmer, Js.

Submitted on briefs November 29—officially released December 7, 2021

Appeal by the proposed intervenor from the Superior Court in the judicial district of New London, *Calmar*, *J.*

Per Curiam. The judgment is affirmed.

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ALFONSO CAMMARATO *v.* SACRED HEART UNIVERSITY, INC.
(AC 44372)

Prescott, Moll and DiPentima, Js.

Argued November 30—officially released December 7, 2021

Plaintiff's appeal from the Superior Court in the judicial district of Fairfield, *Cordani*, *J.*

Per Curiam. The judgment is affirmed.

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GEORGE AGUIAR *v.* BETWEEN–THE–BRIDGES, LLC, ET AL.
(AC 43914)

Moll, Suarez and Lavine, Js.

Argued November 29—officially released December 7, 2021

Appeal by the named defendant et al. from the Superior Court in the judicial district of Hartford, *Budzik*, *J.*

Per Curiam. The judgment is affirmed.

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# Cumulative Table of Cases
# Connecticut Appellate Reports
# Volume 209

A. D. *v.* B. R. (Memorandum Decision) . . . 901
Aguiar *v.* Between-the-Bridges, LLC (Memorandum Decision) . . . 902
Anim *v.* DaCosta (Memorandum Decision) . . . 901
Austin *v.* Coin Depot Corp.. . . . 131
*Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner; whether board erred in determining that commissioner properly concluded that defendant had discharged its obligations under applicable statute (§ 31-307a (c)); whether board correctly concluded that commissioner properly declined to apply negotiable instruments provisions of Uniform Commercial Code.*
Cammarato *v.* Sacred Heart University, Inc. (Memorandum Decision) . . . 902
In re Amanda L. . . . 1
*Termination of parental rights; whether trial court made factual findings required under statute (§ 17a-112 (j) (3) (B) and (k)); claim that trial court improperly terminated respondent parents' parental rights; claim that termination of parental rights was unconstitutional, unlawful, and fraudulent.*
Jones *v.* Law Offices of William S. Palmieri, LLC (Memorandum Decision) . . . 901
Norwich *v.* Norwich Properties Realty, LLC (Memorandum Decision) . . . 902
O'Neill *v.* O'Neill . . . 165
*Dissolution of marriage; claim that periodic alimony and child support amounts exceeded defendant's net income; whether trial court's finding of defendant's net earning capacity was clearly erroneous; whether trial court improperly ordered that alimony would increase after plaintiff vacated marital residence; whether trial court had authority to award nonmodifiable alimony; claim that nonmodifiable alimony conflicted with cohabitation statute (§ 46b-86); whether trial court improperly awarded plaintiff marital residence without specifying that she would take property subject to all mortgages and liens of record; whether trial court improperly ordered that plaintiff could relocate with parties' minor children; whether trial court's order was ambiguous as to time period for periodic alimony.*
State *v.* Bouvier . . . 9
*Operating motor vehicle while under influence of intoxicating liquor; reckless driving; whether trial court properly denied defendant's motion to suppress certain statements made during police interrogation; claim that defendant had not been advised of his rights pursuant to* Miranda *v.* Arizona *(384 U.S. 436) before making statements in custodial interview; claim that trial court improperly determined that defendant implicitly had waived his* Miranda *rights; whether trial court abused its discretion in denying defendant's motion in limine to preclude testimony of arresting officers; whether trial court erred in sustaining state's objection to defense counsel's questions to arresting officer regarding finding of no probable cause to arrest made by Department of Motor Vehicles hearing officer; claim that hearing officer's finding of no probable cause to arrest could be introduced to impeach testimony of arresting officer; claim that hearing officer's finding of no probable cause to arrest was relevant and admissible to prove that there was no probable cause to arrest defendant.*
State *v.* Butler . . . 63
*Risk of injury to child; breach of peace in second degree; statutory (§ 54-56l) supervised diversionary program for persons with psychiatric disabilities; subject matter jurisdiction; whether criminal court had power to open judgment of dismissal rendered by it after concluding that defendant had satisfactorily completed diversionary program; claim that statute (§ 52-212a) permitting opening of civil judgment on filing of motion to open within four months of date on which judgment was rendered also applied to criminal judgments.*
United Public Service Employees Union, Cops Local 062 *v.* Hamden . . . 116
*Temporary injunction; whether trial court employed correct legal standard in granting plaintiff's application for temporary injunction.*

White *v.* Commissioner of Correction . . . . . 144
*Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; claim that habeas counsel failed to procure testimony at habeas trial of witness who allegedly had perjured her testimony against petitioner at his criminal trial; claim that habeas counsel failed to procure testimony at habeas trial of witness whose testimony allegedly supported petitioner's claim that his trial counsel was ineffective and who could have impeached testimony of eyewitnesses at petitioner's criminal trial.*
Wright *v.* Commissioner of Correction . . . . . 50
*Habeas corpus; ineffective assistance of counsel; whether habeas court correctly determined that petitioner's trial counsel rendered ineffective assistance by failing to present alibi defense.*

# NOTICE OF CONNECTICUT STATE AGENCIES

## DEPARTMENT OF SOCIAL SERVICES

### TANF Caseload Reduction Report

Pursuant to federal regulations at 45 CFR § 261.40 et seq., the Connecticut Department of Social Services is seeking public review and comment on the methodology and the case number estimates used in its Temporary Assistance for Needy Families (TANF) Caseload Reduction Report to calculate the state's TANF Work Participation Rate for Federal Fiscal Year (FFY) 2022.

