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CONNECTICUT REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* HIRAL M. PATEL (SC 20446)

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

Syllabus

Convicted of various crimes, including murder, in connection with a home invasion, the defendant appealed, claiming, inter alia, that the trial court had improperly admitted into evidence a dual inculpatory statement made by a codefendant, C, to E, a fellow prison inmate. The defendant's cousin, N, had included the defendant and C in N's plan to rob the victim, with whom N had previously engaged in drug transactions. N drove the defendant and C to the area of the victim's home, which the defendant and C eventually entered. After encountering the victim, C shot and killed him. While in custody on an unrelated charge, C recounted the events of the home invasion, including the defendant's role, to E, who surreptitiously recorded the conversation. At trial, the recording of C's conversation with E was admitted as a statement against penal interest under the applicable provision (§ 8-6 (4)) of the Connecticut Code of Evidence. In addition, defense counsel, in order to advance a theory of third-party culpability, sought to have the defendant's sister, M, testify about a purported confession that P, N's cousin, made to M. The trial court excluded M's testimony regarding P's confession on the ground that it was not sufficiently trustworthy. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in admitting into evidence C's dual inculpatory statement to E:

   a. The admission of C's statement did not violate the defendant's right to confrontation under the United States constitution: in *Crawford* v. *United States* (541 U.S. 36), the United States Supreme Court indicated that statements of a defendant's coconspirator to a fellow inmate inculpating the defendant are nontestimonial, and, subsequently, federal and state courts have consistently rejected claims that the admission of statements between inmates or between an inmate and an informant that inculpate a defendant violate the defendant's right to confrontation; moreover, in determining whether the admission of such statements implicates a defendant's right to confrontation, courts have undertaken an objective analysis of the circumstances surrounding the making of the statements and the encounter during which they were made in order to assess the primary purpose and degree of formality of that encounter; in the present case, C's statement to E was elicited under circumstances in which the objectively manifested purpose of the encounter was not

to secure testimony for trial, as C made his statement in an informal setting, namely, his prison cell, to his cellmate, E, who questioned C in a sufficiently casual manner to avoid alerting C that C's statement was going to be relayed to law enforcement.

b. The admission of C's statement did not violate the defendant's confrontation rights under article first, § 8, of the Connecticut constitution: although the defendant urged this court to depart from the federal standard and to hold, under the state constitution, that a statement qualifies as testimonial if the reasonable expectation of either the declarant or the interrogator/listener is to prove past events potentially relevant to a later criminal prosecution, this court was not convinced that the defendant established the necessary predicates for departing from the federal standard, as an analysis under the six factors set forth in *State* v. *Geisler* (222 Conn. 672) did not support a more protective interpretation under the state constitution; moreover, although this court noted that it might be compelled to reach a different result under a slight variation of the facts, in the present case, the court had a fair assurance that government officials did not influence the content or the making of C's statement, as there was no evidence to suggest any involvement by the state's attorney's office in orchestrating the inquiry or that the police coached E on what questions to ask or what facts they were seeking to learn, and, because the conversation between C and E was recorded, the trial court could ascertain the extent to which, if any, C's answers may have been shaped or coerced by E.

c. The trial court did not abuse its discretion in admitting C's statement under § 8-6 (4) of the Connecticut Code of Evidence as a statement against penal interest: although the fact that the statement was made thirteen months after the commission of the crimes weighed against its admission, and although E and C, who were fellow inmates for only a short period of time, did not share the type of relationship that would support the statement's trustworthiness, C's account of the home invasion was consistent with the physical evidence in almost all material respects, the statement was clearly against C's penal interest, as he cast himself as the principal actor in the commission of the crimes, and C's statement and the circumstances surrounding the making of that statement had none of the characteristics that historically has caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of a declarant's accomplice.

2. The Appellate Court correctly concluded that the trial court had properly excluded P's confession to M, which the defendant attempted to offer through M's testimony as a statement against penal interest under § 8-6 (4): the trial court reasonably concluded that P's purported confession, in which he admitted that it was he, and not the defendant, who accompanied C into the victim's home, was not sufficiently trustworthy to be admitted as a statement against penal interest, as much of the evidence that the defendant characterized as corroborative indicated only that P

may have played some role in connection with the home invasion, not that P had been present in the victim's home; moreover, P's confession was made more than one year after the incident, and M claimed to have told no one except the defendant about P's confession for more than three and one-half years after P made the confession, delays that provided M with the opportunity to learn of the details of the prosecution's theory of the case.

Argued February 22, 2021—officially released March 22, 2022

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit robbery in the first degree, conspiracy to commit burglary in the first degree, and tampering with physical evidence, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict of guilty; subsequently, the court, *Danaher*, *J.*, granted the defendant's motion to vacate the verdict as to the charge of felony murder and vacated the verdict as to the charge of conspiracy to commit robbery in the first degree; judgment of guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, from which the defendant appealed to this court; subsequently, the case was transferred to the Appellate Court, *Alvord*, *Bright* and *Bear*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, was *Dawn Gallo*, state's attorney, for the appellee (state).

Opinion

KAHN, J. Following a jury trial, the defendant, Hiral M. Patel, was convicted of murder in violation of General Statutes § 53a-54a, home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a), conspiracy to commit burglary in the first degree in violation of § 53a-101 (a) (1) and General Statutes § 53a-48, and tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1).[1] The Appellate Court affirmed the judgment of conviction; *State* v. *Patel*, 194 Conn. App. 245, 250, 301, 221 A.3d 45 (2019); and we thereafter granted the defendant's petition for certification to appeal. See *State* v. *Patel*, 334 Conn. 921, 223 A.3d 60 (2020). The defendant's principal challenge relates to the admission into evidence of a codefendant's recorded dual inculpatory statement[2] to a fellow inmate acting at the behest of the state police. The defendant contends that the Appellate Court incorrectly concluded that the statement was nontestimonial and, therefore, did not implicate the defendant's confrontation rights under either the United States constitution or the Connecticut constitution, and that the trial court properly admitted it under the hearsay exception for statements against penal interest. We disagree with the defendant's claims and affirm the Appellate Court's judgment.

[1] The defendant also was convicted of felony murder in violation of General Statutes § 53a-54c and conspiracy to commit robbery in the first degree in violation of §§ 53a-134 (a) (2) and 53a-48. The trial court vacated his convictions on those charges to avoid double jeopardy concerns.

[2] "A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

The Appellate Court's decision sets forth the following facts that the jury reasonably could have found. "On June 12, 2012, [the] police arrested Niraj Patel (Niraj), the defendant's cousin, after a motor vehicle stop . . . . [Niraj] was charged with criminal attempt to possess more than four ounces of marijuana, interfering with an officer, tampering with evidence, possession of drug paraphernalia, and motor vehicle charges. Following his arrest, Niraj unsuccessfully attempted to borrow money . . . to pay his attorney.

"Niraj thereafter formed a plan to rob Luke Vitalis, a marijuana dealer with whom Niraj had conducted drug transactions. Vitalis lived with his mother, Rita G. Vitalis . . . in Sharon. [Niraj offered money to Michael Calabrese, a friend, and the defendant to perform the robbery.]

"Niraj knew that Vitalis had sold ten pounds of marijuana from his home on August 5, 2012, and set up a transaction with Vitalis for the following day, with the intention of robbing Vitalis of his proceeds of the previous sale. On August 6, 2012, Niraj drove Calabrese and the defendant to the area of Vitalis' home and dropped them off down the road. Calabrese and the defendant ran through the woods to Vitalis' home. They watched the home and saw Vitalis' mother come home. At approximately 6 p.m., Calabrese and the defendant, wearing masks, bandanas, black hats, and gloves, entered the home, encountered Vitalis' mother, and restrained her using zip ties. Calabrese, armed with a Ruger handgun that he received from Niraj, went upstairs and encountered Vitalis in his bedroom. He struck Vitalis with the handgun and shot him three times, killing him. Calabrese searched the bedroom but could find only Vitalis' wallet with $70 and approximately one-half ounce of marijuana, both of which he took. Calabrese and the defendant ran from the property into the woods, where the defendant lost his cell

phone. Calabrese and the defendant eventually met up with Niraj, who was driving around looking for them. Calabrese burned his clothing and sneakers on the side of Wolfe Road in Warren.

"After freeing herself, Vitalis' mother called 911. State police . . . arrived at the scene at approximately 6:14 p.m. and found Vitalis deceased. Some of the drawers in the furniture in Vitalis' bedroom were pulled out. The police searched the bedroom and found $32,150 . . . 1.7 pounds of marijuana . . . and evidence of marijuana sales." (Footnote omitted.) *State* v. *Patel*, supra, 194 Conn. App. 250–51.

The record reveals the following additional undisputed facts and procedural history. While the police were investigating the Sharon home invasion, Calabrese was arrested and detained on an unrelated charge. While in custody, Calabrese recounted the events that had occurred during the home invasion, including the defendant's role, to a jailhouse informant who was surreptitiously recording the conversation. At trial, the state established that Calabrese had invoked his fifth amendment privilege not to testify and introduced, over defense counsel's objection, the recording of Calabrese's dual inculpatory statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The state also introduced cell phone site location information, testimony from Calabrese's former girlfriend, and other evidence that tended to corroborate the defendant's presence at, and involvement in, the Sharon home invasion, as well as evidence establishing that friends and family of the defendant had been unable to make contact with the defendant immediately before, during, and after the period during which the Sharon home invasion occurred. See id., 251–52, 262, 284–89.

The defense advanced theories of alibi and third-party culpability. The defendant's older sister, Salony Majmu-

dar, testified that the defendant was visiting her in Boston, Massachusetts, to celebrate an important Hindu holiday when the Sharon home invasion occurred.[3] Defense counsel also sought to have Majmudar testify about a purported confession that had been made to her by Niraj's brother, Shyam Patel (Shyam), in which Shyam admitted that it was he, and not the defendant, who had accompanied Calabrese to Vitalis' home. Defense counsel offered Shyam's statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The trial court sustained the prosecutor's objection to the admission of the statement, ruling that the statement was insufficiently trustworthy to satisfy § 8-6 (4).

The jury returned a verdict, finding the defendant guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, among other charges, and the trial court thereafter rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. The court imposed a total effective sentence of forty-five years of imprisonment, execution suspended after thirty-five years and one day, and five years of probation.

The defendant appealed from the judgment of conviction, claiming that constitutional and evidentiary errors entitled him to a new trial. See id., 249–50. The Appellate Court affirmed the judgment of conviction. Id., 250,

[3] The holiday, Raksha Bhandana, which celebrates the bond between a brother and sister, or other close male/female relationships, fell on August 2, 2012. The director of Hindu life at Yale University confirmed the holiday's significance and that, although the preferred way to celebrate is in each other's presence, there is flexibility in both the manner and timing of the holiday's observance. Cell phone records established that Majmudar and the defendant had a thirty-seven minute phone call on August 2, 2012, and no phone contact on August 6, 2012.

301. We thereafter granted the defendant's petition for certification to appeal, limited to the following issues: (1) whether the Appellate Court correctly concluded that the admission of Calabrese's dual inculpatory statement (a) did not violate the defendant's confrontation rights under the United States constitution, (b) did not violate the defendant's confrontation rights under the Connecticut constitution, and (c) was proper under our code of evidence as a statement against penal interest; and (2) whether the Appellate Court correctly concluded that the trial court had properly excluded Shyam's confession. See *State* v. *Patel*, supra, 334 Conn. 921 n.22. The defendant's constitutional claims are subject to plenary review; see, e.g., *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008); whereas his evidentiary claims, which challenge the application, rather than the interpretation, of our code of evidence, are reviewed for an abuse of discretion. See, e.g., *State* v. *Pierre*, 277 Conn. 42, 68, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); see also *State* v. *Saucier*, 283 Conn. 207, 218–21, 926 A.2d 633 (2007) (contrasting standards of review).

I

The defendant challenges the admission of Calabrese's dual inculpatory statement on both constitutional and evidentiary grounds. We agree with the Appellate Court that the trial court properly admitted this statement.

The following additional undisputed facts provide context for our resolution of this issue. Calabrese was arrested on August 29, 2013, on drug charges unrelated to the August 6, 2012 Sharon home invasion. He was initially held in custody at the same correctional facility where Wayne Early was being held following his convictions of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

On September 3, 2013, Early was summoned to the facility's intelligence office. Department of Correction officials there informed Early that Calabrese, whom Early did not know, was going to be moved into Early's cell and asked Early whether he would be willing to wear a recording device. Early previously had made confidential recordings of other cellmates. Early said that he would be willing to record Calabrese, if Calabrese seemed inclined to talk. Late that evening, Calabrese was moved into Early's cell. The two men shared information about the charges for which they were in custody. Early disclosed that he had originally been charged with home invasion, but that charge later was reduced to burglary. Calabrese responded that the police were "looking" at him for the same type of incident and began to talk about the Sharon home invasion.[4] Early changed the subject because he was not yet wearing the recording device.

The following day, Early was brought back to the corrections intelligence office. Early confirmed that he was willing to record Calabrese. A corrections official then placed a call to a state police official, who spoke with Early to establish that he had no knowledge about the incident of interest[5] and directed Early to get details about it if he could. When Early returned to his cell, equipped with a hidden recording device, he gradually turned the conversation to the subject of the home invasion that Calabrese had mentioned the prior night, telling Calabrese that he "want[ed] to hear how that shit went down . . . ." Calabrese volunteered many

[4] In the recorded exchange on September 4, 2013, Calabrese told Early that the police had questioned him about the incident after they reviewed cell phone records for Vitalis, which eventually led them to information about Calabrese's cell phone. The trial court credited Early's testimony that, on the evening of September 3, 2013, Calabrese initiated the topic of the Sharon home invasion.

[5] It is unclear from the record whether Early was told where the incident took place, or how the matter of interest was described to Early.

details, including the fact that the defendant participated, but Early repeatedly asked questions to obtain further details or clarification about the incident.

Calabrese's account ascribed the following actions and intentions to the participants. He and the defendant went to Sharon with the intention of robbing a drug dealer (Vitalis). Calabrese entered Vitalis' home first, because he was the only one with a gun. After they entered and saw Vitalis' mother, Calabrese grabbed her and started to tie her hands. Calabrese directed the defendant to finish the task and to watch her while Calabrese confronted Vitalis upstairs. Calabrese did not plan to shoot Vitalis but did so after Vitalis threatened him with a knife and tried to grab the gun. The defendant fled when he heard the gunshots, allowing Vitalis' mother to make her way to a phone and to call the police. Calabrese's search yielded only $70 and a small amount of marijuana before he had to flee. Calabrese was able to catch up with the defendant because the defendant had stopped to look for his cell phone, which he had dropped while running through a swampy area in the woods and was unable to recover. Niraj, who had planned the robbery, eventually found them and gave Calabrese a change of clothes. Calabrese set fire to his blood soaked clothes and shoes in a wooded area, because he had left a footprint in a pool of Vitalis' blood at the crime scene.

At trial, the state offered the recording of Calabrese's dual inculpatory statement into evidence for its truth; therefore, it indisputably is hearsay. See Conn. Code Evid. § 8-1 (3). Because Calabrese's invocation of his fifth amendment privilege not to testify deprived the defendant of an opportunity to cross-examine Calabrese about that statement, his statement is admissible only if it avoids the constitutional hurdle imposed by the confrontation clauses of the federal and state constitutions; see U.S. Const., amends. VI and XIV, §1; Conn.

Const., art. I, § 8; and the evidentiary hurdle of hearsay rules.[6]

A

The parties disagree as to whether the United States Supreme Court has in fact settled the issue of whether the admission of a hearsay statement to a jailhouse informant inculpating the declarant and a codefendant violates the codefendant's rights under the confrontation clause of the sixth amendment to the United States constitution. The defendant contends that the court answered that question in the negative only in dicta, under distinguishing circumstances, and that subsequent decisions that have expanded the framework of this inquiry by recognizing that the identity and actions of the questioner must be considered. The defendant argues that he prevails under the current framework because Early, acting as an agent of law enforcement, effectively interrogated Calabrese for the primary purpose of obtaining testimony to be used in a criminal prosecution.

There can be no doubt that the court's confrontation clause jurisprudence has vexed courts as applied to

[6] Although several of this court's decisions address the evidentiary issue first; see, e.g., *State* v. *Simpson*, 286 Conn. 634, 650–51, 945 A.2d 449 (2008); *State* v. *Camacho*, supra, 282 Conn. 362–63; *State* v. *Kirby*, 280 Conn. 361, 373–78, 908 A.2d 506 (2006); those cases appear to rely on the jurisprudential policy of constitutional avoidance, which directs courts to decide a case on a nonconstitutional basis if one is available, rather than unnecessarily deciding a constitutional issue. See, e.g., *State* v. *Cameron M.*, 307 Conn. 504, 516 n.16, 55 A.3d 272 (2012) (overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 728 n.14, 754, 91 A.3d 862 (2014)), cert. denied, 569 U.S. 1005, 133 S. Ct. 2744, 186 L. Ed. 2d 194 (2013); *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002). This policy is inapplicable, however, to cases in which a defendant raises the constitutional claim based on his right to confrontation. Resolution of the evidentiary claim would not obviate the need to address the constitutional issue because, even if the statement is inadmissible under the hearsay exception relied on, the state would be free on retrial to seek admission of the same statement on a different evidentiary basis. The constitutional issue, therefore, is the appropriate starting point.

particular circumstances, a point we elaborate on in part I B of this opinion. The present case, however, is one in which we have confidence as to how the court would resolve the issue presented, namely, in favor of the state. The federal constitutional issue, therefore, is our starting point. See *State* v. *Purcell*, 331 Conn. 318, 334 n.11, 203 A.3d 542 (2019) (noting that we address federal constitution first when "we can predict to a reasonable degree of certainty how the United States Supreme Court would resolve the issue"); see also *State* v. *Taupier*, 330 Conn. 149, 166 n.14, 193 A.3d 1 (2018) (concluding that it was more efficient to address federal claim first because review of federal precedent would be necessary under state constitutional framework in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992)), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

The sixth amendment's confrontation clause, which is binding on the states through the due process clause of the fourteenth amendment; *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. Although an "essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination"; (emphasis omitted; internal quotation marks omitted) *Davis* v. *Alaska*, 415 U.S. 308, 315–16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); this clause has never been interpreted to require the opportunity to cross-examine every hearsay declarant. See, e.g., *Idaho* v. *Wright*, 497 U.S. 805, 813–14, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); see also *Crawford* v. *Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In prior cases, we have chronicled the development of the court's confrontation case law, including its sea

change from a focus on whether the hearsay statement bore adequate "indicia of reliability"; (internal quotation marks omitted) *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); to a focus on whether the statement is "[t]estimonial" in nature under *Crawford* v. *Washington*, supra, 541 U.S. 59, and its progeny. See generally *State* v. *Rodriguez*, 337 Conn. 175, 226–27, 252 A.3d 811 (2020) (*Kahn*, *J.*, concurring).[7] Although the court has "labored to flesh out what it means for a statement to be 'testimonial' "; *Ohio* v. *Clark*, 576 U.S. 237, 244, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015); it has deemed the term to include not only ex parte in-court testimony and formalized testimonial materials such as affidavits and depositions but also "[p]olice interrogations . . . ." *Crawford* v. *Washington*, supra, 51–53. The court used that term in its colloquial, rather than its strictly legal, sense to include a "recorded statement, knowingly given in response to structured police questioning . . . ." Id., 53 n.4. Such statements "are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (Internal quotation marks omitted.) *Ohio* v. *Clark*, supra, 244, quoting *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In dicta in *Crawford* and *Davis*, the court indicated that statements of a coconspirator to a fellow inmate and to an undercover agent inculpating the defendant were clearly nontestimonial. The court asserted that its newly adopted testimonial rubric would not alter the results reached in its prior cases. See *Davis* v. *Washington*, supra, 547 U.S. 825–26; *Crawford* v. *Washington*,

[7] See also *State* v. *Sinclair*, 332 Conn. 204, 218–25, 210 A.3d 509 (2019); *State* v. *Slater*, 285 Conn. 162, 169–74, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State* v. *Kirby*, supra, 280 Conn. 378–83.

supra, 541 U.S. 58. Two of the cases cited by the court as examples were *Dutton* v. *Evans*, 400 U.S. 74, 77–78, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality opinion), and *Bourjaily* v. *United States*, 483 U.S. 171, 174, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), in which the declarants were unavailable for cross-examination. See *Davis* v. *Washington*, supra, 825; *Crawford* v. *Washington*, supra, 57–58. In *Dutton*, the court had held that the admission of a statement of the defendant's coconspirator to a cellmate, implicating the defendant in a triple homicide, did not violate the defendant's confrontation rights. See *Dutton* v. Evans, supra, 87–89. In *Bourjaily*, the court had held that the admission of a recorded telephone conversation between the defendant's coconspirator and an FBI informant, in which the coconspirator implicated the defendant in a drug selling enterprise, did not violate the defendant's confrontation rights. See *Bourjaily* v. *United States*, supra, 173–74, 183–84.

Post-*Crawford*, federal courts and state courts have consistently rejected claims that the admission of inmate to inmate or inmate to informant statements inculpating a defendant, whether recorded or not, violated his or her confrontation rights. See, e.g., *United States* v. *Veloz*, 948 F.3d 418, 430–32 (1st Cir.), cert. denied, U.S. , 141 S. Ct. 438, 208 L. Ed. 2d 133 (2020); *United States* v. *Dargan*, 738 F.3d 643, 650–51 (4th Cir. 2013); *United States* v. *Dale*, 614 F.3d 942, 954–56 (8th Cir. 2010), cert. denied, 563 U.S. 918, 131 S. Ct. 1814, 179 L. Ed. 2d 774 (2011), and cert. denied sub nom. *Johnson* v. *United States*, 563 U.S. 919, 131 S. Ct. 1814, 179 L. Ed. 2d 775 (2011); *United States* v. *Smalls*, 605 F.3d 765, 778 (10th Cir. 2010); *People* v. *Arauz*, 210 Cal. App. 4th 1394, 1402, 149 Cal. Rptr. 3d 211 (2012); *State* v. *Nieves*, 376 Wis. 2d 300, 326–27, 897 N.W.2d 363 (2017). Courts also have routinely held that statements made unwittingly to a government agent or an undercover officer, outside of the prison context, are nontestimo-

nial.[8] See, e.g., *Brown* v. *Epps*, 686 F.3d 281, 287 and n.35 (5th Cir. 2012) (citing cases reaching this conclusion). Although some of these cases simply relied on the United States Supreme Court's dicta; see, e.g., *United States* v. *Veloz*, supra, 431–32; *United States* v. *Saget*,

[8] We are aware of only two cases to the contrary. In *Cazares* v. *State*, Docket No. 08-15-00266-CR, 2017 WL 3498483, *10 (Tex. App. August 16, 2017, review refused), cert. denied, U.S. , 139 S. Ct. 422, 202 L. Ed. 2d 324 (2018), the court deemed the informant's purpose, which was unknown to the declarant, to be dispositive. In *People* v. *Redeaux*, 355 Ill. App. 3d 302, 823 N.E.2d 268, cert. denied, 215 Ill. 2d 613, 833 N.E.2d 7 (2005), the court took a narrower approach. It suggested that a coconspirator's statements to an undercover officer could be testimonial if elicited pursuant to an "interrogation," meaning formal, structured questioning. (Internal quotation marks omitted.) Id., 306–307. The court in *Redeaux* ultimately concluded that the conversation at issue did not come close to such questioning, pointing to the facts that its purpose was to facilitate a drug transaction, not "a subterfuge to gain information about this or some other crime," and that the undercover officer never asked the coconspirator, a drug dealer, to name his "source," i.e., the defendant. (Internal quotation marks omitted.) Id., 306.

Before and shortly after *Crawford* was decided, a few commentators had advocated for a de facto interrogation approach but limited that term to circumstances in which there was sustained questioning, leading questions, or suggestions made with a preconceived notion of the evidence that the agent or informant wanted to obtain. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 608–609 (1992); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 903–904 (2007). Courts have rejected a "de facto" interrogation theory in the context of jailhouse informants acting as agents for the police on the grounds that this circumstance is not an interrogation and would not yield a testimonial statement, even if it could be broadly characterized as an interrogation. See, e.g., *United States* v. *Smalls*, supra, 605 F.3d 779 ("[C]asual questioning by a fellow inmate does not equate to police interrogation, even though the government coordinated the placement of the fellow inmate and encouraged him to question [the defendant's accomplice]. But whether we properly may label [the confidential informant's] encounter with [the defendant's accomplice] as an interrogation in some remote sense is beside the point because *Davis* establishes that not every statement made in response to an interrogation is testimonial. Rather, only in some instances does interrogation tend to generate testimonial responses." (Emphasis omitted; internal quotation marks omitted.)). But see id., 788 (Kelly, J., dissenting) (arguing that history supports confrontation analysis based on declarant with full knowledge of facts, including true identity and purpose of person eliciting information). We explain subsequently in this opinion why both *Cazares* and *Redeaux* are contrary to the United States Supreme Court's most recent case law.

377 F.3d 223, 229 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005); many others reasoned that such statements could not have been given for the purpose of proving past facts relevant to a prosecution because the declarant did not know that he was speaking to an informant or an undercover officer. See, e.g., *United States* v. *Dargan*, supra, 646, 650–51; *State* v. *Nieves*, supra, 326–27.

The defendant contends, however, that the court's more recent confrontation clause jurisprudence suggests that the court would now reject this dicta. Our review of this case law confirms, rather than undermines, the vitality of this dicta.

"*Crawford* and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing the primary purpose of [an] interrogation." (Internal quotation marks omitted.) *Michigan* v. *Bryant*, 562 U.S. 344, 381, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (Scalia, J., dissenting). More recent cases have interpreted *Davis* to require consideration of "the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Id., 370; see also *Ohio* v. *Clark*, supra, 576 U.S. 246–47 (considering identity of participants as well). A consistent theme echoed in the case law, however, is that this consideration is one based on *objective* facts. See *Davis* v. *Washington*, supra, 547 U.S. 826 ("[t]he question before us in *Davis* . . . is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements"); *Crawford* v. *Washington*, supra, 541 U.S. 52 (testimonial statements would include those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (internal quotation marks omitted)).

This point was underscored and elaborated on in *Michigan* v. *Bryant*, supra, 562 U.S. 344, when the court stated: "The Michigan Supreme Court correctly understood that this inquiry is objective. . . . *Davis* uses the word 'objective' or 'objectively' no fewer than eight times in describing the relevant inquiry. . . . 'Objectively' also appears in the definitions of both testimonial and nontestimonial statements that *Davis* established. . . .

"An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, *the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter*, *but rather the purpose that reasonable participants would have had*, *as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred*." (Citations omitted; emphasis added; footnote omitted.) Id., 360.

The court's most recent confrontation clause case exemplifies this objective, totality of circumstances approach, as well as the significance of the formality of the encounter in making that determination. See *Ohio* v. *Clark*, supra, 576 U.S. 237. In *Clark*, the court considered the statements of a three year old child, in response to his teachers' questions, in which he identified his mother's boyfriend as the perpetrator of injuries discovered by the teachers. Id., 240. The teachers were mandated by state law to report suspected abuse to government authorities. Id., 242. These facts required the court to squarely address for the first time the question of whether statements made to individuals who are

not law enforcement officers implicate confrontation rights.Id., 246.

The court first summarized its confrontation clause jurisprudence, noting that the primary purpose test has evolved to require consideration of "all of the relevant circumstances." (Internal quotation marks omitted.) Id., 244. One such circumstance it identified "is the informality of the situation and the interrogation. . . . A formal [station house] interrogation, like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." (Citation omitted; internal quotation marks omitted.) Id., 245.

The court in *Clark* recognized that statements to individuals who are not law enforcement officers "could conceivably raise confrontation concerns"; id., 246; but cautioned that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Id., 249. Thus, the fact that the child was speaking to his teachers "remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity." Id., 249; see also id. ("the relationship between a student and his teacher is very different from that between a citizen and the police").

In concluding that the primary purpose of the encounter was not to gather evidence for the defendant's prosecution but to protect the child, the court in *Clark* pointed to the following facts: "At no point did the teachers inform [the child] that his answers would be used to arrest or punish his abuser. [The child] never hinted that he intended his statements to be used by the police or prosecutors.[9] And the conversation between

[9] The court in *Clark* also observed that its decision was bolstered by the age of the child: "Statements by very young children will rarely, if ever,

[the child] and his teachers was informal and spontaneous. The teachers asked [the child] about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized [station house] questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon* [v. *Indiana*, which was decided together with *Davis* v. *Washington*, supra, 547 U.S. 813]."[10] (Footnote added.) Id., 247.

Consistent with *Bryant*, the court in *Clark* thus relied exclusively on the objectively *manifested* facts—what was said, who said it, how it was said, and where it was said. Nothing indicates that, contrary to *Bryant*, the hidden intentions or identity of the person eliciting the statement would be relevant, let alone dispositive.[11] See *United States* v. *Volpendesto*, 746 F.3d 273, 289–90 (7th Cir.) ("*Bryant* mandates that we not evaluate the purpose of [the] recorded conversation from the subjective point of view of [the coconspirator], who knew he was secretly collecting evidence for the government.

implicate the [c]onfrontation [c]lause. Few preschool students understand the details of our criminal justice system. Rather, [r]esearch on children's understanding of the legal system finds that young children have little understanding of prosecution. . . . Thus, *it is extremely unlikely that a* [*three year old*] *child in* [*this child's*] *position would intend his statements to be a substitute for trial testimony*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Ohio* v. *Clark*, supra, 576 U.S. 247–48.

[10] *Hammon* involved statements given by a domestic violence victim to the police, after being isolated from her abusive husband, which were memorialized in a "battery affidavit." (Internal quotation marks omitted.) *Davis* v. *Washington*, supra, 574 U.S. 820. The court held that the statements in *Hammon* were testimonial. Id., 830.

[11] The court in *Clark* rejected the defendant's reliance on the state's mandatory reporting obligation as a basis to equate the child's teachers with the police and their questions with an official interrogation. See *Ohio* v. *Clark*, supra, 576 U.S. 249. The court observed that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." Id.

Instead, we evaluate their conversation objectively. And from an objective perspective, [the recorded] conversation looks like a casual, confidential discussion between [coconspirators].''), cert. denied sub nom. *Sarno* v. *United States*, 574 U.S. 936, 135 S. Ct. 382, 190 L. Ed. 2d 256 (2014), and cert. denied sub nom. *Polchan* v. *United States*, 574 U.S. 936, 135 S. Ct. 383, 190 L. Ed. 2d 256 (2014). *Clark* also underscores the significance of the formality surrounding the questioning, which imparts to the declarant a solemnity of purpose akin to other forms of testimonial statements, such as ex parte testimony, affidavits, and grand jury testimony. See *Ohio* v. *Clark*, supra, 576 U.S. 243 (''[i]n *Crawford* . . . [w]e explained that 'witnesses,' under the [c]onfrontation [c]lause, are those 'who bear testimony,' and we defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact' '' (citation omitted)); see also *State* v. *Sinclair*, 332 Conn. 204, 225, 210 A.3d 509 (2019) (''there is agreement among all of the justices that the formality attendant to the making of the statement must be considered'').

The court's reasoning in *Bryant* and *Clark* thus confirms the court's dicta characterizing the statements in *Dutton* and *Bourjaily* made to persons who harbored secret intentions to obtain evidence to be used at trial as clearly nontestimonial.[12] Like the statements in *Dut-*

[12] The defendant makes much of the fact that the statements in *Dutton* and *Bourjaily* were admitted under the hearsay exception for statements by a coconspirator—historically viewed as inherently reliable—whereas Calabrese's statement was admitted under the exception for statements against penal interest—historically viewed as presumptively unreliable when used to inculpate a codefendant. Even if we were to accept the defendant's characterization; see *United States* v. *Inadi*, 475 U.S. 387, 400, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) (recognizing that *Dutton* involved state coconspirator rule that admitted broader category of statements than did federal coconspirator rule); the distinction he draws is immaterial. *Bryant* would compel us to reach the same result even in the absence of this dictum. Moreover, the distinction between the hearsay exceptions has no relevance under *Crawford*'s testimonial analytical framework, which abandoned the traditional evidentiary analytical approach, a reliability focused inquiry. See,

ton and *Bourjaily*, Calabrese's statement was elicited in circumstances under which the objectively manifested purpose of the encounter was not to secure testimony for trial. Calabrese made his statements in an informal setting, his prison cell, to his cellmate, who undoubtedly actively questioned the defendant but did so in an evidently sufficiently casual manner to avoid alerting Calabrese that his statement was going to be relayed to law enforcement. Cf. *United States* v. *Dargan*, supra, 738 F.3d 650–51 (statements by defendant's coconspirator to cellmate were clearly nontestimonial because they were made "in an informal setting—a scenario far afield from the type of declarations that represented the focus of *Crawford*'s concern" and declarant "had no plausible expectation of 'bearing witness' against anyone"). The admission of Calabrese's dual inculpatory statement, therefore, did not violate the defendant's confrontation rights under the federal constitution.

B

We next turn to the defendant's confrontation clause challenge under article first, § 8, of the Connecticut constitution. The defendant asks this court to hold that, under our state constitution, a statement qualifies as "testimonial" if the reasonable expectation of either the declarant *or the interrogator/listener* is to establish or to prove past events potentially relevant to a later criminal prosecution. (Internal quotation marks omitted.) We are not persuaded that the defendant has established the necessary predicates for departing from the federal standard. We do not, however, foreclose the possibility of departing from the federal standard under appropriate circumstances in a future case, and raise a strong cautionary note about the present circumstances.

e.g., *State* v. *Rivera*, 268 Conn. 351, 365 n.13, 844 A.2d 191 (2004) ("[b]ecause the United States Supreme Court [in *Crawford*] has characterized [the] statement [in *Dutton*] as nontestimonial . . . it would follow that the statement [against penal interest to a fellow inmate] . . . is also nontestimonial").

In *State* v. *Geisler*, supra, 222 Conn. 684–85, this court identified factors to be considered to encourage a principled development of our state constitutional jurisprudence. Those six factors are (1) persuasive relevant federal precedents, (2) the text of the operative constitutional provisions, (3) historical insights into the intent of our constitutional forebears, (4) related Connecticut precedents, (5) persuasive precedents of other state courts, and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. Id., 685; accord *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

The defendant concedes that the first, second, and fifth factors do not support a more protective interpretation under state law. The text of the two clauses are nearly identical. Compare Conn. Const., art. I, § 8 (guaranteeing defendant's right "to be confronted *by* the witnesses against him" (emphasis added)) with U.S. Const., amend. VI (guaranteeing right "to be confronted *with* the witnesses against him" (emphasis added)). The federal and state precedent we have addressed in part I A of this opinion does not support the defendant's proposed standard. To this we would add that we are aware of only one state that has charted an independent course under its state constitution's confrontation clause with regard to this issue.[13] That state did not

[13] There are examples of courts relying on their respective state constitutions to fill gaps in the United States Supreme Court's testimonial framework, at least until the court does so itself. See, e.g., *State* v. *Scanlan*, 193 Wn. 2d 753, 766, 445 P.3d 960 (2019) (concluding that Washington case law articulating comprehensive definition of "testimonial" statements and specific test for applying that definition to statements to nongovernmental witnesses under Washington constitution due to gap in federal jurisprudence was superseded by subsequent decision of United States Supreme Court applying its primary purpose test to statements to nongovernmental witnesses), cert. denied, U.S. , 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020); see also *State* v. *Rodriguez*, supra, 337 Conn. 226–27 (*Kahn*, *J.*, concurring) (filling gap regarding admissibility of forensic evidence with its own test

adopt the defendant's proposed standard; it never adopted *Crawford*'s testimonial standard and continued to adhere to the "adequate indicia of reliability" standard recognized in *Ohio* v. *Roberts*, supra, 448 U.S. 66. See *State* v. *Copeland*, 353 Or. 816, 820–24, 306 P.3d 610 (2013).

With regard to the third and fourth factors, historical insights and Connecticut precedent, the defendant expressly conceded before the Appellate Court that these factors also do not favor his position. This court's first confrontation clause case, in 1921, took the position that "[t]he underlying reasons for the adoption of this right in the [f]ederal [c]onstitution and in [s]tate [c]onstitutions, and the principles of interpretation applying to this provision, are identical." *State* v. *Gaetano*, 96 Conn. 306, 310, 114 A. 82 (1921). We recently reiterated this position. See *State* v. *Lockhart*, 298 Conn. 537, 555, 4 A.3d 1176 (2010) (noting that federal and state provisions are subject to same interpretation because they have "shared genesis in the common law").[14]

The defendant does not expressly concede the third and fourth *Geisler* factors to this court as he did before

under federal constitution); *People* v. *John*, 27 N.Y.3d 294, 312–15, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016) (filling gap regarding admissibility of forensic scientific laboratory reports).

[14] Although this court indicated that the federal and state provisions are subject to the same interpretation because of their "shared genesis in the common law"; *State* v. *Lockhart*, supra, 298 Conn. 555; it is important to acknowledge that we have never undertaken an independent examination of the circumstances surrounding the adoption of the federal confrontation clause. This acknowledgement is important because examinations of those circumstances by courts and scholars have not yielded a consensus as to what historical facts matter and what these facts reveal about the intended meaning and application of the confrontation clause.

This inconsistency is reflected in the court's case law; see, e.g., *Crawford* v. *Washington*, supra, 541 U.S. 60–64 (determining that court's previous interpretation of confrontation clause in *Roberts* was wholly incompatible with historical basis for adoption of confrontation clause); as well as in scholarship that, in turn, criticizes *Crawford*'s own historical account. See, e.g., K. Graham, "Confrontation Stories: Raleigh on the Mayflower," 3 Ohio St. J. Crim. L. 209, 209 (2005) ("Justice Scalia's majority opinion [in *Crawford*]

tells a version of the history of the [c]onfrontation [c]lause that would do Hollywood proud"); B. Trachtenberg, "Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause," 64 Fla. L. Rev. 1669, 1677–78 (2012) (citing sources).

The lack of consensus as to which historical facts motivated the adoption of the confrontation clause and how the clause applies to present circumstances seems to be a product of several factors. No court or scholar has concluded that the confrontation clause is unambiguous and can be interpreted literally. See *State* v. *Torello*, 103 Conn. 511, 513, 131 A. 429 (1925) ("[interpreted] [l]iterally it would prohibit the introduction of the testimony of any witness who was not produced in court"); M. Larkin, "The Right of Confrontation: What Next?," 1 Tex. Tech L. Rev. 67, 67 (1969) ("[t]he precise source of this use of the word 'confront' is obscure"). Ascertaining original intent in the absence of a plain textual meaning is complicated by the lack of any meaningful debate during the drafting and ratification of the federal confrontation clause. See H. Gutman, "Academic Determinism: The Division of the Bill of Rights," 54 S. Cal. L. Rev. 295, 332 n.181 (1981) (debate on confrontation clause lasted five minutes); R. Mosteller, "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions", 1993 U. Ill. L. Rev. 691, 737 ("Enough of the historical materials surrounding the drafting and the ratification debates survives that we can be relatively confident that no precise meaning was ascribed to the [c]onfrontation [c]lause in either process. Indeed, the clause received only limited attention." (Footnote omitted.)). Case law is of marginal help in ascertaining original intent because criminal cases largely were tried in state courts at the time of the framing and the sixth amendment right of confrontation was not extended to the states until 1965. See R. Friedman, "*Crawford*, *Davis* and *Way* Beyond," 15 J.L. & Policy 553, 553 (2007); K. Graham, supra, 3 Ohio St. J. Crim. L. 210.

In addition, application of the confrontation clause has been complicated by significant historical developments that could not have been foreseen by the framers. Crimes are investigated and prosecuted differently than at the time of the framing. See M. Mannheimer, "Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments," 80 Temp. L. Rev. 1135, 1164 (2007) ("professional police now replicate the investigatory function of the magistrate"); E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494–95 (2021) (noting that, at time of framing, police generally did not initiate investigations on their own based on suspicion of probable crime, and prosecution typically was initiated by crime victims and their families); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 906–907 (2007) ("[i]n the [f]ramers' day, there was essentially no such thing as an undercover investigation; indeed, organized, professional police forces did not come onto the scene until around the Civil War" (footnote omitted)). Hearsay exceptions have been expanded significantly; see E. Schaerer, supra, 494–95; and new forms of evidence, e.g., forensic evidence, have developed. See D. Noll, "Constitutional Evasion and the Confrontation Puzzle," 56 B.C. L. Rev. 1899, 1904 (2015).

the Appellate Court, but he acknowledges this case law in his brief to this court. In lieu of an argument regarding the significance of that case law, the defendant emphasizes the historical fact that third-party statements against penal interest constituted inadmissible hearsay at the time of the framing, as well as for an extended period thereafter. See, e.g., *Bruton* v. *United States*, 391 U.S. 123, 128 n.3, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State* v. *Schiappa*, 248 Conn. 132, 147 and n.18, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). See generally E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494 (2021) ("[a]t the framing, hearsay was more strictly prohibited at trial, and courts recognized few hearsay exceptions"). This fact has no logical connection, however, to the defendant's proposed confrontation standard.[15] The defendant's testimonial standard would not

The defendant advances no argument about the significance of any of these factors, other than the lack of a historical hearsay exception for statements against penal interest, which we address subsequently in this opinion. We acknowledge these factors to make clear that *Gaetano* does not foreclose an argument that the federal courts have misinterpreted the confrontation clause or that the development of our common law may support an independent interpretation in a different context.

[15] In the section of his brief devoted to historical insights and Connecticut precedent, the defendant cites authority for propositions that he also does not connect to the principal question before us—whether our state has ever been more protective of confrontation rights than the federal system or standard—and that do not lend support to the specific testimonial standard that he advances. These authorities state the following propositions: Connecticut has long recognized the importance of cross-examination; see, e.g., 2 H. Dutton, A Revision of Swift's Digest of the Laws of the State of Connecticut (1862) c. XX, § 411, p. 437; and special sensitivity to confrontation clause concerns is appropriate when the testimony of a witness is critical to the state's case against the defendant and the consequences of a conviction based on the absent witness' testimony are grave. See, e.g., *State* v. *Lebrick*, 334 Conn. 492, 507, 512, 223 A.3d 333 (2020) (stating these principles in connection with question of whether state made reasonable efforts to locate witness who purportedly was unavailable to testify, to satisfy federal confrontation clause).

The defendant also cites to one scholarly article in which the author asserts that the testimonial nature of the statement should be established

categorically preclude such statements, whether they were dual inculpatory statements or not; it would only preclude such statements when the declarant is unavailable for cross-examination and the reasonable expectation of either the declarant or the listener is to establish or to prove past events potentially relevant to a later criminal prosecution. Reliance on the lack of a recognized exception for these statements at the time of the framing is also in tension with the defendant's representation that he does not seek to overrule *Crawford*, which rejected the *Roberts* framework, which considered whether the statement fell within a "firmly rooted" hearsay exception. See *Ohio* v. *Roberts*, supra, 448 U.S. 66; see also *State* v. *Nieves*, supra, 376 Wis. 2d 316–19 (citing sources addressing admission of dual inculpatory statements post-*Crawford* and acknowledging that *Bruton*[16] doctrine regarding confrontation violation arising from admission of such statements as against third party survives only as to testimonial statements).

The defendant's state constitutional claim, thus, effectively rests exclusively on the sixth *Geisler* factor, public policy. He identifies the following considerations. First, the defendant argues that the United States Supreme Court is not infallible. The sea change from *Roberts*' reliability standard to *Crawford*'s testimonial standard demonstrates this reality, as does the fact that the court's confrontation clause case law continues to be in flux. Second, the defendant seeks a modified interpretive standard—an additional layer of prophylaxis to

from the perspective of either the speaker or the listener. See M. Pardo, "Confrontation After Scalia and Kennedy," 70 Ala. L. Rev. 757, 782 (2019). The author of this article offers no historical analysis to support this standard and acknowledges doctrinal difficulties in applying it. See id., 782 n.180. Many other commentators reject the defendant's view. See, e.g., M. Mannheimer, supra, 80 Temp. L. Rev. 1192; W. Reed, "*Michigan* v. *Bryant*: Originalism Confronts Pragmatism," 89 Denv. L. Rev. 269, 300–302 (2011).

[16] *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

prevent a significant risk of deprivation of confrontation rights—not the rejection of the court's testimonial, primary purpose framework. The defendant argues that this interpretation fills a gap in the court's case law, which has yet to clarify if a statement is testimonial when the speaker is unaware that the statement may be used as evidence in a criminal prosecution but the listener seeks to obtain the statement for that purpose. He contends that, by adopting a standard under which the perspective of either the declarant or the listener can render the statement testimonial, we would place the emphasis where it belongs—on the testimonial *effect* of the statement, i.e., the jury would believe that the statement is equivalent to testimony and would rely on it to assess guilt or innocence. Third, the defendant argues that the adoption of the "either perspective" approach would serve the public interest by enhancing the perception that our criminal trial proceedings are fair.[17] (Internal quotation marks omitted.)

[17] The defendant's brief has a fourth policy section, from which we have difficulty gleaning a specific policy argument. The defendant asserts that one or more of the participants in the planning and execution of Calabrese's "interrogation" should have known that the recorded statement would be admissible at trial if Calabrese was unavailable to testify, that the sequence of codefendants' trials can affect their availability for cross-examination, and that sequence is a matter of prosecutorial discretion.

There are several flaws in these assumptions. There is no evidence that the police knew that Calabrese was the shooter when they asked Early to record him. Had Calabrese offered an account identifying someone else as the shooter, it is possible that the state would have attempted to use the statement to extract a plea agreement in exchange for Calabrese's testimony against the shooter. Even if Calabrese had been tried first after admitting to being the shooter, there is a strong possibility that he still would have been unavailable to testify at the defendant's subsequent trial. Calabrese's fifth amendment privilege would continue during any pending appeal; see, e.g., *United States* v. *Kennedy*, 372 F.3d 686, 691 (4th Cir. 2004), cert. denied, 543 U.S. 1123, 125 S. Ct. 1019, 160 L. Ed. 2d 1073 (2005); as well as during any possible retrial should he prevail on appeal. We also note that circumstances outside of the state's control (e.g., discovery, availability of witnesses, etc.) may dictate the sequence of codefendants' trials. If a rare case arose in which there was evidence that the state intentionally delayed the declarant's trial so as to ensure the declarant's unavailability for cross-examination,

We are not persuaded that these arguments are sufficient to carry the day under the present circumstances. We previously have relied on policy considerations similar to those mentioned by the defendant but have always cited to other *Geisler* factors that supported the rule we adopted. See, e.g., *State* v. *Purcell*, supra, 331 Conn. 342–46 (explaining that we were adopting broader prophylactic rule not expanding constitutional right, but also citing other *Geisler* factors that supported rule); *State* v. *Linares*, 232 Conn. 345, 379–80, 655 A.2d 737 (1995) (concluding that United States Supreme Court's rationale for departing from prior, more protective standard was unsound but also citing other *Geisler* factors that supported our rule). Although the need to fill a "gap" in the court's confrontation jurisprudence to resolve a case may provide a compelling policy argument, even in the absence of other supporting *Geisler* factors, our discussion in part II explains why the gap identified by the defendant does not exist. None of the defendant's other policy arguments rises to a similar level of necessity. Some of his policy arguments, e.g., that the court does not always reach the correct result, could apply in any case. In sum, it is clear that the defendant cannot prevail under a traditional *Geisler* analysis. His state constitutional claim under the confrontation clause, therefore, fails.[18]

the defendant may have a viable due process claim or argument for the adoption of an equitable rule akin to the forfeiture doctrine, which bars a defendant from objecting to the admission of hearsay statements of a witness whose absence has been procured by the defendant. See T. Lininger, "Reconceptualizing Confrontation After *Davis*," 85 Tex. L. Rev. 271, 300–301 and nn.165–68 (2006) (discussing forfeiture doctrine). We have no occasion to consider either possibility in the present case.