The federal TANF block grant includes specific performance expectations and requirements to help federal and state government measure program success. All states are required to meet specific work participation rates. Federal law requires work participation rates, which reflect the percentage of families receiving TANF assistance that must be engaged in federally-defined work activities.

To ensure that states receive credit for families that have become self-sufficient, Congress created the caseload reduction credit. States must complete form ACF-202, the Caseload Reduction Report, and provide the public with an opportunity to comment on its methodology and estimates. The reduction report provides an analysis of monthly caseload, case closure, and application activity, including activity related to changes in eligibility criteria, to arrive at the estimated impact of eligibility changes on the state's average assistance caseloads in FFY 2022 (October 1, 2021 – September 30, 2022).

The caseload reduction credit reduces the required work participation rate that a state must meet for a given fiscal year. It reflects the net percentage point reduction in the state's caseload in the prior fiscal year as compared to the caseload in base year FFY 2005. The Deficit Reduction Act of 2005 recalibrated the base year to be FFY 2005. Thus, the caseload reduction credit for FFY 2022 reduces the state's work participation rate for that fiscal year based on the caseload decline in the prior year, FFY 2021, compared to FFY 2005.

Statement of Purpose: To solicit public comments on the Caseload Reduction Report in accordance with federal TANF regulations.

Written comments on Connecticut's Caseload Reduction Report must be received by the Department by December 17, 2021, attention: Peter Hadler, Director, Division of Program Oversight & Grant Administration, Department of Social Services, 55 Farmington Avenue, Hartford, CT 06105 or by email to peter.hadler@ct.gov.

A copy of the draft report is available at no cost upon request to the Department, by email to peter.hadler@ct.gov. The final report will also be available on the web at http://portal.ct.gov/dss.

# NOTICES

## NOTICE OF EVALUATION OF INCUMBENT JUDGES WHO SEEK REAPPOINTMENT

The terms of the following Judges of the State of Connecticut will expire during the year 2023 and the nominations by the Governor will come before the Judicial Selection Commission for review commencing in February 2022.

There are 9 judges with terms expiring in 2023:

**SUPERIOR COURT**

Hon. Kevin C. Doyle

Hon. Auden C. Grogins

Hon. Alex V. Hernandez

Hon. Sheila M. Prats

Hon. Bernadette Conway

Hon. Earl B. Richards, III

Hon. James W. Abrams

Hon. Robin Pavia

Comments regarding the reappointment of any of the Judges on the Reappointment List for 2023 may be submitted to the Judicial Selection Commission, 165 Capitol Ave, Suite 1080, Hartford, CT 06106 on or before January 31, 2022. Reappointment interviews of the listed Judges will commence in February 2022 and will continue through May 2022. Accordingly, comments received after January 31, 2022 will be considered if received prior to a Judge's reappointment interview. Anonymous submissions will be considered but afforded less weight than signed submissions.

Charles E. Tiernan, III *Chairperson*

## Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

**Certified as of November 3, 2021:**

| | |
|---|---|
| Robert Meyer | Sacred Heart University |

**Certified as of November 12, 2021**:

| | |
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| Francisco Cebada | Raytheon Technologies Corp. |
| Debra Forster Boehringer | Ingelheim USA Corp. |

**Certified as of November 18, 2021**:

| | |
|---|---|
| Michael Raymond | MC Credit Partners LP |

**Certified as of November 23, 2021**:

| | |
|---|---|
| Ryan Farha | Viking Global Investors LP |
| Kimberly Timko | W.R. Berkley Corp. |

Hon. Patrick L. Carroll III
*Chief Court Administrator*

## Notice of Reprimand of Attorney

DOCKET NO: NNH CV 21 6119035 S. OFFICE OF CHIEF DISCIPLINARY COUNSEL VS. BARRETT, SEAN PATRICK. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, 11/18/2021

ORDER: Pursuant to Practice Book § 2-82(b), the court enters the following orders based on its acceptance of the parties' Proposed Disposition attached to the Presentment in this matter dated September 23, 2021 and executed on October 4, 2021:

1) The Respondent is hereby suspended from the practice of law for a period of thirty days, retroactive to August 2, 2021; and

2) The Respondent is hereby reprimanded.

By the Court,

James Wilson Abrams, *Judge*