[18] We underscore that we do not intend for this decision to foreclose the possibility of departing from the federal courts' interpretation of the confrontation clause in another context. We are mindful of two concerns that are not implicated in the present case that may, in the future, weigh in favor of an independent course of action. First, there are indications in opinions of various United States Supreme Court justices that the court may adopt more limiting principles than those articulated in *Crawford* and *Davis*. See, e.g., *Williams* v. *Illinois*, 567 U.S. 50, 58–59, 132 S. Ct. 2221,

We end this discussion, however, with a strong note of caution. Although the defendant cannot prevail under our state constitution in the present case, we might be compelled to reach a different result under a slight variation of facts. The circumstances under which Calabrese's statement was elicited implicate several concerns identified by the court in *Crawford* and its progeny. *Crawford* recognized that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." *Crawford* v. *Washington*, supra, 541 U.S. 56 n.7. The court in *Davis* also cautioned that law enforcement officials should not be permitted to circumvent the confrontation clause by intentionally altering the method by which they collect the statement to render the statement nontestimonial. See *Davis* v. *Washington*, supra, 547 U.S. 826 ("we do not think it conceivable that the protections of the [c]onfrontation

183 L. Ed. 2d 89 (2012) (plurality opinion); see also *Ohio* v. *Clark*, supra, 576 U.S. 254 (Thomas, J. concurring). Second, courts are increasingly confronting circumstances in which they are unsure how to assess whether a statement is testimonial. See K. McMunigal, "*Crawford*, Confrontation, and Mental States," 64 Syracuse L. Rev. 219, 220 (2014) (observing that commentators have described contemporary confrontation clause jurisprudence as " 'incoherent,' 'uncertain,' 'unpredictable,' 'a train wreck,' suffering from 'vagueness' and '[doublespeak],' and, simply put, a 'mess' " (footnotes omitted)). This problem is particularly acute in cases in which forensic evidence is at issue. See, e.g., *State* v. *Rodriguez*, supra, 337 Conn. 203–204 (*Kahn*, *J.*, concurring). Even some of the court's justices have complained about the lack of clear direction from the court. See id., 204 (citing cases from various courts raising this concern). Justice Gorsuch, joined by Justice Sotomayor, stated in a recent dissent from the court's denial of certiorari in a confrontation clause case: "Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. *Williams* imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur." *Stuart* v. *Alabama*, U.S. , 139 S. Ct. 36, 37, 202 L. Ed. 2d 414 (2018) (Gorsuch, J., dissenting from the denial of certiorari). As applied to the facts of the present case, however, the current standard yields a clear result.

[c]lause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition" (emphasis omitted)); see also *Williams* v. *Illinois*, 567 U.S. 50, 133, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (Kagan, J., dissenting) (noting that five justices reject proposition that, "[i]f the [c]onfrontation [c]lause prevents the [s]tate from getting its evidence in through the front door, then the [s]tate could sneak it in through the back"). Recruiting an inmate to elicit inculpatory evidence regarding uncharged criminal activity from another inmate suspected of committing such activity, when law enforcement officials would be unable, or were in fact unable, to obtain a confession directly,[19] clearly raises the potential for abuse.[20] Although such

[19] The police affidavit in support of the defendant's arrest warrant reflects that, many months before Calabrese gave the surreptitiously recorded statement, he had given several statements to the police about the Sharon home invasion. Calabrese was approached by the police because of cell phone records connecting him to Niraj. Calabrese provided a statement to the police at that time and later provided additional statements through his attorney. Calabrese initially claimed to have learned about the home invasion only after the fact but later admitted that he was present when Niraj announced the plan. In all of the statements, however, Calabrese disavowed any participation and claimed that the defendant and an unknown third party were the perpetrators.

[20] The fact that Early was recording Calabrese in their prison cell at the behest of law enforcement would not implicate either Calabrese's *Miranda* rights under the fifth amendment to the United States constitution; see *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); because courts do not consider this situation to be a "custodial interrogation"; (internal quotation marks omitted) *Illinois* v. *Perkins*, 496 U.S. 292, 296–98, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990); or his right to counsel under the sixth and fourteenth amendments to the United States constitution, because that right is offense specific and is limited to charged offenses or uncharged offenses that are directly connected to the charged offense. See id., 299; *United States* v. *Basciano*, 634 Fed. Appx. 832, 836 (2d Cir. 2015), cert. denied, U.S. , 136 S. Ct. 2529, 195 L. Ed. 2d 859 (2016). But use of this tactic in other factual scenarios may cross a constitutional line. For example, if Calabrese had been charged in connection with the Sharon home invasion and invoked his right to counsel, the police could not have surreptitiously questioned him through an agent or undercover operative. See, e.g., *Massiah* v. *United States*, 377 U.S. 201, 205–206, 84 S. Ct. 1199,

circumstances do not meet the present legal definition of an interrogation and, hence, do not implicate the confrontation clause, we can envision facts under which eliciting an inculpatory statement in this setting might rise to the level of a violation of due process or a circumstance under which it might be appropriate for this court to consider the extraordinary measure of reversal under the exercise of its supervisory authority. Cf. *Illinois* v. *Perkins*, 496 U.S. 292, 302–303, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (Brennan, J., concurring) (expressing concern whether due process may be violated when undercover agent and jailhouse informant "lure [the] respondent into incriminating himself when he was in jail on an unrelated charge," noting that, under such circumstances, state "can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses").

Our concerns are tempered in the present case, however, for a few reasons. There was no evidence presented suggesting any involvement by the Office of the State's Attorney in orchestrating the recording or directing the inquiry. Nor is there evidence that any police official coached Early on what questions to ask or what facts they were seeking to learn. The trial court did not abuse its discretion by crediting Early's testimony that he was not given any information about the crime and that Calabrese first raised the subject of his involvement

12 L. Ed. 2d 246 (1964) ("Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with [a] crime. . . . [I]f such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." (Citations omitted; footnotes omitted; internal quotation marks omitted.)). Although Calabrese clearly was a suspect in the Sharon home invasion when Early recorded Calabrese's statements; see footnote 19 of this opinion; there is no claim that there was probable cause to arrest Calabrese in connection with that incident at that time and that a decision was made to delay arrest to circumvent Calabrese's right to counsel.

in the Sharon home invasion.[21] Because the exchange was recorded, the trial court was able to ascertain the extent to which, if any, Calabrese's answers may have been shaped or coerced by Early. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 609 (1992) (noting that recording coconspirators' statements made to government agent or informant will "deter prosecutorial abuse and enhance jury's ability to function"). Recording also eliminates concerns of fabrication by the informant. See id.; cf. *State* v. *Jones*, 337 Conn. 486, 504, 254 A.3d 239 (2020) (noting that special credibility instruction is required when jailhouse informant testifies because such testimony must be reviewed with particular scrutiny in light of witness' powerful motive to falsify his or her testimony). That recording makes clear that Calabrese volunteered most of the inculpatory information with no prompting. We therefore have a fair assurance that the involvement of government officials did not influence the content or the making of the statement.

C

Because we have concluded that the admission of Calabrese's dual inculpatory statement did not violate

[21] The trial court properly raised these concerns at the hearing on the motion in limine in Niraj's trial; its ruling in that case was deemed the law of the case for the defendant's identical motion: "It does, in my mind, create an issue as to whether the recording is testimonial, and that's an issue that really can only be resolved, I believe, with an understanding of what led up to the recording. Who initiated the conversation? My understanding is the topic first came up the day before the recording. What were the circumstances under which, after that conversation, the cooperating individual agreed to record a conversation? What happened on the morning of the conversation before it took place? What interaction did that individual have with law enforcement? Certainly, I believe all that is relevant to a *Crawford* analysis." Neither Niraj nor the defendant called the corrections officials or law enforcement officials who spoke with Early to testify at the hearing on the motion in limine. We note, however, that nothing that Early stated in his conversation with Calabrese suggested any personal knowledge about the facts of the crime.

the defendant's federal or state confrontation rights, the admissibility of the statement is, therefore, limited only by the rules of evidence. See, e.g., *Ohio* v. *Clark*, supra, 576 U.S. 245. Calabrese's statement was admitted under the hearsay exception for statements against penal interest. See Conn. Code Evid. § 8-6 (4). "We evaluate dual inculpatory statements using the same criteria that we use for statements against penal interest." *State* v. *Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). We conclude that the trial court's admission of Calabrese's statement under § 8-6 (4) was not an abuse of discretion.

Admission of a hearsay statement pursuant to § 8-6 (4) of the Connecticut Code of Evidence "is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017); see also *State* v. *Pierre*, supra, 277 Conn. 67. Only the second part of that inquiry is at issue in this appeal.

Our code of evidence directs trial courts to consider the following factors in assessing the trustworthiness of the statement: "(A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest." Conn. Code Evid. § 8-6 (4). "[N]o single factor . . . is necessarily conclusive . . . . Thus, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, 254 Conn. 309, 316, 757 A.2d 542 (2000).

The trial court concluded that the length of the delay between the crimes and the making of the statement, thirteen months, weighed against its trustworthiness but that all of the other factors strongly weighed in favor of admission. The state concedes that the timing of the statement weighs against admission. See, e.g., *State* v. *Pierre*, supra, 277 Conn. 70 ("[i]n general, declarations made soon after the crime suggest more reliability than those made after a lapse of time [when] a declarant has a more ample opportunity for reflection and contrivance" (internal quotation marks omitted)). We therefore focus on the remaining factors. We disagree with the trial court's treatment of one of the factors but conclude that it ultimately did not abuse its discretion in admitting the statement.

The trial court suggested that the fact that the statement was made "to a fellow inmate who appeared to the defendant [to] be a fellow gang member, and one who was facing serious charges," rendered the statement more trustworthy. The record does not support a factual predicate for this conclusion, and the law does not support its reasoning. Calabrese was not a fellow gang member.[22] He unambiguously informed Early that he was not a "blood," although "all [his] boys" belonged to the gang, and he did not join because he "really [didn't] give a shit" about belonging to the gang.

The fact that Early and Calabrese were fellow inmates, in and of itself, does not establish that they shared the type of relationship of trust and confidence that demonstrates the trustworthiness of the statement. Cf. *State* v. *Thompson*, 305 Conn. 412, 435, 45 A.3d 605 (2012) (statement was trustworthy when made to fellow inmate who was known to declarant for several years

[22] It is unclear what the trial court meant when it stated that "Early was facing serious charges." When Calabrese's statement was elicited, Early had already been convicted of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

before incarceration, and with whom declarant had become "reasonably close" in two months of incarceration prior to making of statement (internal quotation marks omitted)), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); *State* v. *Camacho*, supra, 282 Conn. 361 (statement made "to people with whom [declarant] had a trusting relationship"); *State* v. *Pierre*, supra, 277 Conn. 69 (statement made to friend, with whom declarant "routinely socialized"); *State* v. *Bryan*, 193 Conn. App. 285, 304–306, 219 A.3d 477 (relationship of trust and friendship when declarant had known person to whom he made statement for approximately ten years, had stayed at person's home, and had committed robbery with that person), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). Our appellate case law indicates that "[s]tatements made by a declarant to fellow inmates have been considered untrustworthy. See *State* v. *DeFreitas*, 179 Conn. 431, 453, 426 A.2d 799 (1980) (declarations against penal interest are untrustworthy when, inter alia, confessions made to fellow inmate); *Morant* v. *State*, 68 Conn. App. 137, 172, 802 A.2d 93 (exclusion of [third-party] confession proper when, inter alia, declarant confided not in close friends but in fellow inmate) (overruled in part on other grounds by *Shabazz* v. *State*, 259 Conn. 811, 830 n.13, 792 A.2d 797 (2002)), cert. denied, 260 Conn. 914, 796 A.2d 558 (2002). The fact that the statements allegedly made by [the declarant] were made to a fellow inmate, *with whom* [*the declarant*] *did not have a close relationship*, weighs against their trustworthiness." (Emphasis added.) *Martin* v. *Flanagan*, 107 Conn. App. 544, 549–50, 945 A.2d 1024 (2008).

State v. *Smith*, supra, 289 Conn. 598, on which the state relies, is not to the contrary. In *Smith*, we concluded that the trial court's admission of an inmate's recorded statement, when the court found that it was made in a private manner to a cellmate in whom the

declarant would be likely to confide, was not an abuse of discretion. Id., 630, 632–33. It was not our intention in *Smith* to adopt a blanket rule or presumption that a relationship between inmates, or even cellmates, is one of trust and confidence simply because of their shared circumstance. The inmates in *Smith* were both facing drug charges and had been cellmates for perhaps as long as one month when the statements were made. Id., 615.

In the present case, Early and Calabrese were strangers who were cellmates for less than twenty-four hours when the statement was made. Early's purported status as a gang member could have induced Calabrese to embellish his criminal history to send a message that neither Early nor any of his fellow gang members in the facility should mess with him. There is no basis in the record to conclude that, in this fleeting period, a relationship of trust and confidence developed.

The two remaining factors, however, corroboration and the degree to which the statement was against Calabrese's penal interest, overwhelmingly weigh in favor of trustworthiness. Calabrese's account was consistent with the physical evidence in almost all material respects; the only material inconsistency was his claim that Vitalis had pulled a knife on him when no knife was found at the scene. There are numerous reasons why Calabrese may have intentionally fabricated the existence of the knife.[23] The state also produced independent evidence to corroborate Calabrese's identification of the defendant as his accomplice and Calabrese's presence at the scene—cell phone location information and a statement that Calabrese had made to his girl-

[23] It is immaterial whether Calabrese subjectively, but incorrectly, assumed that he would be less culpable if it was believed that he killed Vitalis in self-defense. "Whether a statement is against a declarant's penal interests is an objective inquiry of law, rather than a subjective analysis of the declarant's personal legal knowledge." *State* v. *Camacho*, supra, 282 Conn. 359.

friend before the crime, among other evidence. Although the defendant points to certain aspects of Calabrese's account that are inconsistent with the evidence (i.e., time of day, which door was the point of entry, etc.), none of these facts is material. It is unsurprising that such inconsequential details could have been misremembered more than one year after the events occurred.

The extent to which the statement is against Calabrese's own penal interest could not be greater. He cast himself as the principal actor—the only perpetrator armed, the person who first restrained Vitalis' mother, the person who shot Vitalis, and the only one who stole property from the scene. He exposed himself to felony murder charges, among other charges. Calabrese's statement and the circumstances of its making have none of the characteristics that had historically caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of an accomplice of the declarant. See *Lilly* v. *Virginia*, 527 U.S. 116, 134, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (plurality opinion) (concluding that such statements are not within firmly rooted hearsay exception for confrontation clause purposes); see also id., 136–37 (confirming that such statements may nonetheless be admitted if they possess particularized guarantees of trustworthiness). Calabrese neither shifted blame from himself to the defendant nor attempted to share the blame for the murder with the defendant. See *State* v. *Schiappa*, supra, 248 Conn. 155 (citing these factors). Calabrese did not know that his statement was being recorded at the behest of state officials, and, thus, he could not have been making the statement to curry favor with the government. See *State* v. *Rivera*, 268 Conn. 351, 370, 844 A.2d 191 (2004) ("*Lilly*'s main concern was with statements in which, as is common in police station confessions, the declarant admits only what the authorities are already capable of proving against him and

seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial)" (internal quotation marks omitted)); *State* v. *Gold*, 180 Conn. 619, 635, 431 A.2d 501 (concern with attempt to "curry favor"), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); 2 R. Mosteller, McCormick on Evidence (8th Ed. 2020) § 319, p. 569 ("federal courts have most frequently admitted [third-party] statements that inculpate a defendant [when] two general conditions are satisfied: (1) the statement does not seek to curry the favor of law enforcement authorities, and (2) it does not shift blame"). Therefore, the trial court clearly did not abuse its discretion by admitting Calabrese's dual inculpatory statement under § 8-6 (4).

II

The defendant's final challenge is to the trial court's exclusion of Shyam's confession to the defendant's sister, Majmudar, which the defendant offered as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The defendant contends that the trial court abused its discretion in concluding that Shyam's statement was not trustworthy. We agree with the Appellate Court that the trial court's ruling was not an abuse of discretion.[24]

The principles that we articulated in part I C regarding the hearsay exception for statements against penal interest under § 8-6 (4) of the Connecticut Code of Evi-

[24] The state contends that the trial court also properly excluded Shyam's purported confession on the ground that the defendant failed to establish Shyam's unavailability, a precondition for the admission of a statement against penal interest. See Conn. Code Evid. § 8-6 (4). Although there were several exchanges between defense counsel and the court on this issue, it is not entirely clear whether the trial court conclusively determined that the defendant had failed to meet this condition. Like the Appellate Court, we conclude that it is unnecessary to address Shyam's availability in light of our conclusion that the trial court did not abuse its discretion in determining that Shyam's statement was not trustworthy. See *State* v. *Patel*, supra, 194 Conn. App. 279 n.19.

dence apply equally to the admissibility of Shyam's confession. We assess the trial court's discretion in applying those principles to the following undisputed facts. During the presentation of the defense's case-in-chief, Majmudar testified that her cousin Shyam had made a surprise visit to her Boston home sometime in the last two weeks of September, 2013. When asked what Shyam had said during that visit, the prosecutor objected. In a proffer outside of the jury's presence, Majmudar provided the following testimony. She and Shyam had a close relationship, becoming especially close when Shyam lived with Majmudar's family in Branford, Connecticut, for two years while Majmudar was in high school. When Shyam visited Majmudar in Boston in September, 2013, he told Majmudar that his family was asking relatives for help posting bond for Niraj, and asked whether he could borrow $50,000 from her. Majmudar replied that she could not lend the money because she needed it to help the defendant post bond and pay attorney's fees. Majmudar told Shyam that she knew the defendant was innocent because he had been with her in Boston when the crimes occurred. When Shyam did not appear surprised by this revelation, Majmudar asked him if he knew who had accompanied Calabrese. After further probing, Shyam broke down in tears and admitted that he and Calabrese were the ones who had tried to rob Vitalis. Shyam then provided her with an account of the incident, in which he stated that he had fled the Vitalis home after Calabrese shot Vitalis and later returned in a vehicle with Niraj to pick up Calabrese. Majmudar asked Shyam whether Calabrese had used the defendant's cell phone during the robbery.[25] Shyam responded affirmatively and volunteered

[25] Evidence was presented at trial regarding the movement of cell phones associated with Niraj, Calabrese, and the defendant on August 6, 2012, which placed those phones near the crime scene and often in contact with one another. See *State* v. *Patel*, supra, 194 Conn. App. 285–86. The cell phone associated with the defendant accessed the cell tower located between seven and eight miles from the crime scene for a series of phone calls prior

that he had left his own cell phone at home. Majmudar told Shyam that he needed to come forward and confess, but Shyam said that he could not do that to his parents, as they already faced the risk that Niraj would be taken away from them.

The trial court asked Majmudar who she had told about Shyam's confession. She replied that she had told only the defendant, after he was released on bond.

The court sustained the prosecutor's objection to the admission of the testimony pertaining to Shyam's confession. The court found that, in light of the totality of the circumstances under which the statement was purportedly made, the statement was untrustworthy and particularly lacking in sufficient corroboration. The court cited the following factors. The court pointed out that the alleged confession was made thirteen months after the crime and that Majmudar claimed to have told no one except the defendant about the alleged confession for more than three and one-half years after the statement was made. It reasoned: "Both of these delays provided her with years to learn the details of the prosecution's theory of the case and, if she wished to do so, [to] fabricate the statement. . . . [B]oth the delay in which the statement was supposedly made and the time at which it was revealed, which was yesterday, independently, and, when combined, weigh heavily against the admissibility of the statement. The incriminating statements were, based on the evidence made to date, made to only one person, [Majmudar]; that fact

to 6:04 p.m. See id., 286–87. There were no outgoing calls or messages from the cell phone associated with the defendant after 6:04 p.m. on August 6, 2012, which, the state's expert observed, "indicated 'either that the phone was off or that it was . . . in an area where it could not receive any cell signal,' or that 'something could have happened to the phone that rendered it unable' to receive a [cell] signal." Id., 286. On August 6, 2012, Shyam's phone was used to make several phone calls through a device in his home in Warren.

weighs against admissibility. The concept that [Majmudar] allegedly allowed her parents and her sister to agonize over the emotional and financial burden of this prosecution for the past three and [one-half] years, all the while keeping to herself the supposed confession that would have been of incalculable relief to them, is incomprehensible and weighs against admissibility. The nature of the relationship between [Majmudar] and Shyam . . . weighs heavily against admissibility. The witness is highly motivated to assist her brother, and, even though there may be a strong relationship between these two cousins, Shyam and [Majmudar] . . . Shyam . . . had to know that [Majmudar's] primary loyalty would be to her brother. Unless Shyam . . . wanted his confession to be open and known, he would never have made it to one of the four people on this planet who are most highly motivated above and beyond all others to bring it to the attention of the authorities to save their son, their sibling, from what they would have believed to be a wrongful prosecution."

The court further reasoned that "[t]he details of the statement . . . make it untrustworthy and even bizarre." The court questioned why Shyam would volunteer trivial details such as which vehicle he had driven,[26]

[26] According to Majmudar, Shyam said that he and Niraj had driven "the Pathfinder" back to the woods to find Calabrese. Shyam's family owns a white Pathfinder. Majmudar testified that, when she questioned Shyam as to why the police had seized her parents' two black sport utility vehicles (SUVs), Shyam said that they had used "the black Saab SUV from New York" during the robbery. From the defendant's perspective, these statements identifying the vehicles provide two benefits. The report of the use of the black Saab explains a witness' report of seeing Niraj driving a vehicle fitting the description of the defendant's black Honda CRV about five miles away from Vitalis' home, when no such vehicle was registered to Niraj or to Niraj's family. The report of the use of the Pathfinder, after the murder was committed, in conjunction with evidence that Shyam had access to that vehicle on August 6, 2012, and that the Pathfinder was thoroughly cleaned in the weeks before the police seized it in mid-September, 2013, provides potential physical evidence connecting Shyam to the crime.

and found it "[e]specially suspect" that Majmudar asked Shyam if Calabrese used the defendant's phone during the robbery. See footnote 26 of this opinion. The court noted that there was no evidence explaining how Majmudar would have known that phones played any role in the robbery—"for all she knew, the plan was hatched by coconspirators in a bar, immediately carried out and no phones were used at all." The court found it nonsensical that, if Calabrese and Shyam decided not to use their own phones during the robbery, they would use the phone of someone with whom they are associated or related, instead of untraceable phones.

The court also pointed out that evidence demonstrated that "Vitalis had significant contacts and dealings with Niraj . . . and Shyam . . . which explains . . . at least in part, why Niraj . . . and Shyam . . . did not enter that home, because . . . despite masks, through their voices in the prior context, it would have been readily recognized, and that would explain why Niraj . . . solicited others who [did] not have contact with . . . Vitalis to carry out the robbery. . . . [T]hat evidence alone points more to . . . Calabrese and this defendant than it does to Shyam . . . having been the person to enter the Vitalis home. The circumstances surrounding the event are far more consistent with [the] defendant entering the Vitalis' home than Shyam . . . entering that home."

The Appellate Court agreed that Shyam's statement "was against [his] penal interest to a significant extent, such that this factor weighs in favor of a finding of trustworthiness," but concluded that the trial court had not abused its discretion in concluding that the remaining factors clearly weighed against such a finding. *State* v. *Patel*, supra, 194 Conn. App. 280, 283. We agree that the trial court's exclusion of the statement was not an abuse of discretion.[27]

[27] We observe that several statements made by the trial court in connection with its ruling could be interpreted as comments explaining why Majmudar's

The defendant's arguments for the admission of the statement are unpersuasive. He suggests that, with regard to the temporal factor, it is more important that Shyam's confession was made shortly after the arrests in connection with the Sharon home invasion than the fact that it was made more than one year after the incident. The defendant cites no case law supporting this proposition, and this proposition is contradicted by the rationale for the temporal factor—that a lapse of time following the crime provides a declarant with opportunity for reflection and contrivance. See *State* v. *Pierre*, supra, 277 Conn. 70. The defendant's emphasis on the close relationship between the cousins, Majmudar and Shyam, and on the case law recognizing that a blood relationship may be one of trust; see, e.g., *State* v. *Rivera*, supra, 268 Conn. 369; misses the point. The trial court reasonably pointed to the stronger relationship between the defendant and his sister, and her loyalty to him over Shyam.

Most of the evidence that the defendant characterizes as corroborative indicates only that Shyam may have played some role in connection with the incident, not that Shyam was present in the Vitalis home.[28] We pre-

testimony lacked credibility. "We previously have concluded . . . that a trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest." *State* v. *Rivera*, supra, 268 Conn. 372; see also 2 R. Mosteller, supra, § 319, p. 575 ("The federal courts have disagreed on whether the corroboration requirement applies to the veracity of the in-court witness testifying that the statement was made in addition to the clearly required showing that the statement itself is trustworthy. As a matter of standard hearsay analysis, the credibility of the in-court witness regarding the fact that the statement was made is not an appropriate inquiry." (Footnote omitted.)). The defendant did not challenge the trial court's ruling on this basis. Even if the trial court had improperly rested its decision in part on Majmudar's credibility, however, the reasons articulated by the trial court illustrate why a jury would have been highly unlikely to credit her testimony, and any potential error in excluding Shyam's purported confession would have been harmless.

[28] "There was evidence at trial that Shyam sent the following text messages to Niraj at 8:13 p.m. on August 6, 2012: 'U want me to come to the station in [P]athfinder?'; '?'; 'Lemme know . . . I got keys.' A white Pathfinder,

viously have emphasized that "[t]he corroboration requirement for the admission of a [third-party] statement against penal interest is significant and goes beyond minimal corroboration." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 319. The only evidence that could corroborate Shyam's presence at the Vitalis home invasion is one of the several statements given by Vitalis' mother to the police about the incident. In January, 2016, more than three years after the incident, Rita Vitalis told the police that she believed that one of the masked intruders was an Indian male and believed that this person was Shyam. She knew Niraj and Shyam but not the defendant. In other statements, however, she reported that she believed that both of the intruders were white, that they could be Hispanic, or that she did not know who either intruder was with certainty. The trial court, therefore, reasonably concluded that Shyam's statement was not sufficiently trustworthy to be admitted as a statement against penal interest.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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registered at the home Shyam shared with his parents and, occasionally, Niraj, was seized by [the] police. The vehicle smelled clean and seemingly had new floor mats. A receipt dated August 31, 2012, at 10:40 a.m. from Personal Touch Car Wash in New Milford was found in a bedroom at Shyam's home, and Shyam's cell phone utilized two cell towers in the vicinity of the car wash around the date and time printed on the receipt." *State* v. *Patel*, supra, 194 Conn. App. 282 n.22. "There was [also] evidence at trial that there were Google searches conducted on Shyam's computer for the terms 'conspiracy to commit murder in Connecticut' and 'conspiracy to kill,' along with searches for penalties for those crimes." Id., 282 n.23.

STATE OF CONNECTICUT *v.* JOSE A. B.*
(SC 20332)

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

Syllabus

Convicted of sexual assault in the first degree, attempt to commit sexual assault in the first degree, sexual assault in the fourth degree, and two counts of risk of injury to a child, the defendant appealed, claiming that the trial court improperly had overruled defense counsel's objections to the prosecutor's use of peremptory challenges to excuse two prospective jurors, C and N, and that his conviction of two counts of risk of injury to a child violated the constitutional prohibition against double jeopardy. C is an African-American, and N is also a member of a racial minority. The prosecutor had explained that the basis for the peremptory challenges to C and N was their stated distrust of law enforcement and/or the criminal justice system. Specifically, the prosecutor relied on N's statements during voir dire indicating that she previously had been convicted of a crime for which she received a pardon, that she had resented the police at the time she was arrested but no longer felt that way, and that her husband's friend had previously pleaded guilty to sexual assault but that she did not believe the truth of the allegations against him. With respect to C, the prosecutor relied on the fact that, although C had disclosed an incident involving a larceny on his juror questionnaire, he also revealed during voir dire an undisclosed conviction resulting from an assault of a police officer, for which C believed he was unfairly prosecuted. Defense counsel objected to the peremptory challenges on the basis of the United States Supreme Court's decision in *Batson* v. *Kentucky* (476 U.S. 79), which prohibits a party from challenging prospective jurors solely on account of their race. The trial court overruled the *Batson* challenges, concluding that the reasons proffered by the prosecutor, namely, N's resentment toward the police and her criminal conviction resulting in a pardon, as well as C's prior arrest for a serious crime for which he believed he was unfairly prosecuted, were race neutral and not a pretext for discrimination. From the judgment of conviction, the defendant appealed. *Held*:

1. The trial court did not commit clear error in determining that the defendant had failed to meet his burden of proving, by a preponderance of the

* 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.

evidence, that the jury selection process in the present case was tainted by purposeful discrimination:

a. The defendant conceded that the distrust of law enforcement and/or the criminal justice system is a race neutral reason for exercising a peremptory challenge under federal constitutional law, and this court declined to conclude, on the basis of the record in the present case, that such negative perceptions constitute a facially discriminatory reason for exercising a peremptory challenge under the Connecticut constitution: although neither the text nor the history of the relevant provisions (article I, §§ 1, 8, 19 and 20, as amended) of the Connecticut constitution shed any light on the scope of permissible reasons for peremptory challenges, federal precedent provided no support for the defendant's claim, and sister state precedent did not provide overwhelming support for that claim, this court's recent decision in *State* v. *Holmes* (334 Conn. 202) signaled a shift in this state's precedent toward ensuring the impartiality of juries by addressing the problems of implicit bias and disparate impact during jury selection; moreover, in *Holmes*, this court recognized that significant public policy and sociological reasons support the conclusion that a negative perception of law enforcement is not a race neutral reason for excluding a prospective juror, considering the disparate impact those reasons have on racial minorities and, to that end, announced in that case the creation of the Jury Selection Task Force to study and propose changes to the jury selection process in Connecticut that would remediate the issue of racial discrimination and implicit bias in jury selection; nonetheless, principles of judicial restraint counseled against this court's making a new constitutional pronouncement on this issue, as the Jury Selection Task Force recently had proposed a new rule of practice to address these concerns, the proposed rule had been submitted to the judges of the Superior Court for consideration, and the rule-making process was ongoing; accordingly, this court declined to hold in the present case that greater protection was warranted under the Connecticut constitution than is provided under the existing federal *Batson* scheme.

b. The trial court's finding that the reasons proffered by the prosecutor for peremptorily challenging C and N were not a pretext for impermissible discrimination was not clearly erroneous; the record indicated that the prosecutor questioned all of the prospective jurors in a similar manner as to whether they, or someone close to them, had ever been arrested or charged with a crime, any affirmative responses to those questions were followed by questions regarding the details of any arrest or charge and whether it would influence the prospective juror, the more extensive questioning of C with regard to his criminal history was reflective of the incomplete answers that he provided in his questionnaire and during voir dire rather than reflective of a racially discriminatory intent, and there was no evidence of a pattern of discrimination by the prosecutor in excluding prospective jurors of a particular race.

2. The defendant could not prevail on his claim that his right to be free from double jeopardy was violated because risk of injury to a child, with which the defendant was charged, is a lesser included offense of sexual assault in the first degree and sexual assault in the fourth degree: even if it was assumed that the offenses in question arose from the same act or transaction, the defendant failed to show that those crimes constituted the same offense for double jeopardy purposes under the test set forth in *Blockburger* v. *United States* (284 U.S. 299), and this court, in a recently decided case, *State* v. *Tinsley* (340 Conn. 425), rejected the defendant's argument that, notwithstanding the distinct elements of each offense charged, a court should consider the facts alleged in the information when determining whether the statutory elements of each offense are the same under *Blockburger*; in the present case, the crimes of sexual assault in the first degree and sexual assault in the fourth degree each required proof of a fact that risk of injury to a child did not, as sexual assault in the first degree required proof that the defendant engaged in sexual intercourse with the victim and was more than two years older than the victim, sexual assault in the fourth degree required proof that the defendant intentionally subjected someone under the age of fifteen to sexual contact, and the particular risk of injury offenses of which the defendant was convicted required proof of neither of those facts; moreover, because the defendant did not argue that that the legislature had intended that risk of injury to a child, on the one hand, and sexual assault in the first or fourth degree, on the other, should be considered the same offense, he could not rebut the presumption that those crimes did not constitute the same offense under *Blockburger*.

Argued February 26, 2021—officially released March 22, 2022

Procedural History

Substitute information charging the defendant with two 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, attempt to commit sexual assault in the first degree, and sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Doyle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Drew J. Cunningham, with whom was *Damian K. Gunningsmith*, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Elena Ricci Palermo*, senior assistant state's attorney, for the appellee (state).

Harry Weller, *Peter T. Zarella*, and *C. Ian McLachlan* filed a brief as amici curiae.

Alinor C. Sterling and *James J. Healy* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

George Welch, human rights attorney, filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Tadhg Dooley filed a brief for Professors and Research Scholars at Connecticut's Law Schools as amici curiae.

William Tong, attorney general, *Clare Kindall*, solicitor general, and *Joshua Perry*, special counsel for civil rights, filed a brief for the Office of the Attorney General as amicus curiae.

Christine Perra Rapillo, chief public defender, and *Adele V. Patterson*, senior assistant public defender, filed a brief for the Office of the Chief Public Defender as amicus curiae.

David N. Rosen filed a brief as amicus curiae.

Georgina Yeomans filed a brief for NAACP Legal Defense and Educational Fund, Inc., as amicus curiae.

Opinion

ROBINSON, C. J. The principal issue in this appeal asks us to revisit our recent decision in *State* v. *Holmes*, 334 Conn. 202, 221 A.3d 407 (2019), and to consider whether, given the disparate impact on minority communities, a prospective juror's negative experience with, or distrust of, the criminal justice system provides a race neutral reason for the exercise of a peremptory

challenge under the Connecticut constitution. The defendant, Jose A. B., appeals[1] from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault or attempt to commit sexual assault and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] On appeal, the defendant claims that (1) the trial court improperly overruled his *Batson*[3] objection to the prosecutor's exercise of peremptory challenges to two venirepersons, and (2) his conviction of two counts of risk of injury to a child violates his right to be free from double jeopardy. We disagree, and, accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural history. The victim lived with the defendant, the defendant's wife, who was the victim's legal guardian, and the victim's brother, from the time the victim was eighteen months old. The victim testified that the defendant sexually assaulted her on numerous occasions between 2000 and 2007, when she was between five and twelve years old.[4]

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

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

Although § 53-21 has been amended numerous times since the defendant's commission of the crimes that formed the basis of his conviction; see, e.g., Public Acts 2007, No. 07-143, § 4; Public Acts 2013, No. 13-297, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53-21 throughout this opinion.

[3] *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[4] The victim testified that the defendant forcibly kissed her, put his tongue inside her mouth and on her vagina, attempted, but failed, to insert his penis in her vagina, touched her breasts and her outer vaginal area, and made her touch his penis.

The state subsequently charged the defendant with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[5] sexual assault in the fourth degree in violation of General Statutes (Rev. to 2001) § 53a-73a (a) (1) (A),[6] attempt to commit sexual assault in the first degree in violation of § 53a-70 (a) (2) and General Statutes § 53a-49 (a) (2),[7] and two counts of risk of injury to a child in violation of § 53-21 (a) (2). The case was tried to a jury, which found the defendant guilty on all counts. The trial court rendered a judgment of conviction in accordance with the jury's verdict, sentenced the defendant to a total effective sentence of seventeen years of imprisonment, followed by two years of special parole, issued a criminal protective order and ordered sexual offender registration. This direct appeal followed.[8] Additional relevant facts and

[5] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

Section 53a-70 was amended by No. 02-138, § 5, of the 2002 Public Acts and No. 15-211, § 16, of the 2015 Public Acts. Those amendments made certain changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[6] General Statutes (Rev. to 2001) § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . ."

All references to § 53a-73a in this opinion are to the 2001 revision of the statute.

[7] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[8] Following oral argument, this court sua sponte ordered the parties to submit simultaneous supplemental briefs, limited to the following issue: "Whether this court should exercise its supervisory powers to hold, pursuant to the proposal of the Jury Selection Task Force, that, '[t]he denial of an objection to a peremptory challenge shall be reviewed by an appellate court de novo, except [that] the trial court's express factual findings shall be

procedural history will be set forth in the context of each claim on appeal.

I

JURY SELECTION CLAIMS

The defendant first claims that his state and federal constitutional rights were violated because the state's peremptory challenges to two venirepersons, N.L. and C.J.,[9] during jury selection violated *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The record reveals the following additional facts and procedural history relevant to this claim.

During the prosecutor's voir dire examination of N.L., the following exchange occurred:

"[The Prosecutor]: Do you know of anyone who has ever been accused of a sexual assault besides the one you just told us about?

"[N.L.]: Yes.

"[The Prosecutor]: Tell me a little bit about that.

"[N.L.]: Well, he was actually a friend of my husband's. He used to date this girl, and they had kids together, but

reviewed under a clearly erroneous standard.' Jury Selection Task Force, Report [of the Jury Selection Task Force] to Chief Justice Richard A. Robinson (December 31, 2020) p. 16 [available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf (last visited March 15, 2022)]. But see id., pp. 22–23, statement of Judge Douglas Lavine in Opposition."

We also invited amici curiae to file briefs on this issue. We are grateful to the following amici curiae for responding to our invitation with their thoughtful briefs: (1) Harry Weller, Peter T. Zarella, and C. Ian McLachlan; (2) the Office of the Chief Public Defender; (3) the Office of the Attorney General; (4) the Commission on Human Rights and Opportunities; (5) David N. Rosen; (6) NAACP Legal Defense and Educational Fund, Inc.; (7) the Connecticut Trial Lawyers Association; and (8) Professors and Research Scholars at Connecticut's Law Schools.

[9] We note that the record indicates that C.J. is an African-American man. The record does not specify the racial identity of N.L., but it is undisputed that she is a member of a racial minority.

she had a son with someone else, and she didn't have custody of him. The grandparents did. And I guess maybe he wanted to, you know, live with them, and the person got accused of sexually molesting him. . . . I don't know if it happened. And he went to jail, but he's been out of jail for a long time.[10]

* * *

"[The Prosecutor]: Do you think that people [who] are victims of sexual assault should go to the police?

"[N.L.]: Yes.

* * *

"[The Prosecutor]: Now, have you or anyone close to you, besides what you told us, ever been charged or arrested for a crime?

"[N.L.]: Myself, I have.

"[The Prosecutor]: Can you tell me a little bit about that?

[10] The record reveals the following additional colloquy concerning the sexual assault allegations against N.L.'s acquaintance:

"[The Prosecutor]: This was a friend of—

"[N.L.]: My husband's.

"[The Prosecutor]: Do you ever talk to him about any of this?

"[N.L.]: No.

"[The Prosecutor]: Were you personally close to this person?

"[N.L.]: Not close, but I know who he is.

"[The Prosecutor]: Anything about that that would make you think, I can't sit on this case?

"[N.L.]: No. I didn't believe the allegations.

"[The Prosecutor]: Why didn't you believe the allegations?

"[N.L.]: Because of the circumstances, how it was told to me, not me knowing personally, and [I] didn't feel like it was true to me. I felt like he just took it because he's already been convicted of something else, which ha[s] nothing to do with that. And he just—I guess they told him, if he didn't take the deal, this would happen.

"[The Prosecutor]: Anything about that situation with him that you think might impact your decision [in] this case?

"[N.L.]: No."

"[N.L.]: Yeah. It's years ago. I've actually had a pardon. So I don't know if I should talk about it.

"The Court: If you have a pardon—I guess the question would be, is there anything about that experience that might affect your ability to be fair and impartial in this case?

"[N.L.]: I don't think so.

"[The Prosecutor]: You're hesitating a little.

"[N.L.]: No, I don't think so. I think I can separate the two.[11]

* * *

"[The Prosecutor]: Do you think that the fact that you were arrested and then later pardoned, do you think that might make you think you might lean more toward the defense in this case?

"[N.L.]: Not based on that. I would actually have to hear both sides. Then I can make a decision from there.

"[The Prosecutor]: Do you think you would hold it against the state because of what happened?

"[N.L.]: No.

* * *

"[The Prosecutor]: All right. There will . . . probably [be] testimony from at least one police officer in this case. What's your feeling about the police in general?

[11] The record reveals the following additional colloquy about N.L.'s conviction:

"[The Prosecutor]: How long ago was this?

"[N.L.]: '97, '95, '97.

"[Prosecutor]: Did it involve any children?

"[N.L.]: No.

"[The Prosecutor]: Anything about a sexual assault?

"[N.L.]: No."

"[N.L.]: Well, I ha[d] a lot of resentment when I got arrested, but, over time, I've learned that whatever happened was not their fault. It was something that I did. And I actually have members that are police officers.

"[The Prosecutor]: Members of [your] family?

"[N.L.]: Mm-hmm.

* * *

"[The Prosecutor]: So, you held a lot of resentment at one time for the police. And now?

"[N.L.]: No.

"[The Prosecutor]: Have you ever had to call the police yourself for any reason?

"[N.L.]: Yeah.

"[The Prosecutor]: For what?

"[N.L.]: Domestic, when I was like real young." (Footnotes added.)

Upon conclusion of the voir dire examination of N.L., the prosecutor exercised a peremptory challenge. The prosecutor stated, inter alia, that N.L.'s articulated resentment toward the police and her criminal history of a conviction resulting in a pardon warranted the use of a peremptory challenge.[12] Defense counsel then raised a *Batson* objection to the state's peremptory challenge of N.L. The trial court overruled defense counsel's *Batson* objection, concluding that the prosecutor's

[12] The other reasons the prosecutor provided for the peremptory challenge were (1) N.L.'s initial response that she would not be able to convict the defendant based on the testimony of a single witness, (2) her initial response that she would not be able to return a guilty verdict if she were not 100 percent certain, and (3) her disbelief of the allegations of sexual assault against her husband's friend.

proffered reasons for the peremptory challenge of N.L. were race neutral and not a pretext for discrimination.[13]

The prosecutor subsequently conducted a voir dire examination of C.J., during which they discussed C.J.'s arrest history, which C.J. had only partially disclosed in his juror questionnaire:

"[The Prosecutor]: Have you or anyone close to you ever been arrested for any kind of crime?

"[C.J.]: I have been arrested for a crime.

"[The Prosecutor]: For what, sir?

"[C.J.]: Well, a long time ago, coming out [of] my aunt's building, an undercover police officer grabbed my arm, and I'm thinking it's a robbery, so I swung to get him off of me, but then that—then everything took place. Then I find out he was a police officer.

"[The Prosecutor]: Okay. So you were arrested for that?

"[C.J.]: Yes.[14]

[13] The trial court cited the following additional observation regarding N.L.: "There was an additional issue that [the prosecutor] did raise . . . which was when [N.L.] said that she would expect a sexual assault victim to report [the assault] immediately to the police. That's obviously not this case. I do think there were race neutral reasons to remove her at this time."

[14] The record reveals the following colloquy about C.J.'s arrest for the incident with the police officer:

"[The Prosecutor]: And when was that?

"[C.J.]: That was over thirty-five years ago, almost forty years ago, probably. Thirty-five.

"[The Prosecutor]: So did you go to jail?

"[C.J.]: I was already in jail. I never got out.

"[The Prosecutor]: You were in jail for what?

"[C.J.]: Went from the incident, from the time it happened . . . until they gave me that disposition, so, by the time I got the disposition, it was almost like time served.

"[The Prosecutor]: Okay. So how much time do you think you—

"[C.J.]: Sixteen months.

"[The Prosecutor]: Okay. And that was how long ago?

"[C.J.]: That was all the way back in '87.

"[The Prosecutor]: Besides that one time, were you ever arrested any other time?

"[C.J.]: No. All—everything ended over thirty years [ago]. That's it.

* * *

"[The Prosecutor]: You gave a little information on your juror questionnaire, and you . . . put down something about larceny six, but dropped from my job. . . . What's that mean?

"[C.J.]: . . . I worked at Stop and Shop for almost twelve years. All right. We had a hectic night one night. I had my stuff in a carriage, and I was the key holder, so, when I was leaving . . . I grabbed my carriage, but . . . because of the night, I didn't scan those things out, so they put a larceny six, but they dropped it—all that. But that was in 2011.[15]

* * *

"[The Prosecutor]: Okay. Besides that, any other time you or anyone else close to you [has] ever been arrested?

"[C.J.]: No." (Footnotes added.)

The state then questioned C.J. regarding his attitude toward the police and the criminal justice system:

"[The Prosecutor]: That's the only time you were ever arrested?

"[C.J.]: Well . . . everything was in that time period. [Nineteen ninety-seven] was the end, when the charge was done with.

"[The Prosecutor]: Say that again.

"[C.J.]: All of those arrests [were] in that time frame. It was the same thing. Violation of probation to all this stuff right here."

[15] The record reveals the following colloquy with respect to the Stop and Shop incident:

"[The Prosecutor]: That was—

"[C.J.]: That's what I was talking about.

"[The Prosecutor]: That was in 2011?

"[C.J.]: In '11. So that's what I was talking about. It was—but they—that was—I worked for that company.

"[The Prosecutor]: Okay. So—

"[C.J.]: So they—they—that's how. Because I didn't have a receipt for those items, because, through the night . . . I was stocking and everything, rushing. We had two alarm calls, a whole bunch of things [were] happening, and, when I was leaving in the morning, I didn't even pay attention that those didn't get scanned out, so when I went to court, they dropped all that stuff."

"[The Prosecutor]: Do you think the fact that you have been arrested and [that] you've kind of dealt with the criminal justice system, do you think that might play a part in your deliberations if you're a juror?

"[C.J.]: Not really.

"[The Prosecutor]: What do you mean?

"[C.J.]: Because, at the end of the day, all these offense[s] you [are] talking about happened over thirty years ago.

"[The Prosecutor]: Okay. . . . The fact that you were arrested [for] the larceny six that ended up getting dropped. Do you think that you might hold a grudge against the state because of your background?

"[C.J.]: No.

"[The Prosecutor]: Do you think you were fairly prosecuted?

"[C.J.]: Do I think I was fairly prosecuted? Not on the first one, no.

"[The Prosecutor]: No? That was the one with the—

"[C.J.]: The assault—

"[The Prosecutor]: —assault?

"[C.J.]: —on the police officer.

"[The Prosecutor]: And that was in Hartford?

"[C.J.]: That was in Hartford. . . .

"[The Prosecutor]: What's your opinion of the police?

"[C.J.]: I don't have no opinions on [the] police because, in my whole family, there's massive police officers. Chief of police was my uncle, so I don't have [an] opinion on none of them. There's good police, and there's bad police, so I don't have an opinion on that. I treat people as individuals."

The prosecutor first moved to excuse C.J. for cause, given his failure to account completely for his past convictions in his questionnaire by omitting his arrest for assaulting a police officer. Defense counsel objected to the challenge for cause, arguing that C.J.'s recollection had been affected by the length of time that had passed since his arrest. The trial court agreed with defense counsel and denied the state's challenge for cause. The prosecutor then exercised a peremptory challenge, arguing that, in addition to C.J.'s apparent omissions in completing the questionnaire, the charge of assaulting a police officer itself was serious in nature and that C.J. believed that he had been incorrectly and unfairly prosecuted in that instance. In response, defense counsel raised a *Batson* objection. The court overruled the *Batson* objection, finding that "an objectively neutral reason [for the peremptory challenge] would be the fact that he was previously arrested [and] charged with a serious crime, even though it was a long time ago, [and that] he felt he was not fairly treated." The trial court also found that the prosecutor's race neutral reason was not a pretext for discrimination.[16]

Before addressing the defendant's claims in detail, we review the well established general principles under which we consider *Batson* claims. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our consti-

[16] The trial court found the prosecutor's questioning of C.J. to be consistent with that of the other prospective jurors, noting: "[O]n our first day of jury selection, there was a [prospective] juror . . . who was a white male . . . who had been previously found not guilty but [who] was prosecuted for operating under the influence, and he was not selected by the state. . . . I believe this is a race neutral reason, and I find the questioning so far, from what I observed, to be consistent and nothing pretextual that would warrant the court to take further actions."

tutional and statutory law permit[s] each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one [state created] means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, supra, 476 U.S. 79] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . .

"Under Connecticut law, a *Batson* inquiry involves three steps.[17] First, a party must assert a *Batson* claim

[17] "We note that a *Batson* inquiry under Connecticut law is different from most federal and state *Batson* inquiries. Under federal law, a three step

. . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual." (Footnote altered; footnote omitted; internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 222–24; see, e.g., *State* v. *Edwards*, 314 Conn. 465, 483–85, 102 A.3d 52 (2014).

It is undisputed that the defendant has satisfied the first step of the *Batson* inquiry as to N.L. and C.J. See footnote 9 of this opinion. Turning, then, to the second step of the *Batson* inquiry, we must determine whether

procedure is followed when a *Batson* violation is claimed: (1) the party objecting to the exercise of the peremptory challenge must establish a prima facie case of discrimination; (2) the party exercising the challenge then must offer a neutral explanation for its use; and (3) the party opposing the peremptory challenge must prove that the challenge was the product of purposeful discrimination. . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination." (Internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 223–24 n.15; see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

the prosecutor's proffered reason for the peremptory challenges, namely, a prospective juror's distrust of the criminal justice system based on his or her personal experience, was facially race neutral. This is a question of law, over which we exercise plenary review. See, e.g., *State* v. *Holmes*, supra, 334 Conn. 226.

The defendant first argues that, as a matter of Connecticut constitutional law, the prosecutor's proffered reasons for the peremptory challenges were facially discriminatory based on race, given their disparate impact on members of minority groups.[18] We address this argument under the state constitution before turning to the third step of the *Batson* inquiry, namely, the defendant's alternative claim that, even if race neutral, any proffered reason by the prosecutor was a pretext for purposeful discrimination.

A

State Constitutional Claim as to the Second Prong of the *Batson* Inquiry

The defendant claims that certain provisions of the Connecticut constitution, namely, §§ 1, 8, 19 and 20 of article first, as amended,[19] provide broader protection

[18] The defendant concedes that, as a matter of federal constitutional law in the wake of the United States Supreme Court's decision in *Hernandez* v. *New York*, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), distrust of law enforcement is a facially race neutral reason to exclude a potential juror under the United States constitution. See *State* v. *Holmes*, supra, 334 Conn. 231–33; see also footnote 22 of this opinion and accompanying text.

[19] Article first, § 1, of the Connecticut constitution provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

Article first, § 8, of the Connecticut constitution, as amended by article seventeen of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

Article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, provides in relevant part: "The right of trial by

than does the federal constitution with respect to the exercise of peremptory challenges and the right to an impartial jury. The defendant contends, therefore, that our state constitution prohibits the exercise of peremptory challenges based on a venireperson's distrust of the criminal justice system or law enforcement.[20] In

jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law . . . . In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."

Article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

[20] We note that the defendant did not claim at trial that distrust of the criminal justice system was not a race neutral reason under either the state or federal constitution for the peremptory challenges of N.L and C.J. Although unpreserved, the defendant's constitutional claims nevertheless are reviewable under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *Golding* requires the following conditions to be met in order for a defendant to prevail on a claim of constitutional error not preserved at trial: "(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." (Footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, supra, 781.

The state asserts, however, that the defendant's claim has "no basis in fact" and, thus, is not reviewable under *Golding* because "neither N.L. nor C.J. was excused on the basis of distrust of the criminal justice system born of personal experience." The record does not support this argument. The prosecutor's stated reasons for excusing both N.L. and C.J. expressly included, to some extent, their distrust or resentment of the police or the criminal justice system. In exercising a peremptory challenge to N.L., the prosecutor referenced N.L.'s criminal history and reluctance to discuss her prior arrest, as well as her *resentment* toward the police. Similarly, the prosecutor referenced C.J.'s apparent reluctance to discuss his criminal record, as well as his belief that he was not "correctly accused or rightfully charged" of assaulting a police officer. We therefore disagree with the state's argument that there is no basis in fact for the defendant's claim that both venirepersons were excused because of their distrust of the criminal justice system.

response, the state argues that an absolute bar to challenging any venireperson who expresses distrust in the criminal justice system presents an unworkable approach that is not supported by the text of the applicable state constitutional provisions. The state further argues that we should exercise decisional restraint in light of the recent findings and recommendations of the Jury Selection Task Force (Task Force), including the Task Force's proposed change to the rules of practice, which was pending before the Rules Committee of the Superior Court (Rules Committee) when this appeal was argued and has since been submitted for a public hearing before the judges of the Superior Court. Although the defendant's arguments are compelling in light of recent case law and research concerning the effect of implicit bias, we nevertheless agree with the state that restraint is warranted at this time with respect to the adjudication of this issue as a matter of state constitutional law.

In determining that our state constitution in some instances provides greater protection than that provided by the federal constitution, "we have recognized that [i]n the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut constitution—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 155–56, 957 A.2d 407 (2008).

"In *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we enumerated the following six factors to be considered in construing the state constitution: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears;

(4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. . . .

"The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party . . . can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. . . . [N]ot every *Geisler* factor is relevant in all cases. . . . Moreover, a proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party's state constitutional claim; a deeper review of those decisions' underpinnings is required because we follow only persuasive decisions. . . . The *Geisler* analysis applies to cases in which the state constitution has no federal analogue, as well as those in which the claim is that the state constitution provides greater protection than does the federal constitution." (Citations omitted; internal quotation marks omitted.) *Fay* v. *Merrill*, 338 Conn. 1, 26–27, 256 A.3d 622 (2021); see, e.g., *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

1

Constitutional Language

We begin with the first *Geisler* factor, namely, the relevant constitutional text. See, e.g., *Feehan* v. *Marcone*, supra, 331 Conn. 450–51; *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 409–10, 119 A.3d 462 (2015). Article first, § 19, of the Connecticut constitution, as amended by article four of the amend-

ments, provides in relevant part: "The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law . . . . In all civil and criminal actions tried by a jury, *the parties shall have the right to challenge jurors peremptorily*, the number of such challenges to be established by law. *The right to question each juror individually by counsel shall be inviolate*." (Emphasis added.) We conclude that this *Geisler* factor does not favor either party because "this generally phrased constitutional language is at best ambiguous with respect to the constitutional issue presented in this appeal." *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 409; see id., 409–10 (concluding that " 'without . . . delay' " language in article first, § 10, was ambiguous as to whether undue delay in administration of justice is unconstitutional).

The defendant argues that, because article first, § 19, of the Connecticut constitution, unlike the applicable provisions of the federal constitution that govern criminal jury trials,[21] specifically references the right to peremptory challenges, a more expansive right to an inclusive jury is available under the state constitution. We agree with the defendant that Connecticut's constitution provides an express right to peremptory challenges, which the federal constitution does not guarantee, and that "[j]ury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8 . . . ."

[21] The fifth amendment to the United States constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 1 of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

(Footnote omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 248 Conn. 39, 46, 726 A.2d 513 (1999). However, even when read in the context of the state constitution's equal protection clause; see Conn. Const. art. I, § 20; the plain language of article first, § 19, sheds no light on the scope of permissible reasons for peremptory challenges under the state constitution; its breadth could also be understood *not* to warrant additional restrictions on a litigant's exercise of that right to exercise peremptory challenges. Put differently, the text of the applicable provisions of the Connecticut constitution does not provide guidance as to whether particular reasons for peremptory challenges are constitutional and, therefore, neutral with respect to whether distrust of law enforcement or the criminal justice system is a constitutionally valid, race neutral reason for the exercise of a peremptory challenge. Accordingly, with the text being not dispositive, we continue with our review of the other *Geisler* factors. See, e.g., *Fay* v. *Merrill*, supra, 338 Conn. 36.

2

Constitutional History

Neither party has cited any historical source that discusses negative perceptions of the criminal justice system or law enforcement as an unconstitutionally discriminatory ground on which to base a peremptory challenge. Although it is of limited value to our inquiry in this case, we now briefly consider the history of voir dire and peremptory challenges under the Connecticut constitution generally. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 410–11. The right to a trial by jury was established in Connecticut as early as 1636. See W. Horton, The Connecticut State Constitution (2d Ed. 2012) p. 90. "Prior to the adoption of the fourth amendment to Connecticut's constitution, article first, § 19 provided only that '[t]he right of trial

by jury shall remain inviolate.' In 1971, in response to the increasing congestion of court dockets and mounting court costs, the legislature proposed a constitutional amendment to permit mandatory [six person] juries in place of [twelve person] juries in certain circumstances. . . . In order to preserve what the legislature perceived as the fundamental character of jury trials, however, the proposed amendment contained two provisions guaranteeing that parties would continue to have certain rights, previously granted only by statute, regarding the selection of individual jurors. As adopted by the electors of Connecticut in 1972, the amendment constitutionalized the right of the parties 'to challenge jurors peremptorily' and the right 'to question each juror individually by counsel.' " (Citations omitted; footnote omitted.) *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 391–92, 589 A.2d 363 (1991). This amendment, however, predated the United States Supreme Court's decision in *Batson* by fourteen years.

"The purpose and effect of [article first, §§ 8 and 19] is to preserve . . . as a political right the institution of jury trial, *in all its essential features as derived from our ancestors and* [*existent*] *by force of our common law.*" (Emphasis in original; internal quotation marks omitted.) *State* v. *Griffin*, 251 Conn. 671, 694, 741 A.2d 913 (1999). A discussion by Chief Justice Zephaniah Swift, written in 1822, describes the ways in which an impartial jury may be secured and demonstrates that such challenges to venirepersons were intended to exclude jurors with bias, including bias resulting from favor or enmity toward either party: "Challenges to the polls, or to particular jurors, are [1], the want of qualifications, [2] for crimes, and [3] for partiality. . . .

"[3] A juror may be challenged for suspicion of bias, or partiality, which may be either a principal challenge, or a challenge to the favour.

* * *

"Challenges to the favour, are founded merely on probable circumstances of suspicion, as *particular friendship or enmity to either of the parties*: and where the court has reason to think that there is such a bias or prejudice on the mind of a juror, as renders it probable there will not be a candid and fair trial, they have a discretionary power to dismiss him . . . but they ought not to indulge any unreasonable and groundless suspicion of the party." (Emphasis added; footnotes omitted.) 1 Z. Swift, A Digest of the Laws of the State of Connecticut (1822) pp. 737–38; accord *State* v. *Griffin*, supra, 251 Conn. 693–94. Although Chief Justice Swift's discussion is interesting to the extent that he observes that contemplated sources of unwanted bias, justifying exclusion of a juror from service, could well include enmity toward a party to the case, the value of his insights with respect to the *Batson* inquiry in this case is ultimately diminished by the fact that, in his time, only landowning males were qualified to serve as jurors. See 1 Z. Swift, supra, p. 737. Thus, historical insights into the intentions of our constitutional forebears are not particularly instructive with respect to the defendant's state constitutional claim.

3

Federal Precedent

Federal precedent does not support the defendant's claim with respect to the disparate impact of a peremptory challenge based on a prospective juror's distrust of law enforcement and the criminal justice system. "In *Hernandez* [v. *New York*, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)], the United States Supreme Court concluded that a prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern

that bilingual jurors might have difficulty accepting the court interpreter's official translation of multiple witnesses' testimony given in Spanish. . . . In so concluding, the Supreme Court rejected the argument that the prosecutor's reasons, if assumed to be true, were not race neutral and thus violated the equal protection clause as a matter of law because of their disproportionate impact on Latino jurors." (Citation omitted.) *State* v. *Holmes*, supra, 334 Conn. 228. "[T]he only post-*Hernandez* cases we have located on [whether distrust of law enforcement or the criminal justice system is not a race neutral reason under *Batson* for exercising a peremptory challenge] have expressly rejected this disparate impact argument."[22] Id., 231–32. Moreover, the

[22] See *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) ("[a prospective] juror's bias or dissatisfaction with law enforcement is a [race neutral] reason for striking the juror" (internal quotation marks omitted)); *United States* v. *Brown*, 809 F.3d 371, 376 (7th Cir.) ("we have acknowledged that bias against law enforcement is a legitimate [race neutral] justification"), cert. denied, 578 U.S. 977, 136 S. Ct. 2034, 195 L. Ed. 2d 219 (2016); *United States* v. *Alvarez-Ulloa*, 784 F.3d 558, 567 (9th Cir. 2015) (distrust of law enforcement is valid ground for peremptory strike); *United States* v. *Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011) ("[the prospective juror's] concern about 'rogue police officers,' and a 'bad experience' with law enforcement that '[l]eft a bad taste' . . . provided a [race neutral] explanation for the prosecution's decision to strike her" (citation omitted)), aff'd sub nom. *Smith* v. *United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); *United States* v. *Gamory*, 635 F.3d 480, 496 (11th Cir.) (noting that "[the prospective juror] harbored doubts about her ability to be impartial based [on] her belief that her brother had been the victim of police brutality" and that this characteristic "is [not] peculiar to any race"), cert. denied, 565 U.S. 1080, 132 S. Ct. 826, 181 L. Ed. 2d 527 (2011); *United States* v. *Carter*, 111 F.3d 509, 511–12 (7th Cir. 1997) (prior negative experience with law enforcement was race neutral reason to exclude prospective juror); *United States* v. *Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) (prospective juror's potential prejudice against law enforcement was race neutral reason to exclude him); *United States* v. *Thomas*, Docket No. 2:19-cr-00461-LSC-JHE-3, 2021 WL 76562, *5–6 (N.D. Ala. January 8, 2021) (rejecting defendant's argument that fear or distrust of law enforcement is not race neutral reason for peremptory challenge); *Jordan* v. *Lefevre*, 22 F. Supp. 2d 259, 272 (S.D.N.Y. 1998) ("[n]egative experience with law enforcement has been found to constitute a [race neutral] factor for peremptorily challenging a [prospective] juror"), rev'd in part on other grounds, 206 F.3d 196 (2d Cir. 2000).

defendant has not cited any concurrences, dissents, or other federal authority on point. Therefore, this *Geisler* factor does not support the defendant's state constitutional claim.

4

Connecticut Precedent

The defendant begins his analysis of Connecticut precedent with well established case law from this court construing the due process protections under article first, § 8, of the Connecticut constitution not to impose the same meaning and limitations as its federal counterpart. See, e.g., *State* v. *Morales*, 232 Conn. 707, 717–18, 657 A.2d 585 (1995). He then contends that we should extend a greater state constitutional protection against racial bias in the exercise of peremptory challenges. Although we agree with the defendant that our state constitution affords greater protections to peremptory challenges than is provided by the federal constitution, that does not—without more—resolve the question of whether particular reasons for striking jurors are race neutral as a matter of state constitutional law.

As the defendant acknowledges, a line of Connecticut cases has addressed whether a prosecutor's reason for a peremptory challenge is race neutral if there is a disparate impact on jurors of a certain racial group. For instance, in *State* v. *Smith*, 222 Conn. 1, 14, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992), this court recognized that prosecutors commonly seek to exclude from juries those individuals who have had negative interactions with law enforcement "because they fear that such people will be biased against the government." The court "decline[d] to ascribe a racial animus to the state's excusal of a venireperson with an arrest record simply because that venireperson was [B]lack." Id.; see *State* v. *King*, 249 Conn. 645, 666, 735 A.2d 267 (1999) (prosecutor's rea-

sons for striking venireperson were "not motivated by discriminatory considerations" because "it was reasonable for the prosecutor to conclude that [the prospective juror's] concerns about the fairness of the criminal justice system might make it difficult for him to view the state's case with complete objectivity"); *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531 (venireperson's past experiences with law enforcement and perception that family had been treated unfairly were race neutral reasons for state to exercise peremptory challenge), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999); *State* v. *Jackson*, 73 Conn. App. 338, 350–51, 808 A.2d 388 (rejecting defendant's disproportionate impact argument against prosecutor's race neutral explanations), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002), and cert. denied, 262 Conn. 930, 814 A.2d 381 (2002); *State* v. *Morales*, 71 Conn. App. 790, 807, 804 A.2d 902 (prospective juror's "negative opinion concerning police performance" was valid, nondiscriminatory reason for peremptory challenge), cert. denied, 262 Conn. 902, 810 A.2d 270 (2002).

Beyond this line of cases, this court has previously held—in a decision that the defendant asks us to overrule—that there is "nothing in the language of article first, § 8, to suggest that the meaning of the term 'impartial jury' in our state constitution is different from the meaning of that same term in the federal constitution—namely, a jury that is: (1) composed of individuals able to decide the case solely on the evidence and [to] apply the law in accordance with the court's instructions; and (2) properly selected from venire panels comprising a representative cross section of the community." *State* v. *Griffin*, supra, 251 Conn. 691–92; see id., 708–709 ("the death qualification process" does not violate capital defendant's state constitutional right to impartial jury). Moreover, in discussing the purpose of voir dire leading to a challenge for cause or peremptory chal-

lenge, we have observed that, especially with respect to criminal defendants, "[i]f there is any likelihood that some prejudice is in the juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice." (Internal quotation marks omitted.) Id., 698–99.

In asking us to overrule or limit this line of cases, the defendant relies heavily on criticisms, in recent opinions of this court and the Appellate Court, of the adequacy of *Batson* as a remedy for disparate impact and implicit bias within the jury selection process.[23] In *Holmes*, we recently stated that, "[a]lthough *Batson* has serious shortcomings with respect to addressing the effects of disparate impact and unconscious bias, we decline to throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." (Internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 245; see also *State* v. *Holmes*, 176 Conn. App. 156, 192–93, 169 A.3d 264 (2017) (*Lavine*, *J.*, concurring) (urging reform of *Batson* procedures "because this case brings into sharp relief a serious flaw in the way *Batson*

[23] The defendant also relies on this court's decision in *State* v. *Brown*, 232 Conn. 431, 451, 656 A.2d 997 (1995), which held that the impartial jury provision of article first, § 8, "requires the trial court to ensure that a jury remains impartial and unprejudiced throughout the trial," in tasking our trial judges with "an independent obligation" to investigate by holding an evidentiary hearing when alerted of juror misconduct. That decision was, however, superseded after an en banc rehearing by this court in *State* v. *Brown*, 235 Conn. 502, 525–26, 668 A.2d 1288 (1995), which retreated from the state constitutional analysis and utilized the court's supervisory authority to mandate only a preliminary inquiry into juror misconduct, the scope of which remains within the trial court's discretion. See id., 537–38 (*Berdon*, *J.*, dissenting) (criticizing majority's conclusion that hearing was required under supervisory authority, rather than state constitution, given that "the jury is a bedrock of our democracy" and that "the allegations involved the jury's possible exposure to racist remarks made by the court's own sheriffs").

has been, and can be, applied," which "must be remedied if the jury selection process is to attain the goal of producing juries representing all of the communities in our state and gaining their confidence and trust"), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). We then announced the creation of the Task Force, to be appointed by the Chief Justice; *State* v. *Holmes*, supra, 334 Conn. 250; anticipating that it would "propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232 (c),[24] which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination." (Footnote in original.) Id., 251–52.

Notwithstanding past precedent in this state rejecting disparate impact arguments in the context of jury selec-

[24] "General Statutes § 51-232 (c) provides: 'The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record.' " *State* v. *Holmes*, supra, 334 Conn. 251–52 n.27.

tion, we conclude that the state precedent factor has recently shifted in light of this court's resolve in *Holmes* to ensure the impartiality of juries by addressing the problems of implicit bias and disparate impact during jury selection. Our recent criticism of the shortcomings of the *Batson* process in *Holmes*, with concrete action taken by the formation of the Task Force, supports the conclusion that Connecticut's case law has squarely identified the ineffectiveness of *Batson* in addressing the effects of implicit bias and disparate impact on the rights of members of minority communities during the jury selection process. This concern remains salient, notwithstanding our conclusion in part I B of this opinion that the prosecutor's reasons for the peremptory challenges at issue in this case were not a pretext for racial discrimination.

5

Sister State Precedent

The defendant does not cite any sister state court decision that has held, as a matter of state constitutional law, that a negative perception of law enforcement or the criminal justice system is a facially discriminatory reason to exclude a venireperson under the second step of *Batson*. Indeed, a review of sister state court decisions reveals the opposite. See *People* v. *Hardy*, 5 Cal. 5th 56, 81, 418 P.3d 309, 233 Cal. Rptr. 3d 378 (2018) ("[a] prospective juror's distrust of the criminal justice system is a [race neutral] basis for his excusal" (internal quotation marks omitted)), cert. denied, U.S. , 139 S. Ct. 917, 202 L. Ed. 2d 648 (2019); *State* v. *Mootz*, 808 N.W.2d 207, 219 (Iowa 2012) ("[Iowa] cases have repeatedly noted that a juror's interactions with law enforcement and the legal system are a valid, [race neutral] reason for a peremptory challenge"); *State* v. *Pendleton*, 725 N.W.2d 717, 727 (Minn. 2007) ("we are not persuaded that the state's reference to the prospec-

tive juror's equivocal feeling toward [the] police, as a result of her negative encounter with the [Willmar, Minnesota] police, is evidence that the state racially discriminated against the prospective juror by exercising a peremptory challenge"); *State* v. *Nave*, 284 Neb. 477, 487–88, 821 N.W.2d 723 (2012) (" 'heightened distrust of law enforcement personnel' " was race neutral reason for peremptory challenge), cert. denied, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

Some states—consistent with our decision in *Holmes*—have elected to address the failings of *Batson* through means other than construing state constitutional provisions to demand other protections. Leading the way is the Washington Supreme Court's decision in *State* v. *Saintcalle*, 178 Wn. 2d 34, 309 P.3d 326, cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013), which upheld "the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge, but also [took] the 'opportunity to examine whether [Washington's] *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries' . . . by convening a work group of relevant stakeholders to study the problem and [to] resolve it via the state's rule-making process, which is superintended by that court." (Citation omitted.) *State* v. *Holmes*, supra, 334 Conn. 246–47. Washington's highest court subsequently adopted a comprehensive rule of practice, Washington General Rule 37, which eliminated *Batson*'s requirement of purposeful discrimination in the use of peremptory challenges. See Wn. Gen. R. 37 (e). Instead, General Rule 37 asks only whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge"; Wn. Gen. R. 37 (e); and lists a number of reasons that are presumptively invalid, including a distrust of law enforcement. See Wn. Gen. R. 37 (h); see also *State* v.

Holmes, supra, 334 Conn. 247–49 n.23 (providing full text of General Rule 37). The highest courts of New Jersey and Utah have also recently directed consideration of rule based remedies for disparate impact discrimination in jury selection.[25] See *State* v. *Andujar*, 247 N.J. 275, 317–18, 254 A.3d 606 (2021); *State* v. *Aziakanou*, 498 P.3d 391, 407 n.12 (Utah 2021).

Nevertheless, our independent research has revealed two recent state supreme court decisions that support the defendant's argument. Most recently, in *State* v. *Andujar*, supra, 247 N.J. 275, which was decided after oral argument in this appeal, the New Jersey Supreme Court, while directing a rule based, systemic remedy; see id., 317–18; also relied on the equal protection and jury trial provisions in that state's constitution to conclude that "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination." Id., 303. The court observed: "From

[25] In this vein, California recently enacted legislation, signed into law on September 30, 2020, similar in substance to Washington's General Rule 37 and the rule proposed by the Task Force, that enumerates presumptively invalid reasons for the exercise of peremptory challenges. See Assembly Bill No. 3070, §§ 2 and 4 (Cal. 2020), codified at Cal. Civ. Pro. Code § 231.7 (Deering Supp. 2021). Similar legislation is pending in Massachusetts, and several other states are studying the issue through task forces or commissions. See Berkeley Law Death Penalty Clinic, "Batson Reform: State by State," available at https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited March 15, 2022).

We note that Arizona has gone one step further. The Arizona Supreme Court recently amended that state's civil and criminal rules of practice to eliminate peremptory challenges entirely. See Ariz. R. Civ. Proc. 47 (e); Ariz. R. Crim. Proc. 18.4 and 18.5; see also Berkeley Law Death Penalty Clinic, supra (noting legislation pending in New York to eliminate peremptory challenges); see also *State* v. *Holmes*, supra, 334 Conn. 254 (*Mullins*, *J.*, concurring) (suggesting "substantially restricting the use," or "substantially reduc[ing] the number," of peremptory challenges as "the next best thing" to their elimination while comporting with provision of peremptory challenges in article first, § 19, of Connecticut constitution).

the standpoint of the [New Jersey] [c]onstitution, it makes little sense to condemn one form of racial discrimination yet permit another. What matters is that juries selected to hear and decide cases are chosen free from racial bias—whether deliberate or unintentional." Id. The New Jersey court then concluded that the record demonstrated that the jury selection process in that case had been tainted by implicit bias, given the prosecutor's request of a criminal background check of a minority juror who had been seated the day before over the prosecutor's objection. Id., 312. That background check revealed that the juror had not been entirely truthful in his answers about his personal criminal history, although his criminal record would not have disqualified him from service. See id., 312–14; see also id., 308–309 (invoking supervisory authority to require "any party seeking to run a criminal history check on a prospective juror [to] first get permission from the trial court," emphasizing that "the prosecution or defense should present a reasonable, individualized, [good faith] basis to believe that a record check might reveal pertinent information unlikely to be uncovered through the ordinary voir dire process," with "mere hunches" being insufficient and reasons such as distrust of law enforcement being presumptively invalid, and affording both parties notice and opportunity to be heard).

In *State* v. *Jefferson*, 192 Wn. 2d 225, 249, 429 P.3d 467 (2018), the Washington Supreme Court appeared to exercise its authority to provide greater protections under the state constitution and modified the *Batson* framework, as applied in that state, in order to render the substance of General Rule 37, adopted after that court's decision in *State* v. *Saintcalle*, supra, 178 Wn. 2d 34, applicable in pending appeals.[26] Bearing in mind

[26] We note that the doctrinal basis for the Washington court's decision to change the *Batson* framework in *Jefferson* is not entirely clear. For the authority to do so, the court does not tie its decision to any particular provision of the Washington constitution but, instead, cites its prior decisions in *Seattle* v. *Erickson*, 188 Wn. 2d 721, 733–34, 398 P.3d 1124 (2017), and

"the pervasive force of unconscious bias"; *State* v. *Jefferson*, supra, 251; the court held that "the question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead, the relevant question is whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.' " (Emphasis in original.) Id., 249. Given the objective nature of the new standard, the court also applied de novo review in determining whether race was a factor in the state's exercise of a peremptory challenge. Id., 249–50.

Although there is a persuasive body of recent sister state case law expressing dissatisfaction with the *Batson* framework in combatting implicit bias and disparate impact effects during jury selection, those cases extending state constitutional protections to this area are factually or legally distinguishable—at least at this point. First, the New Jersey and Washington constitutions considered in *Andujar* and *Jefferson*, respectively, do not have a specific guarantee of peremptory challenges like article first, § 19, of the Connecticut constitution. Second, the Washington court's decision in *Jefferson* followed the final adoption of a court rule on this point; it rendered that rule's provisions applicable to pending cases, rather than acting in the first instance. Thus, neither decision provides overwhelming support for an ultimate conclusion that the best remedy

State v. *Saintcalle*, supra, 178 Wn. 2d 51. See *State* v. *Jefferson*, supra, 192 Wn. 2d 249. The court's decision in *Erickson* is doctrinally silent with respect to the authority for changing the *Batson* framework, itself citing only to *Saintcalle*. See *Seattle* v. *Erickson*, supra, 733–34. A review of the cited portion of *Saintcalle* reveals that the court discussed, but did need not to choose, given the rules based disposition of that case, several options for altering the *Batson* framework, including both (1) "authority under federal law to pioneer new procedures within existing [f]ourteenth [a]mendment frameworks," and (2) "greater-than-federal *Batson* protections to defendants under the greater protection afforded under [the Washington] state jury trial right . . . ." *State* v. *Saintcalle*, supra, 51.

at this time for the shortcomings of *Batson* lies in state constitutional adjudication.

6

Economic, Sociological, and Public Policy Considerations

"[T]he economic and sociological considerations factor . . . is in essence a public policy analysis . . . ." *Fay* v. *Merrill*, supra, 338 Conn. 50. The public policy arguments set forth by both parties demonstrate the complexity and importance of addressing implicit bias and disparate impact in the jury selection process. As this court previously recognized, there are significant public policy and sociological reasons to support the conclusion that a negative perception or distrust of law enforcement or the criminal justice system is not a race neutral reason to exclude a venireperson, given the disparate impact that such a reason has on racial minorities. See *State* v. *Holmes*, supra, 334 Conn. 236–37. As we stated in *Holmes*, the *Batson* framework has widely been considered "a toothless tiger when it comes to combating racially motivated jury selection . . . ." Id., 236.

The report of the Task Force commissioned in *Holmes* demonstrates the present failings of the *Batson* framework. The report emphasizes the Task Force's conclusion that implicit bias and disparate impact " 'raise extremely serious concerns with respect to the public perception and fairness of the criminal justice system.' " Jury Selection Task Force, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (December 31, 2020) p. 19, available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf (last visited March 15, 2022), quoting *State* v. *Holmes*, supra, 334 Conn. 234. The Task Force therefore proposed a new rule of practice to address the role of implicit bias and disparate impact insofar as they both contribute to the

exclusion of potential jurors on the basis of race or ethnicity, particularly with respect to the exercise of peremptory challenges.[27] Jury Selection Task Force, supra, p.

[27] The proposed rule provides in relevant part: "(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based upon race or ethnicity.

"(b) Scope; Appellate Review. The rule applies to all parties in all jury trials. The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard. The reviewing court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to, or consider reasons, that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors, who are not members of the same protected group as the challenged juror. Should the reviewing court determine that the objection was erroneously denied, then the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

"(c) Objection. A party may object to the use of a peremptory challenge to raise a claim of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the prospective juror.

"(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reason that the peremptory challenge has been exercised.

"(e) Determination. The court shall then evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason, or from conducting further voir dire of the prospective juror.

"(f) Nature of Observer. For the purpose of this rule, an objective observer (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g) herein.

"(g) Circumstances considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory

20. The new rule would replace Connecticut's modified, three step *Batson* test with a wholly different methodol-

challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

"(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge: (1) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

"(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above . . . shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (h).

"(j) Review Process. The chief justice shall appoint an individual or individuals to monitor issues relating to this rule." Jury Selection Task Force, supra, pp. 16–18.

ogy, eliminating the necessity of proving purposeful discrimination and considering, instead, whether "the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge . . . ." Id., p. 16. The Task Force's proposed rule would require trial judges to articulate their reasoning in ruling on peremptory challenges and would deem certain reasons for peremptory challenges presumptively invalid. Id. It also would provide a new standard of appellate review applicable to claims of racial or ethnic discrimination in jury selection. Id.

Principles of judicial restraint counsel against this court making a sweeping constitutional pronouncement when the process of addressing the deficiencies of *Batson* is ongoing through the rule-making process, superintended by the Rules Committee. Cf. *State* v. *Lockhart*, 298 Conn. 537, 561, 4 A.3d 1176 (2010) (declining to impose electronic recording requirement during custodial interrogations that was not mandated by state constitution because legislature is better suited to decide policy). The Rules Committee, which has the ability to conduct hearings and to respond to the positions of the various stakeholders before recommending action by the judges of the Superior Court,[28] "is charged . . . with the responsibility of formulating rules of practice and procedure that directly control the conduct of litigation. It sets the parameters of the adjudicative process that regulates the interactions between individual liti-

[28] "The Rules Committee is a body composed of judges of the Superior Court. Its function is to consider proposed changes in the rules of practice for the Superior Court, and to recommend amendments to the Practice Book, which may be adopted by vote of the Superior Court judges. Once proposed Practice Book amendments have been approved by the Rules Committee, they are published in the Connecticut Law Journal, and are subject to public comment before their adoption by the judges." *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 237, 472 A.2d 9 (1984).

gants and the courts." *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 246, 472 A.2d 9 (1984). On December 13, 2021, the Rules Committee voted to submit the Task Force's proposed rule for a public hearing prior to consideration by the judges of the Superior Court. See Rules Committee of the Superior Court, Minutes of the Meeting (December 13, 2021) p. 2, available at https://www.jud.ct.gov/Committees/rules/rules_minutes_121321.pdf (last visited March 15, 2022). Thus, although the public policy factor weighs substantially in favor of an alteration to the *Batson* analysis, it does not support the defendant's claim that such a remedy requires us to resort immediately to new constitutional standards. A restrained approach is prudent in these circumstances, particularly given the ongoing rule-making process previously set into motion by the comprehensive report and recommendation of the Task Force.

Having reviewed the relevant case law and materials revealed by our *Geisler* analysis, we are not prepared to conclude, on this record, that a prosecutor's exercise of a peremptory challenge on the basis of a venireperson's negative perceptions or distrust of law enforcement or the criminal justice system constitutes an impermissible, race based reason under the Connecticut constitution pursuant to the second step of the *Batson* inquiry. Without making any final pronouncement on the matter, or issuing a determination applicable to any and all factual scenarios involving the exercise of peremptory challenges on the basis of negative perceptions of this nature, we are disinclined on the present record to hold that greater protection is warranted under the Connecticut constitution than is provided under the existing federal *Batson* scheme.

B

Pretext Analysis Under the Third Prong of *Batson*

We now turn to the third step of the *Batson* inquiry to determine whether the reasons provided by the pros-

ecutor in exercising peremptory challenges were pretexts for purposeful discrimination.[29] See, e.g., *State* v. *Edwards*, supra, 314 Conn. 493. We begin by setting forth the standard of review. "The third *Batson* step . . . requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous."[30] (Internal quota-

[29] The state argues that "the defendant's claim of pretext is inadequately briefed and deficient because he has failed to demonstrate that [the] trial court's finding of no pretext is clearly erroneous on the basis of the entire . . . record." (Emphasis omitted.) We disagree. The defendant's brief spends several pages analyzing the record and comparing the voir dire of C.J. in particular to that of several other venirepersons in an attempt to establish pretext. But cf. *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015) (claim was inadequately briefed when appellants undertook "no analysis or application of the law to the facts of [the] case"); *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Citations omitted; internal quotation marks omitted.)).

[30] As we noted previously, after oral argument in this appeal, we ordered supplemental briefing and invited amicus curiae briefs on whether we should adopt the standard of appellate review proposed by the Task Force, which would provide for de novo review of denials of objections to peremptory challenges, with the exception of express factual findings that would remain subject to the clearly erroneous standard of review. See footnotes 8 and 27 of this opinion. Having considered these thoughtful briefs, we are constrained to agree with the state's argument that it would be premature to adopt this standard of appellate review before the judges of the Superior Court take action with respect to the rule of practice proposed by the Task Force, which the Rules Committee has voted to send for a public hearing in advance of action by the judges of the Superior Court. Accordingly, at this time, we decline to adopt the de novo standard of review in the absence of any change to the substantive *Batson* inquiry, and we leave that issue for another day.

tion marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 226.

"In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias [when] the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation in light of all the other evidence relevant to [a party's] intent. The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt

raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination." (Internal quotation marks omitted.) Id., 224–25.

The defendant first argues that the prosecutor's questioning of both N.L. and C.J. was uniquely targeted in his focus on their respective criminal histories. Specifically, concerning C.J., defense counsel argued during voir dire, echoed in the defendant's brief on appeal, that the prosecutor's questions to C.J. about his convictions and the answers in his juror questionnaire were more extensive than those posed to other jurors. In response, the state argues that the prosecutor's extended questioning of C.J. regarding his criminal history was a product of his incomplete juror questionnaire and the "piecemeal disclosure" of his criminal history. Similarly, the trial court noted that the questioning of C.J. was consistent with the questioning of other jurors.

We conclude that the trial court did not commit clear error in determining that the race neutral reasons proffered by the prosecutor were not a pretext for impermissible discrimination. The record demonstrates that the prosecutor asked each potential juror if they, or someone who was close to them, had ever been arrested or charged with a crime. The state further points out that each affirmative response was followed by questions regarding the details of that arrest or charge and whether it would influence that venireperson in his or her service as a juror. Although the questioning regarding C.J.'s criminal history was more extensive, the record indicates that the more extensive questioning reflected the

incomplete answers that C.J. had provided both during voir dire and in his juror questionnaire.

The defendant further points out that, of the four venirepersons who admitted to having previously been arrested, the state exercised three peremptory challenges, and the court dismissed the fourth for cause. The record does not indicate the races of those venirepersons, other than C.J. and N.L.,[31] and, therefore, it does not support an inference or a pattern of the prosecutor's exclusion of potential jurors of a particular race. Indeed, no *Batson* claim was raised with respect to either of the other jurors with criminal histories excused by the prosecutor's peremptory challenges. Accordingly, we conclude that the trial court did not commit clear error in determining that the defendant failed to meet his burden of proving, by a preponderance of the evidence, that the jury selection process in his case was tainted by purposeful discrimination.

II

DOUBLE JEOPARDY CLAIMS

The defendant next claims that his right to be free from double jeopardy was violated as a result of his conviction of two counts of risk of injury to a child in violation of § 53-21 (a) (2), in addition to his conviction of sexual assault in the first degree in violation of § 53a-70 (a) (2), attempt to commit sexual assault in the first degree in violation of §§ 53a-70 (a) (2) and 53a-49 (a) (2), and sexual assault in the fourth degree in violation of § 53a-73 (a) (1) (A).[32] See footnotes 2, 5, 6 and 7 of this opinion (relevant text of statutory provisions). Relying on the Appellate Court's decision in *State* v.

[31] See footnote 9 of this opinion.

[32] Because this double jeopardy claim was not raised at trial, we review it—at the unopposed request of the defendant—pursuant to *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). See footnote 20 of this opinion.

Tinsley, 197 Conn. App. 302, 232 A.3d 86 (2020), rev'd, 340 Conn. 425, 264 A.3d 560 (2021), the defendant asserts that, as charged in the information, it is not possible to commit the offenses of sexual assault in the first and fourth degrees without having already committed risk of injury to a child and, therefore, that risk of injury to a child is a lesser included offense of both sexual assault charges, as described in the information. In response, the state relies heavily on this court's decision in *State* v. *Alvaro F.*, 291 Conn. 1, 10, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009), and argues that, even if it is assumed that the offenses arose out of the same act or transaction, they are not the "same offense" under the well established standard set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Guided by our recent decision in *State* v. *Tinsley*, 340 Conn. 425, 264 A.3d 560 (2021), which reversed the Appellate Court's decision on which the defendant relies; id., 428; we conclude that the defendant's right against double jeopardy was not violated because the offenses of sexual assault in the first and fourth degrees contain distinct elements from that of risk of injury to a child, rendering them not greater and lesser included offenses.

We first address the appropriate standard of review. "A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omit-

ted.) *State* v. *Porter*, 328 Conn. 648, 654–55, 182 A.3d 625 (2018).

"Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [When] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 655; see *State* v. *Miranda*, 260 Conn. 93, 125, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); *State* v. *Goldson*, 178 Conn. 422, 424, 423 A.2d 114 (1979).

For purposes of the present analysis, we assume, without deciding, that step one of the *Blockburger* analysis is met, that is, that the state alleged in its information that the offenses in question arose from the same act or transaction. We therefore turn to the defendant's argument under step two, that is, that risk of injury to a child is a lesser included offense of sexual assault in the first and fourth degrees.

"Our case law has been consistent and unequivocal" that the second step of *Blockburger* "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.)

State v. *Porter*, supra, 328 Conn. 656; see, e.g., *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). When conducting this analysis, "we are concerned with theoretical possibilities, and do not focus on the evidence presented." (Internal quotation marks omitted.) *State* v. *Mezrioui*, 26 Conn. App. 395, 403–404, 602 A.2d 29, cert. denied, 224 Conn. 909, 617 A.2d 169 (1992).

The defendant argues that, notwithstanding the distinct elements of each offense charged, risk of injury to a child is a lesser included offense of sexual assault in the first and fourth degrees because of how each charge was alleged in the information. We recently rejected this argument in *State* v. *Tinsley*, supra, 340 Conn. 434. In *Tinsley*, we clarified that "the 'manner described in the information' is relevant in determining whether one crime is a lesser included offense of another only to the extent the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than to determine the particular factual predicate of the case." Id., 442. Therefore, we now consider the elements of each charge and consider whether each contains an element that the other does not.

In the present case, the defendant was convicted of first degree sexual assault in violation of § 53a-70 (a) (2), which requires the state to prove that (1) the defendant "engage[d] in sexual intercourse with another person," (2) "such other person is under thirteen years of age," and (3) "the [defendant] is more than two years older than such person . . . ." The defendant was also convicted of fourth degree sexual assault in violation of § 53a-73a (a) (1) (A). The state had to prove that "(1) the defendant intentionally subjected, (2) a person under the age of fifteen years, (3) to sexual contact. The term [s]exual contact for the purposes of § 53a-

73a is further defined as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 10. Finally, the defendant was charged with risk of injury to a child in violation of § 53-21 (a) (2). "To convict the defendant of risk of injury to a child under § 53-21 [a] (2), the state must prove that (1) the defendant had contact with the intimate parts of, or subjected to contact with his intimate parts, (2) a child under the age of sixteen years, (3) in a sexually and indecent manner likely to impair the health or morals of such child." (Internal quotation marks omitted.) Id.; accord *State* v. *Bletsch*, 281 Conn. 5, 28, 912 A.2d 992 (2007).

"Our courts have addressed the relationship between risk of injury to a child and the various degrees of sexual assault in the context of double jeopardy claims on several occasions, each time concluding that the two crimes do not constitute the same offense"; *State* v. *Alvaro F.*, supra, 291 Conn. 7; and we decline to come to a different conclusion in the present case.[33] See id., 9 (convictions of risk of injury to child and fourth degree sexual assault did not violate prohibition against double jeopardy); *State* v. *Bletsch*, supra, 281 Conn. 28–29 (sexual assault in second degree and risk of injury to child are not same offense because language of two statutes makes it possible to have "sexual intercourse" under General Statutes § 53a-71 (a) without touching victim's

[33] As this court noted in *Alvaro F.*, although the prior cases addressing this question involved the pre-1995 amendments to § 53-21, their reasoning remains relevant and persuasive. See *State* v. *Alvaro F.*, supra, 291 Conn. 8–9; see also footnote 2 of this opinion.

"intimate parts" under General Statutes (Rev. to 1999) § 53-21 (2), and vice versa); *State* v. *Ellison*, 79 Conn. App. 591, 602, 830 A.2d 812 (sexual assault in second degree and risk of injury to child are not same offense because sexual assault in second degree does not require contact to be " 'in a sexual and indecent manner likely to impair the health or morals of such child' "), cert. denied, 267 Conn. 901, 838 A.2d 211 (2003); *State* v. *Morris*, 49 Conn. App. 409, 419, 716 A.2d 897 ("the element of 'sexual contact,' included within the offense of sexual assault in the fourth degree, is not necessarily equivalent to the touching of the private parts of a child in a ' "sexual and indecent manner" ' . . . prohibited by the risk of injury to a child statute" (citation omitted)), cert. denied, 247 Conn. 904, 720 A.2d 516 (1998); see also *State* v. *James*, 211 Conn. 555, 586, 560 A.2d 426 (1989) ("[S]pecific intent is not an element of the crime defined in the second part of § 53-21 . . . . Only an intention to make the bodily movement [that] constitutes the act [that] the crime requires, which we have referred to as a general intent, is necessary." (Citations omitted; internal quotation marks omitted.)); *State* v. *Perruccio*, 192 Conn. 154, 162, 471 A.2d 632 ("sexual assault in the fourth degree and risk of injury [to a child] each require proof of an element not required by the other"), appeal dismissed, 469 U.S. 801, 105 S. Ct. 55, 83 L. Ed. 2d 6 (1984); *State* v. *Shaw*, 186 Conn. 45, 51, 438 A.2d 872 (1982) (sexual assault in fourth degree requires additional specific intent element that risk of injury to child does not).

Sexual assault in the first degree in violation of § 53a-70 (a) (2) requires proof that the defendant engaged in sexual intercourse with the victim and was more than two years older than the victim. Sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) requires proof that the defendant intentionally subjected someone under the age of fifteen to sexual contact. Risk of injury to a child in violation of § 53-21 (a)

(2) contains neither of those elements. In contrast, that statute requires proof only that the child was under the age of sixteen and that the defendant had contact with the child in a manner likely to impair the child's health or morals. From the statutory language, it is evident that each charge contains an element of proof that the other does not. Therefore, neither of the offenses constitutes a greater or lesser included offense of the other.

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 326, 163 A.3d 581 (2017); see *State* v. *Tinsley*, supra, 340 Conn. 445–46. The defendant in the present case, however, does not argue that the legislature intended to treat §§ 53a-70 (a) (2) and 53a-73a (a) (1) (A), on the one hand, and § 53-21 (a) (2), on the other, as the same offense for double jeopardy purposes. Accordingly, we conclude that, because §§ 53a-70 (a) (2) and 53a-73a (a) (1) (A), and § 53-21 (a) (2) are not the same offense for double jeopardy purposes, the defendant's conviction of two counts of risk of injury does not violate his right to be free from double jeopardy.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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SHERI SPEER *v.* MICHAEL TEIGER

The plaintiff's petition for certification to appeal from the Appellate Court, 208 Conn. App. 907 (AC 38557), is denied.

Sheri Speer, self-represented, in support of the petition.

Decided March 8, 2022

CONNEX CREDIT UNION *v.* MICHELLE M. THIBODEAU

The defendant's petition for certification to appeal from the Appellate Court, 208 Conn. App. 861 (AC 43830), is granted, limited to the following issues:

"1. Did the Appellate Court properly interpret and apply the requirement of Connecticut's Uniform Commercial Code to notify a consumer-debtor that he or she has a right to an accounting of unpaid indebtedness after repossession of secured property?

"2. Under the Retail Installment Sales Financing Act, General Statutes § 36a-770 et seq., may a retail seller of a motor vehicle, after repossession and sale of the vehicle, credit a retail buyer's alleged deficiency only with the proceeds from the vehicle's sale when the prima facie fair market value of the vehicle exceeded the amount of those proceeds?"

Garrett A. Denniston, in support of the petition.

Robert C. Lubus, Jr., in opposition.

Decided March 8, 2022

STATE OF CONNECTICUT *v.* DORAINE REED

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 873 (AC 42509), is denied.

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

Richard E. Condon, Jr., senior assistant public defender, in support of the petition.

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

Decided March 8, 2022

STATE OF CONNECTICUT *v.* JAMES K.

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 441 (AC 42872), is granted, limited to the following issues:

"1. Did the trial court improperly preclude defense counsel from asking prospective jurors to express their opinions about the practice of a parent kissing his or her child on the lips, and, if the answer to that question is 'yes' and the error is subject to harmless error review, was that error harmful?

"2. Did the trial court err in not excluding a video-recorded forensic interview with the complainant when the complainant gave clear and cogent testimony at trial and the prejudicial effect of the video-recorded interview greatly outweighed its marginal probative value?"

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

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

Decided March 8, 2022

STATE OF CONNECTICUT *v.* ULYSES R. ALVAREZ

The state's petition for certification to appeal from the Appellate Court, 209 Conn. App. 250 (AC 43506), is granted, limited to the following issues:

"1. Did the Appellate Court improperly apply the constitutional harmless error standard to the trial court's failure to disclose certain sealed records under *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), instead of the standard typically used for purely evidentiary claims?

"2. Did the Appellate Court incorrectly determine that the trial court had abused its discretion in finding that evidence of the defendant's uncharged misconduct against P was not sufficiently similar to his charged conduct against the complainant, K, in this case?"

Denise B. Smoker, senior assistant state's attorney, in support of the petition.

Decided March 8, 2022

STATE OF CONNECTICUT *v.* DEJON A. SMITH

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 296 (AC 44156), is denied.

Emily H. Wagner, assistant public defender, in support of the petition.

Thadius L. Bochain, deputy assistant state's attorney, in opposition.

Decided March 8, 2022

JOSE CORDERO *v.* COMMISSIONER OF CORRECTION

The petitioner Jose Cordero's petition for certification to appeal from the Appellate Court, 209 Conn. App. 903 (AC 44193), is denied.

Jose Cordero, self-represented, in support of the petition.

Zenobia Graham-Days, assistant attorney general, in opposition.

Decided March 8, 2022

STATE OF CONNECTICUT *v.* BEN B. OMAR

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 283 (AC 44263), is denied.

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

Gary A. Mastronardi, assigned counsel, in support of the petition.

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

Decided March 8, 2022

CAROL WALZER *v.* ROY WALZER

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 604 (AC 44313), is denied.

Roy S. Walzer, self-represented party, in support of the petition.

Decided March 8, 2022

DOROTHY A. SMULLEY *v.* SAFECO INSURANCE COMPANY OF ILLINOIS ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 45002) is denied.

Dorothy A. Smulley, self-represented, in support of the petition.

Philip T. Newbury, Jr., in opposition.

Decided March 8, 2022

IN RE ONYX K.-A.

The petition of respondent mother for certification to appeal from the Appellate Court (AC 45076) is denied.

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

R. A., self-represented, in support of the petition.

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

Decided March 8, 2022

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CONNECTICUT APPELLATE REPORTS

Vol. 211

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE LUCIA C.*
(AC 44807)

IN RE CHRISTIAN C. ET AL.
(AC 44809)

Prescott, Alexander and Harper, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his three minor children, L, C, and A. Although the children's mother lived with the father and the children, the father had been the children's primary caregiver. After his conviction of sexual assault of a five year old child, for which he was sentenced to twenty-five years of incarceration, the children remained in the care and custody of the mother, who suffers from significant mental health issues. The Department of Children and Families thereafter began to receive reports that the children were abused, neglected, inadequately supervised and had inadequate shelter in their mother's care. The petitioner, the Commissioner of Children

* 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.

and Families, filed petitions for the termination of the parental rights of the father and the mother as to A, L and C. The mother consented to the termination of her parental rights. *Held* that the trial court correctly concluded that, in accordance with the applicable statute (§ 17a-112 (j) (3) (C)), the respondent father had denied his children, by an act or acts of comission or omission, the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being: as a result of the father's criminal action and prolonged incarceration, the father left his children to be abused, neglected and without adequate shelter in the custody of their mother; moreover, following the father's incarceration, each child has suffered from mental health and behavioral issues, which have required them to receive therapy and support services and to be medicated, and L and C have been hospitalized and have received psychiatric treatment; accordingly, the court reasonably determined that the cumulative effect of the evidence justified its conclusion that the father's prolonged incarceration caused his children to be neglected by their mother and, in turn, deprived them of the care, guidance, or control necessary for their well-being.

Argued January 12—officially released March 14, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, and tried to the court, *Woods*, *J.*; judgments terminating the respondents' parental rights, from which the respondent father filed separate appeals to this court; thereafter, this court consolidated the appeals. *Affirmed.*

David E. Schneider, *Jr.*, assigned counsel, for the appellant in both appeals (respondent father).

Evan M. O'Roark, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee in both appeals (petitioner).

** March 14, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PRESCOTT, J. In these consolidated appeals,[1] the respondent father, Eddie C., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights as to his three minor children, Lucia C., Christian C., and Alexander C. The respondent claims that the court improperly concluded, in accordance with General Statutes § 17a-112 (j) (3) (C), that he had denied his children, by an act or acts of commission or omission, the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being.[2] In connection with his claim, the respondent argues that the court improperly "speculat[ed]" that, because he was incarcerated following his conviction of sexual assault of a minor, his absence from his children's lives and his children being left in the custody of their mother caused his children to be denied the care, guidance, or control necessary for their well-being. We affirm the judgments of the trial court.

[1] The respondent filed two separate appeals, Docket Nos. AC 44807 and AC 44809, from the judgments of the trial court. Pursuant to Practice Book § 61-7 (b) (3), this court sua sponte ordered that the appeals be consolidated and that the respondent and the petitioner each file a single, consolidated brief and appendix.

[2] The respondent also claims on appeal that the court (1) violated his right to an "in person trial" by conducting a portion of the proceedings over the Microsoft Teams platform, rather than conducting the trial in court and in person, and (2) violated his right to due process of law by precluding him from physically confronting witnesses in court and in person when it conducted a portion of the proceedings over the Microsoft Teams platform. These claims are virtually identical to the claims that this court rejected in *In re Annessa J.*, 206 Conn. App. 572, 584–88, 260 A.3d 1253, cert. granted, 338 Conn. 904, 258 A.3d 674 (2021), cert. granted, 338 Conn. 905, 258 A.3d 675 (2021), and cert. granted, 338 Conn. 906, 258 A.3d 90 (2021). Although we note that our Supreme Court has granted certification to appeal in *In re Annessa J.*, "prior to a final determination of the cause by our Supreme Court, a decision of this court is binding precedent on this court." *State* v. *Andino*, 173 Conn. App. 851, 875 n.12, 162 A.3d 736, cert. denied, 327 Conn. 906, 170 A.3d 3 (2017). Thus, in accordance with this court's decision in *In re Annessa J.*, we reject the respondent's additional claims.

The following facts, as found by the court or as otherwise undisputed in the record, and procedural history are relevant to our resolution of this appeal. Prior to his incarceration, the respondent was his children's primary caregiver. The respondent housed, fed, clothed, and financially supported his children. In addition to providing for their basic necessities, the respondent played with his children, read to them, and played an active role in their educational and extracurricular activities. By contrast, the children's mother, Ashley C. (mother), who suffers from significant mental health issues and has been diagnosed with oppositional defiant disorder, did not show significant interest in engaging with or parenting her children, despite residing in the same home with the children. Prior to the respondent's arrest, the family was not involved with the Department of Children and Families (department).

In October, 2015, the respondent was convicted of the sexual assault of a five year old extended family member and was sentenced to twenty-five years of incarceration. His maximum release date is November 7, 2039. Following his arrest, the respondent was "afraid" that the safety of his children would be compromised in the care of their mother.

After the respondent was incarcerated, Lucia, Christian, and Alexander initially remained in the care and custody of their mother. Thereafter, the department began to receive reports of the abuse, neglect, inadequate supervision, and inadequate shelter of the children in their mother's care. Specifically, the department received reports alleging that the mother physically and verbally abused the children, including beating them, choking them, calling them by derogatory names, and threatening to abandon them. In March, 2016, for example, Christian was hospitalized due to behavioral issues and reported to medical staff that his mother repeatedly choked him following his misbehavior and told him that

she would "put him in foster care and get a new kid." Additionally, the department received reports that their home had no food or electricity and was in an unsanitary condition. During this time, the department also received reports documenting substantial deterioration in the children's emotional well-being and hygiene.[3] The mother declined to engage in parenting support services to which she had been referred by the department. Due to her noncompliance, she was discharged from these services. In sum, while the children were in her care, the mother subjected them to abuse, neglect,[4] and housing instability.

On June 7, 2016, the petitioner filed neglect petitions with respect to the three children. On September 15, 2016, the petitioner filed ex parte applications for orders of temporary custody (OTC) of the children, which the court, *Turner*, *J.*, granted. The court vested temporary custody of all three children in the petitioner. On October 14, 2016, the court vacated the existing OTC, adjudicated the children neglected, and committed Lucia and Christian to the care and custody of the petitioner. The court ordered that Alexander remain in the custody of his mother subject to a nine month period of protective supervision by the department.

In February, 2017, the department received a report concerning Alexander's hygiene and behavior at school

[3] In an affidavit dated September 15, 2016, which the court admitted into evidence during the termination of parental rights trial, a department social worker averred that she had received multiple reports from staff members of Lucia's school concerning Lucia's emotional well-being, behavior, and hygiene while she was in the care and custody of her mother. The social worker also averred that she had received a report from the principal of Christian's school that Christian exhibited emotional distress and difficulty in school while he was in the care and custody of his mother, as well as a report from a clinical social worker from Yale-New Haven Hospital concerning Christian's behavior and hygiene.

[4] At oral argument before this court, the respondent's counsel acknowledged that, in their mother's care while he was incarcerated, the children were neglected.

and an allegation that Alexander had sustained a suspicious injury. The petitioner subsequently filed an application for an ex parte OTC of Alexander, which the court, *Maronich*, *J.*, granted, as well as a motion to modify the order of protective supervision to an order of commitment of Alexander to the care and custody of the petitioner. On March 6, 2017, following a contested trial, the court, *Hon. Thomas F. Upson*, judge trial referee, vacated the OTC with respect to Alexander. On June 19, 2017, however, the court, *Turner*, *J.*, granted the motion to modify the order of protective supervision of Alexander and committed Alexander to the care and custody of the petitioner by agreement of the parties.

After removing them from the care and custody of their mother, the department placed Lucia and Alexander in various foster homes. Before eventually placing Christian in the foster home of his paternal grandfather and paternal stepgrandmother,[5] the department initially placed Christian in a residential treatment program, and he subsequently was hospitalized on numerous occasions to receive inpatient psychiatric care.[6] Following the respondent's incarceration, Christian has suffered from significant mental health issues, including adjustment disorder, attention deficit hyperactivity disorder, oppositional defiant disorder, and post-traumatic stress disorder, for which he receives therapy and is prescribed

[5] The home of Christian's paternal grandfather and paternal stepgrandmother is licensed as a family and community ties foster home.

[6] At the time of trial, each child resided in a separate foster home. Lucia resided in her foster home somewhat consistently since 2018 and has developed a trusting, positive relationship with her foster family, who have provided her with love and stability. Christian resided with his paternal grandfather and paternal stepgrandmother somewhat consistently since 2018.His paternal grandfather and paternal stepgrandmother have expressed a desire to adopt Christian, and Christian has expressed a desire to remain in their care. Alexander has developed a trusting, loving relationship with his foster mother, who has expressed an interest in adopting him, and the other children in his foster home, whom Alexander considers siblings.

medication. Likewise, following the respondent's incarceration, Lucia has been hospitalized in order to receive psychiatric care, and she has been diagnosed with acute adjustment disorder and anxiety for which she receives therapy and is prescribed medication. Following the respondent's incarceration, Alexander has struggled, and continues to struggle, with behavioral issues and emotional regulation, for which he receives therapy, receives other support, and is prescribed medication. Specifically, he exhibits impulsivity, aggression, and destructive behaviors and has been diagnosed with attention deficit hyperactivity disorder and trauma specific disorder. With respect to each child, the record reflects a significant deterioration of their well-being following the respondent's incarceration.[7]

In June, 2019, the petitioner filed petitions for the termination of the parental rights of the respondent and the mother as to Lucia, Christian, and Alexander. The mother consented to the termination of her parental rights as to each of the three children, which the court, *Grogins*, *J.*, accepted on November 27, 2019. In May and December, 2019, the respondent filed two separate motions to revoke the commitment of Lucia and Alexander to the care and custody of the petitioner and to transfer guardianship of Lucia and Alexander to the care and custody of his mother, their paternal grandmother.

The court, *Woods*, *J.*, conducted a trial concerning the petitions for the termination of the respondent's

[7] In *In re Kelly S.*, 29 Conn. App. 600, 613–16, 616 A.2d 1161 (1992), a case that the respondent heavily relies on in his appellate brief, this court determined that predictive neglect is insufficient to satisfy the commission or omission statutory ground for the termination of parental rights. Put differently, the commission or omission statutory ground "does not permit the termination of parental rights *based on speculation as to what acts may befall a child*." (Emphasis added.) Id., 614. In the present case, however, and unlike in *In re Kelly S.*, the children already have been deprived of the care, guidance, or control necessary for their well-being and have suffered psychological injury as a result of the respondent's actions.

parental rights and the motions to transfer guardianship of Lucia and Alexander to the care and custody of their paternal grandmother over a span of several nonconsecutive days between December, 2019, and March, 2021. In a memorandum of decision dated April 30, 2021, the court terminated the respondent's parental rights as to Lucia, Christian, and Alexander, denied the respondent's motions to transfer guardianship of Lucia and Alexander to their paternal grandmother, and granted the respondent posttermination visitation with the children. The court determined that the respondent, by acts of parental commission or omission, had denied his children the care, guidance, or control necessary for their physical, educational, moral, and emotional well-being. The court's memorandum of decision is not entirely clear as to which acts of commission or omission the court identified. In context, however, we read the memorandum of decision to accept the petitioner's primary argument that, as a result of his sexual assault of a minor and consequent incarceration, the respondent left his children to be abused and neglected in the custody of their mother and, in turn, denied his children the care, guidance, or control necessary for their well-being. Ultimately, the court terminated the respondent's parental rights as to each child. This appeal followed.

We begin by setting forth the applicable standard of review. "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. . . . To the extent we are required to construe the terms of § 17a-112 (j) (3) (C) or its applicability to the facts of this case, however, our review is plenary." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Connecticut Dept. of Children and Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

We next set forth the relevant legal principles that govern our review of the respondent's claim. "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.[8] The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental

[8] "Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *In re Jacob W.*, 178 Conn. App. 195, 204–205, 172 A.3d 1274 (2017), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019).

rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citation omitted; footnote added; internal quotation marks omitted.) Id., 526–27.

"[Section] 17a-112 (j) (3) (C) . . . provides that a ground for termination of parental rights is established when a trial court finds, by clear and convincing evidence, that the child [at issue] has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ."[9] (Internal quotation marks omitted.) Id., 527; see General Statutes § 17a-112 (j) (3) (C). "[T]he petitioner [thus must] show that, as a result of the . . . acts of [parental] commission or omission, the care, guidance or control necessary for the child's well-being has been denied." (Emphasis omitted; internal quotation marks omitted.) *In re Egypt E.*, supra, 327 Conn. 527. Because the termination of parental rights is "a most drastic and permanent remedy"; id., 528; the petitioner "generally . . . [must show], by clear and convincing evidence, that some type of physical or psychological harm to the child already has occurred." Id. "The

[9] "To terminate parental rights, the court also must find that reasonable efforts have been made to reunify a parent and child, unless the parent is unable or unwilling to benefit from those efforts or the court finds that such efforts are unnecessary; General Statutes § 17a-112 (j) (1); and that termination of parental rights is in the best interest of the child. General Statutes § 17a-112 (j) (2)." *In re Egypt E.*, supra, 327 Conn. 509 n.1. The respondent has not challenged these additional required findings in the present appeal.

[deprivation of care, guidance or control] statute rests on two distinct and often contradictory interests [of the child]. The first is a basic interest in safety; the second is the important interest . . . in having a stable family environment." (Internal quotation marks omitted.) *In re Payton V.*, 158 Conn. App. 154, 161–62, 118 A.3d 166, cert. denied, 317 Conn. 924, 118 A.3d 549 (2015).

As our Supreme Court has explained, "the language of § 17a-112 (j) (3) (C) and the decisions interpreting it make clear that the types of parental behaviors and resultant harms that the statute is intended to reach are *many and varied*. By virtue of the language, act or acts of parental commission or omission, both positively harmful actions of a parent and a parent's more passive failures to take action to prevent harm from occurring are encompassed by § 17a-112 (j) (3) (C). The contemplated harmful acts include, but explicitly are not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, and the resultant harm to a child's well-being may be physical, educational, moral or emotional . . . ." (Emphasis added; internal quotation marks omitted.) *In re Egypt E.*, supra, 327 Conn. 528; see also General Statutes § 17a-112 (j) (3) (C). "[Section] 17a-112 (j) (3) (C) clearly was drafted in a manner such as would give it a *broad and flexible range*." (Emphasis added.) *In re Egypt E.*, supra, 529.

In *In re Egypt E.*, our Supreme Court reviewed the various decisions in which this court[10] has concluded,

[10] Our Supreme Court noted that it "ha[d] not had much occasion to interpret § 17a-112 (j) (3) (C) or the corresponding Probate Court statutes"; *In re Egypt E.*, supra, 327 Conn. 529 n.17; outside of its decisions in *In re Valerie D.*, 223 Conn. 492, 512–13, 613 A.2d 748 (1992) (determining that legislature did not intend for Probate Court statutory counterpart to § 17a-112 (j) (3) (C) to apply to acts of parental commission or omission predating birth of child), and *In re Theresa S.*, 196 Conn. 18, 26–27, 491 A.2d 355 (1985) (holding that parent's life-threatening attacks of children, caused by psychotic episode, provided overwhelming evidence of acts of parental

in light of "§ 17a-112 (j) (3) (C), or the correspondent statute for proceedings in the Probate Court . . . that an act of parental commission or omission had been proven"; id.; and noted that these decisions "demonstrate[d] [§ 17a-112 (j) (3) (C)'s] *wide applicability*. Recognized acts of parental commission or omission under [§ 17a-112 (j) (3) (C)] have included physically assaulting a child, resulting in severe injury . . . sexually abusing a child . . . attempting to suffocate a child . . . exposing a child to a parent's [own] erratic, violent and mentally ill behaviors . . . threatening and yelling obscenities at a child . . . severely neglecting a child's developmental and nutritional needs . . . physically and emotionally abusing siblings or killing the child's other parent . . . abusing a sibling in a child's presence or earshot and ordering the child to participate in such abuse . . . refusing to believe a child's reports of sexual abuse and blaming the child for her foster care placement . . . and engaging in repeated criminal behavior resulting in prolonged incarceration, with little effort to engage in visitation with a child.[11] . . . [*T*]*he statute frequently has been applied to parents who have failed to protect their children from abuse inflicted by third parties* and failed to acknowledge that such abuse has occurred. . . . See . . . *In re Sheena I.*, 63 Conn. App. 713, 723, 778 A.2d 997 (2001) [(awareness by mother of father's neglect and abuse of children, and failure by mother to take steps to prevent abuse while children were in her physical custody constituted acts of commission or omission)] . . . *In re Christine F.*, [6 Conn. App. 360, 362, 364, 505 A.2d 734 (failure of mother to protect child from sexual abuse by father

commission or omission adversely affecting well-being of children). See *In re Egypt E.*, supra, 529 n.17.

[11] "[Our Supreme Court] note[d] that, although *some of the . . . behaviors, standing alone, satisfied § 17a-112 (j) (3) (C)*, most were considered to do so in combination with other parental acts or omissions." (Emphasis added.) *In re Egypt E.*, supra, 327 Conn. 529 n.18.

constituted act of commission or omission), cert. denied, 199 Conn. 809, 508 A.2d 770 (1986)] . . . . [T]he children at issue [in this court's relevant decisions] suffered physical, emotional and/or psychological harm as a result of their parents' various acts of commission or omission." (Citations omitted; emphasis added; footnote added; footnote omitted.) Id., 529–30.

Our Supreme Court in *In re Egypt E.* specifically cited *In re Brian T.*, 134 Conn. App. 1, 18, 38 A.3d 114 (2012), and noted that, in that case, this court recognized as acts of commission or omission under the corresponding Probate Court statute to § 17a-112 (j) (3) (C); see General Statutes § 45a-717; a respondent father's "engag[ement] in repeated criminal behavior resulting in prolonged incarceration, with little effort to engage in visitation with [his] child." *In re Egypt E.*, supra, 327 Conn. 530. In *In re Brian T.*, the respondent appealed from the judgment of the trial court terminating his parental rights as to his son. *In re Brian T.*, supra, 3. The respondent claimed, inter alia, that the court improperly determined that he had denied his child, by reason of an act or acts of commission or omission, the care, guidance, or control necessary for the child's well-being; see id., 3, 17, 20; under the Probate Court counterpart to § 17a-112 (j) (3) (C). See id., 7, 9.

During the first seven years of his child's life, the respondent in *In re Brian T.* served two separate prison sentences for a total period of approximately six years and one month. Id., 4–6, 14. Although the court determined that the respondent had "sustained a relationship, of sorts, with the child through cards, letters, and telephone contact"; (internal quotation marks omitted) id., 7; the respondent had scheduled only one fifteen minute visit with his child while he was incarcerated. Id., 18. The court ultimately determined, by clear and convincing evidence, that the respondent's "criminal

acts, incarceration and lack of attention he paid to the child during the child's infancy was sufficient to" establish that the respondent had denied his child, by acts of parental commission or omission, the child's physical, educational, moral, or emotional well-being. Id., 7.

On appeal, this court observed that "[t]he [trial] court's conclusion rested, in part, on its express findings that the respondent's extensive criminal history, prolonged incarceration and the scheduling of only one visitation with the child for a period of fifteen minutes during the respondent's incarceration were sufficient to demonstrate the respondent's denial of parental care, guidance or control for the child's well-being." (Footnote added.) Id., 18. We noted that the respondent did not "point [this court] to any claimed clear error in the court's factual findings relating to the grounds of termination, nor d[id] he point [this court] to any error of law" in the court's conclusion that, in light of its factual findings, the respondent had deprived the child of the care, guidance, and control necessary for his child's well-being. Id. Accordingly, this court concluded, "[i]n light of the record before [it], the court could have reasonably concluded that the respondent deprived the child [of] the care, guidance and control necessary for the child's [physical, educational, moral and emotional] well-being" by acts of commission or omission. Id.

In the present case, the respondent was convicted of the sexual assault of a minor extended family member and was sentenced to twenty-five years of incarceration. Prior to the respondent's incarceration, the record reflects that the respondent housed, fed, clothed, financially supported, and cared for his children. As a result of his criminal action, and as he feared after his arrest, the respondent left his children to be abused, neglected, and without adequate shelter in the custody of their mother. While the respondent remained incarcerated,

the court adjudicated the children neglected and committed them to the care and custody of the petitioner. Subsequently, the department placed the children in foster homes and, in the case of Christian, residential treatment programs. Consequently, following the respondent's incarceration, each child has suffered from mental health and behavioral issues, which have required them to receive therapy and support services and to take medication and which have required Lucia and Christian to be hospitalized and receive psychiatric treatment. In light of these facts, the trial court, citing *In re Brian T.*, determined that, by leaving his children in the custody of their mother due to his criminal act and consequent incarceration, the respondent had denied his children the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being by reason of acts of parental commission or omission. See *In re Brian T.*, supra, 134 Conn. App. 18.

We conclude that the court reasonably determined, in light of the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its ultimate conclusion; see *In re Egypt E.*, supra, 327 Conn. 526; that the respondent's sexual assault of a minor child, which resulted in his consequent conviction and prolonged incarceration, caused his children to be abused and neglected by their mother and, in turn, deprived them of the care, guidance, or control necessary for their well-being. The absence of the respondent from the lives of his children, which resulted from his criminal conviction and prolonged incarceration; see, e.g., *In re Brian T.*, supra, 134 Conn. App. 18;[12] caused the

[12] We acknowledge that *In re Brian T.* is not on all fours with the present case because, in determining that the petitioner had established the commission or omission statutory ground, the trial court, in part, relied on the fact that the respondent had failed to request visitation with his child. See *In re Brian T.*, supra, 134 Conn. App. 18. The record in the present case makes clear that the respondent sought visitation with his children. In the present case, however, the respondent, *in addition to* being absent from his chil-

respondent to "[fail] to protect [his] children from abuse [and neglect] inflicted by" their mother. *In re Egypt E.*, supra, 530. Put differently, but for the criminal act of the respondent—his sexual assault of a minor—he would not have been incarcerated, his children would not have been left without a reliable caregiver, his children would not have been left in the care and custody of their mother, and, thus, his children would not have been neglected by their mother. But for the respondent's criminal action and consequent absence from his children's lives, his children likely would not have been abused and neglected by their mother and deprived of the parental care, guidance, and control necessary for their physical, educational, moral, and emotional well-being.

Thus, although the respondent did not commit an act of physical or sexual abuse against one or more of his children, his sexual abuse of another child, nonetheless, had devastating effects on his own children because it resulted in his incarceration and left his children in the care of someone who later abused and neglected them. As our Supreme Court has explained and as we have noted earlier in this opinion, "the types of parental behaviors and resultant harms that the statute is intended to reach are *many and varied*." (Emphasis added.) Id., 528. Accordingly, we reject the respondent's argument that the court improperly "speculat[ed]" that his absence from his children's lives due to his incarceration caused his children to be deprived of the parental care, guidance, and control necessary for their well-being in the care of their mother. Because the evidence in the record, "construe[d] . . . in a manner most

dren's lives due to his criminal act and consequent incarceration, left the children in the custody of an entirely insufficient caregiver who abused and neglected them. Further, although the respondent in the present case does not have an extensive criminal history, his sentence for the crime he did commit has the same practical effect on his children as did the respondent's extensive criminal history in *In re Brian T.*

favorable to sustaining the judgment of the . . . court"; (internal quotation marks omitted) id., 526; is sufficient to support the court's conclusion that the petitioner established the "broad and flexible"; id., 529; statutory ground of parental commission or omission, the respondent's claim fails.

The judgments are affirmed.

In this opinion the other judges concurred.

IBRAHEEN OLORUNFUNMI *v.* COMMISSIONER OF CORRECTION (AC 44187)

Alexander, Clark and Palmer, Js.

Syllabus

The petitioner, a citizen of Nigeria, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, E, rendered ineffective assistance for having failed to advise him properly about the immigration consequences of his guilty plea to the reduced charge of larceny in the second degree. During the trial court's canvass of the petitioner in the plea proceeding, the petitioner stated that he understood the possible immigration consequences of his guilty plea and that E had discussed those consequences with him. E also stated that he had discussed those consequences with the petitioner. Thereafter, the petitioner was deported to Nigeria on the ground that the larceny conviction constituted an aggravated felony under federal law, which mandated deportation for such offenses in virtually all cases. At the habeas trial, E testified, inter alia, that he discussed with the petitioner the immigration consequences of his guilty plea, and the petitioner was not concerned about deportation but, rather, his sole concern was the term of incarceration he would receive upon conviction and he sought to minimize his sentence. The petitioner testified, inter alia, that when he entered the guilty plea, he was unaware of its immigration consequences and that E had told him that a conviction for larceny in the second degree would not make him eligible for deportation. The court rendered judgment denying the habeas petition and denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court correctly denied the petition for certification to appeal from the denial of the petition for a writ of habeas corpus, as the petitioner failed to establish that the issues were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that they were adequate to proceed further:

there was ample evidence in the record to support the habeas court's implicit finding that the petitioner failed to demonstrate that he would not have pleaded guilty and would have proceeded to trial if he had been properly informed about his deportability; moreover, the habeas court deemed E's testimony highly credible, including his testimony that the petitioner was concerned only with the length of the sentence he would receive upon pleading guilty and not the deportation consequences of any such plea and found the petitioner's testimony contradicting E in virtually all material respects to be entirely unworthy of belief; furthermore, this court rejected the petitioner's claim that, because the habeas court's evaluation of his credibility was predicated on the transcript of his deposition testimony and not on a firsthand observation of his conduct and demeanor, its credibility assessment warranted less deference, that argument having been unsupported by any authority and incompatible with the bedrock principle that the habeas court sits as the trier of fact, the habeas court found the testimony of E more credible than the petitioner's, and this court was bound by those credibility determinations.

Argued November 10, 2021—officially released March 22, 2022

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 denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

J. Patten Brown III, assigned counsel, with whom, on the brief, was *Abby Marchinkoski*, for the appellant (petitioner).

Christopher Alexy, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PALMER, J. The petitioner, Ibraheen Olorunfunmi, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner, a Nigerian citizen, claims that the habeas court abused its discretion

in denying the petition for certification to appeal because his constitutional right to the effective assistance of counsel was violated due to the failure of his trial counsel to advise him, as required by *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), that a plea of guilty to larceny in the second degree would almost certainly result in his deportation to Nigeria, which, in fact, occurred following his plea to that offense and subsequent sentencing. We conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying the petition for certification, and, accordingly, we dismiss the appeal.

The memorandum of decision of the habeas court sets forth the following facts and procedural history concerning the petitioner's underlying conviction. "In the summer of 2014, the West Haven Police Department received a complaint from [the] Darien Rowayton Bank [bank] concerning a possible fraud. [The bank investigated the complaint and] determined that in June of 2014, the bank had received two e-mails from a longtime customer requesting wire transfers, one dated June 9, 2014, and another dated June 11, 2014. The June 9 transfer was for $23,855, and [the] June 11 . . . transfer was for $6000. [The bank was] contacted by the . . . actual customer . . . that he never sent the e-mails or requested wire transfers. [During its investigation, the bank] learned . . . that the $23,855 wire transfer was sent to the TD Bank North from West Haven . . . to an account in the [petitioner's] name. There were [surveillance] videos of the [petitioner] making several withdrawals on days following the transfer. The $6000 transfer went to an account for a business called Palms Fashion [Inc.] in New York City. On July 4, 2014, the [petitioner] wanted to pay some of the money back, $3000 now, with the remainder over time. . . .

"The West Haven Police Department contacted the [petitioner], who wanted to talk with the police, but

was never able to meet up with them. At that point, [the petitioner retained] an attorney . . . who contacted the West Haven Police Department. The vice president of the bank . . . informed the West Haven Police Department that the problem arose as there was a slight difference in the correct e-mail address to their customer and the one that they received for the wire transfer. They contacted the [petitioner] and suggested to him that he return the money, which he never did. The [petitioner] claimed he was expecting a wire transfer, thus, there was confusion on his part. The bank had paid out $30,000 . . . of the [money involved]. The customer noted to the West Haven Police Department that he believes that someone had hacked into his [account], but he had changed his password and believes that the hackers had made a slight change in his e-mail address and attempted [to hack into] not only that account but other accounts as well. . . .

"The petitioner was initially charged with one count of larceny in the first degree in violation of General Statutes § 53a-122.[1] On April 22, 2015, the petitioner and [his counsel, former Public Defender David] Egan, appeared before the [trial] court, *Iannotti*, *J.*, for a change of plea. The plea agreement negotiated with the state resulted in the petitioner pleading guilty in a substitute information to one count of larceny in [the] second degree in violation of General Statutes § 53a-123 (a) (2).[2] The prosecutor, Supervisory Assistant State's

[1] General Statutes § 53a-122 (a) provides in relevant part: "A person is guilty of larceny in the first degree when he commits larceny, as defined in section 53a-119, and . . . . (2) the value of the property or service exceeds twenty thousand dollars . . . ."

Larceny in the first degree is a class B felony that carries with it a possible maximum penalty of twenty years' imprisonment. See General Statutes §§ 53a-122 (c) and 53a-35a (6).

[2] General Statutes § 53a-123 (a) provides in relevant part: "A person is guilty of larceny in the second degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds ten thousand dollars . . . ."

Larceny in the second degree is a class C felony that carries with it a maximum penalty of ten years' imprisonment. See General Statutes §§ 53a-123 (c) and 53a-35a (7).

Attorney Cornelius Kelly, indicated to the [trial] court that because of defense counsel's efforts, the state was willing to agree to let the petitioner plead guilty to the reduced charge of larceny in the second degree [and to agree to a sentence of three years' imprisonment]. This offer was only open to the petitioner for that day and would then be withdrawn. [The prosecutor also informed the trial court that the petitioner had never paid back any of the stolen money]. . . .

"The [trial] court canvassed the petitioner about his guilty plea. The petitioner, who had informed the court that he was born in Nigeria, was asked if he understood that if he is not a citizen of the United States that his conviction had negative deportation and immigration consequences. Specifically, that he could be deported or excluded from admission to the United States. The petitioner acknowledged that he was aware of these consequences from his discussions with . . . Egan, but also emphasized that his life was at stake. The [trial] court asked . . . Egan if he had discussed deportation with the petitioner. . . . Egan [responded as follows]: I should put on the record that not only did I discuss this with my client . . . I [had] occasion to speak to an immigration attorney who was referred to me by my client. I spoke to him in Hartford yesterday. We had a thorough discussion of the situation with respect to, you know, pleading to—actually, the charge that we were contemplating pleading to yesterday was the charge of larceny in the first degree. Now, I was able to, I believe, convince [the prosecutor] that perhaps we should get the charge reduced to the charge of larceny in the second degree, and it was solely in view of the possible deportation consequences that I suggested that this matter be reduced to a charge of larceny in the second degree. I explained to my client that I am not an immigration attorney, but that, nonetheless, we did so in the hope that it—that this would lessen the likeli-

hood of his deportation, although, you know, that's purely a guess on my part. I'm not an immigration attorney. And clearly, by pleading guilty to these charges, he is subjecting himself to removal from this country. That's all been explained to him. . . .

"The [trial] court indicated to . . . Egan that it did not want to know the contents of the discussion he had with the immigration attorney. The [trial] court inquired if . . . Egan had passed those contents on to the petitioner. . . . Egan answered in the affirmative. . . . The canvass of the petitioner continued but stopped when the petitioner requested more time to consider the plea offer. The [trial] court indicated that the petitioner had months and months to consider resolving the case and that the state's offer, now for a lesser offense, was available only that day. . . . The petitioner could either accept the plea offer or proceed to trial on the charge of larceny in the first degree [which, the trial court emphasized, carries a maximum possible penalty of twenty years' imprisonment as distinguished from larceny in the second degree, which carries a maximum possible penalty of ten years' imprisonment]. Although the petitioner at first indicated that he wanted to have a trial, he instead accepted the plea offer. . . . The [trial] court accepted the guilty plea and found that it was knowing, voluntary, and made with the assistance of competent counsel. . . . The matter was continued for the sentencing. . . .

"On July 21, 2015, the petitioner and . . . Egan appeared before Judge Iannotti for the sentencing. . . . Egan noted that the case was extensively pretried . . . [that] [t]he [trial] court [was] familiar with the background [of this case] and [that he had] explained to [the petitioner] many, many times that his biggest problem . . . [was] not necessarily with the disposition that [was] about to be imposed by [the trial] court, but . . . [was] with the immigration authorities. . . . The petitioner addressed the [trial] court and asked that it

impose a lower sentence than he had agreed to accept when he pleaded guilty. . . . Given the severity of the offense, the [trial] court imposed the agreed upon sentence of three years to serve, followed by three years of special parole, because it was fair and just. . . . The [trial] court also ordered the special conditions that the petitioner obtain gainful and verifiable employment, as well as [pay] restitution of $23,855 to the . . . [b]ank." (Emphasis omitted; footnotes added; internal quotation marks omitted.)

Although he did not file a direct appeal from the judgment of conviction that followed his guilty plea and sentencing, in August, 2015, the self-represented petitioner filed a petition for a writ of habeas corpus seeking to have his conviction vacated, and in June, 2016, through counsel, he filed an amended habeas petition. Thereafter, in March, 2017, the petitioner was deported to Nigeria. Subsequently, on January 11, 2018, the petitioner, again through counsel, filed a second amended habeas petition seeking similar relief and alleging ineffective assistance of counsel predicated on the claim that his trial counsel, Egan, had failed to advise him adequately regarding the deportation consequences of his guilty plea to larceny in the second degree,[3] an offense deemed an "aggravated felony" under the federal Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., which mandates deportation for such offenses in virtually all cases.[4]

[3] The petitioner also raised a due process claim alleging that his guilty plea was not made knowingly, intelligently and voluntarily because he did not adequately understand the deportation consequences of his plea. That claim, however, which the habeas court ultimately deemed abandoned, is not at issue in this appeal. Nevertheless, as the habeas court observed, both the evidence necessary to establish that abandoned claim and the relief sought thereunder are the same as the evidence adduced and the relief sought in connection with the claim that is the subject of this appeal.

[4] See, e.g., *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 507, 142 A.3d 243 (2016) (explaining that "[f]or crimes designated as aggravated felonies . . . federal law mandates deportation almost without exception"). We note that the petitioner was deportable both for his conviction

At the habeas trial, the petitioner adduced testimony from several witnesses, including Egan, who testified that the petitioner's criminal case was relatively uncomplicated but that he had had great difficulty obtaining information from the petitioner for the purpose of investigating and presenting a possible defense because the petitioner was evasive and not forthcoming with regard to such information. According to Egan, he and the petitioner met regularly and frequently, and the petitioner's sole concern with respect to the case was the term of incarceration he would receive upon conviction. To that end, Egan further explained, the petitioner accepted the state's offer of a guilty plea to larceny in the second degree with an agreed upon sentence of three years' imprisonment because that plea bargain resulted in a significant reduction in the amount of prison time the petitioner likely would be required to serve were he to be convicted of larceny in the first degree following a trial.

Egan also testified that the petitioner was aware of the deportation and immigration ramifications of his case from the very beginning and, in fact, in a letter to the petitioner dated December 3, 2014, Egan stated that, "as I told you today, the crime with [which] you are charged [larceny in the first degree] will almost certainly result in your deportation upon conviction."[5] In

of larceny in the second degree and for overstaying his work visa, which had expired. The habeas court determined, and the parties do not dispute, that this appeal could result in meaningful relief to the petitioner, despite his deportability for overstaying his visa, because his larceny conviction results in the petitioner being barred from readmission to the United States for twenty years, whereas overstaying his work visa results in a ten year bar to readmission.

[5] Egan also testified that he had represented between twenty-five and thirty defendants who faced deportation and immigration consequences as a result of their offenses, that he had attended a series of seminars on the subject and was familiar with the relevant case law and that he often discussed cases involving immigration issues with other experienced criminal defense attorneys.

his testimony, Egan explained that he also subsequently advised the petitioner that he would be deported from the United States as a result of a guilty plea to larceny in the second degree, and although Egan could not recall the exact language he used in so advising the petitioner, Egan stated, " 'I told him . . . that he was going to be exposing himself, and in all likelihood would be deported, should he plead [guilty] to the charge of larceny in the second degree.' " Egan also testified that a few weeks before the plea was entered in court, the petitioner informed Egan that he had written to his immigration attorney, Justin Conlon, and the petitioner asked Egan to speak to Conlon, which Egan did. A few weeks after entering his guilty plea, the petitioner wrote to Egan and told him, among other things, that he wanted to seek asylum in the United States. Thereafter, shortly before sentencing, the petitioner contacted Egan and asked him to do everything in his power to convince Judge Iannotti to impose a two year sentence rather than a three year sentence.[6]

The petitioner also presented testimony from Conlon, who explained that, under applicable federal law, larceny in the second degree is considered an aggravated felony, the highest category of criminal conviction for removal purposes and one for which deportation is virtually inevitable. As such, Conlon further testified, the petitioner's deportation was "very foreseeable" because exceptions to removal upon conviction of an aggravated felony are extremely limited.

The petitioner testified, as well. Because he had been deported prior to his habeas trial, the petitioner's testimony was presented by way of a transcript of his telephonic deposition. With respect to the larceny charge to which he had pleaded guilty, the petitioner provided

[6] The letters that Egan and the petitioner exchanged both before and after his guilty plea and sentencing also addressed several other topics, including the computation of the petitioner's sentence, the presentence investigation report and restitution.

the habeas court with a version of the facts that effectively exonerated him from any criminal culpability.[7] As the habeas court explained, "[t]he petitioner [also] testified that his understanding was that he could only be deported if he were convicted of larceny in the first degree. Furthermore, the petitioner testified that [Egan] told him that a conviction for larceny in the second degree would not make him eligible for deportation, and that this was the only reason that he agreed to plead guilty. The petitioner denied that his counsel explained to him that an aggravated felony would almost certainly result in his deportation. The petitioner stated that he would have proceeded to trial had he understood that not being convicted at trial was his best chance of his not being deported. The petitioner denied telling the bank official that he had used the [stolen] funds to pay bills. The petitioner did not recall telling the police and bank officials that his account must have been hacked. Lastly, the petitioner testified that before [his] guilty plea . . . Egan wanted to speak with his immigration attorney, after which . . . Egan told the petitioner that larceny in the second degree is not a deportable offense."

In its memorandum of decision following the trial, the habeas court rejected the petitioner's claims and denied his second amended habeas petition. The court

[7] The habeas court summarized the petitioner's version of those facts as follows: "The petitioner provided information about various individuals and events that explained how the victim's funds came into his possession. According to the petitioner, he was contacted by a friend in Nigeria. That friend, in turn, gave [the phone number of his friend] (an individual identified by the petitioner as 'CJ') . . . to the petitioner, who did not know this individual. The petitioner was told to open an account so that he could receive funds from CJ's clients in the United States. The petitioner stated that the business being conducted, for which this account was needed to receive funds, was the import/export of automobiles. The victim's funds were transferred into the petitioner's account, and the petitioner on three occasions withdrew separately $6000, $3000 and $2000. The petitioner testified that CJ told the petitioner to give $20,000 he had withdrawn to yet another friend, one Johnson Adewale, who stayed in New York but came to New Haven to get the money."

characterized Egan's testimony as "highly credible" and found that Egan had "explained the deportation and immigration consequences to the petitioner," that Egan "was adamant that the petitioner faced deportation," and that he had "informed [the petitioner] at the very onset . . . that deportation was almost certain . . . ." The court further found that, "[a]lthough the larceny in the first degree charge was reduced to larceny in the second degree in the hope of reducing the chance of deportation, the petitioner was warned that he was subjecting himself to removal from the United States" and ultimately accepted the offer of a plea to the lesser charge "after he was advised regarding the possible consequences of going to trial on the more severe charge." The court also found that, as reflected in the transcript of the plea proceeding, "[i]t is readily apparent that the petitioner was only concerned about the length of his term of incarceration" and that, in light of the fact that he was aware of the deportation consequences of his plea, "the petitioner's focus thereafter on how much time to spend in prison is both logical and reasonable."

In contrast to Egan's testimony, the habeas court discredited the testimony of the petitioner. Specifically, the court stated: "The petitioner, contrary to . . . Egan, lacks all credibility and his relationship with the truth is fleeting and transactional. The court does not credit the petitioner's testimony in support of his claims. The petitioner's description of the people and underlying events that led to his charges, which were not provided to . . . Egan during the course of his representation, is not credible. The correspondences between the petitioner and . . . Egan reflect a pattern of feigned ignorance by the petitioner, which this court finds is indicative of deception rather than a lack of understanding. The petitioner's repeated assertions, made *after* court proceedings, that he did not under-

stand or expected something other than what occurred are not believable. The court also does not find credible the petitioner's . . . assertion that . . . Egan failed to explain [the] deportation and immigration consequences to him, as well as that [Egan] told the petitioner after consulting with the immigration attorney that larceny in the second degree is not a deportable offense. This lack of credibility is also reflected in a transcript of [the] immigration proceedings. The petitioner told the immigration judge that . . . Egan lied to him and told him that he was pleading [guilty] to larceny in the fourth degree, as well as that he would not be deported if he pleaded [guilty] to larceny in the second degree. Lastly, the court also does not find credible the petitioner's assertion that he would have maintained his plea of not guilty and proceeded to trial [had he known that he would be deported as a result of his guilty plea to larceny in the second degree]." (Emphasis in original.)

The petitioner thereafter filed a petition for certification to appeal from the habeas court's denial of his petition for a writ of habeas corpus. The habeas court denied the petition for certification to appeal, and this appeal followed. The petitioner contends that the court should have granted his petition for certification to appeal because he established that Egan's advice to him about the deportation consequences of his guilty plea to larceny in the second degree was deficient under the sixth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the state constitution.[8] The petitioner further maintains that he would not have entered the plea and would have proceeded to trial if Egan had advised him adequately about those consequences. Even if we assume, arguendo,

[8] We note that the petitioner does not contend that the state constitution affords him any greater protection with respect to his right to the effective assistance of counsel than does the federal constitution.

that Egan's advice in that regard was constitutionally infirm, we conclude that the petitioner cannot prevail on appeal because he has failed to demonstrate that, with different advice, he would have rejected the state's plea offer and opted for a trial instead.

We commence our review of the petitioner's claim by reciting the governing legal principles. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [denial] 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, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . 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. . . . To prove that the denial of his petition for certification to appeal constituted 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. . . . 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 [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks

omitted.) *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 882, 173 A.3d 525 (2017).

The principles applicable to the petitioner's claim of ineffective assistance of counsel are similarly well settled. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings [including those related to the entering of a guilty plea]. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Footnote omitted; internal quotation marks omitted.) Id., 883–84; see id., 884 n.3. Claims of constitutionally inadequate representation in connection with the decision to plead guilty are governed by *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "[According to] *Strickland*, [an ineffective assistance of counsel] claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Under . . . *Hill* . . . which . . . modified the prejudice prong of the *Strickland* test for claims of ineffective assistance [of counsel] when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas

petition." (Emphasis in original; internal quotation marks omitted.) *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 24, 257 A.3d 399, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is [more efficient] to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) Id., 25. Moreover, "[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) Id., 24–25.

"A claim of ineffective assistance of counsel raised by a petitioner who faces mandatory deportation as a consequence of his guilty plea is analyzed more particularly under *Padilla* v. *Kentucky*, [supra, 559 U.S. 356], a case in which the United States Supreme Court held that counsel must inform clients accurately as to whether a guilty plea carries a risk of deportation. Id., 368–69. *Padilla* recently was analyzed under Connecticut law in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 507, 142 A.3d 243 (2016), where[in] our Supreme Court concluded that, although there are no precise terms or one-size-fits-all phrases that counsel must use . . . [i]n circumstances when federal law mandates deportation . . . counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty." (Internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 885.

The petitioner contends, contrary to the determination of the habeas court, that Egan failed to advise him, as required by *Padilla*, that deportation was virtually certain if he pleaded guilty to larceny in the second degree. He further claims that he would not have entered a plea of guilty to that offense and insisted on a trial if he had been advised that he faced a high likelihood of deportation following a plea to second degree larceny. We need not decide whether Egan's advice to the petitioner in regard to his deportability was constitutionally adequate because we conclude that, even if that advice was deficient, the petitioner has failed to demonstrate that he was prejudiced thereby.

"To satisfy the prejudice prong [of the *Strickland-Hill* test], the petitioner had the burden to prove that, absent counsel's alleged failure to advise him in accordance with *Padilla*, it is reasonably probable that he would have rejected the state's plea offer and elected to go to trial." Id., 886. This requirement presents a significant hurdle for the petitioner. As the United States Supreme Court recently explained in the context of a claim of ineffective assistance of counsel which, like the present one, was predicated on an alleged *Padilla* violation, "[s]urmounting *Strickland*'s high bar is never an easy task . . . and the strong societal interest in finality has special force with respect to convictions based on guilty pleas. . . . [Therefore] [c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (Citations omitted; internal quotation marks omitted.) *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017); see also *Budziszewski* v. *Connecticut Judicial Branch*, 199 Conn. App. 518, 525–27, 530, 237 A.3d 792, cert. denied, 335 Conn. 965, 240 A.3d 283 (2020).

Although the habeas court based its decision on the performance prong of *Strickland*—concluding that the advice Egan gave to the petitioner with respect to deportation satisfied the *Padilla* standard—and did not expressly address the prejudice prong of the *Strickland-Hill* test, the court did explicitly reject, as lacking in credibility, the petitioner's testimony that he would not have pleaded guilty to second degree larceny and, instead, would have proceeded to trial if he had known that a conviction of that offense was highly likely to result in his deportation. This credibility determination of the court leads inexorably to the conclusion that the court implicitly found that the petitioner failed to meet his burden of establishing that he was prejudiced by Egan's allegedly deficient advice with respect to the deportation consequences of his guilty plea because to prove prejudice, the petitioner was required to demonstrate a reasonable probability that he agreed to plead guilty only because he was unaware that he would be deported as a result of the plea.

The habeas court's implicit finding that the petitioner failed to demonstrate that he would not have pleaded guilty and would have proceeded to trial if he had been properly informed about his deportability is amply supported by the record. First, the court had strong reason to disbelieve the petitioner's testimony generally. For example, having determined that Egan was a highly credible witness, the court reasonably found that the petitioner's testimony contradicting Egan's testimony in virtually all material respects was entirely unworthy of belief. Indeed, several of the petitioner's assertions were facially implausible, among them: his testimony essentially denying any responsibility for the theft of the money at issue in the case despite the strength of the state's evidence against him; his claim that Egan told him that larceny in the second degree was not a deportable offense notwithstanding Egan's statement,

reflected in the record of the plea proceeding, that, by entering a guilty plea to that charge, the petitioner "clearly . . . [was] subjecting himself to removal from this country"; (emphasis omitted; internal quotation marks omitted); and his contention before the federal immigration judge that Egan had lied and told him that he was pleading guilty to larceny in the fourth degree rather than to larceny in the second degree even though it is perfectly clear from the transcript of the plea proceeding that the petitioner pleaded guilty to second degree larceny and knew full well that he was doing so.

Moreover, Egan testified that the petitioner's sole concern was the length of the sentence he would receive upon pleading guilty in accordance with the state's plea offer and not the deportation consequences of any such plea. In light of this testimony, along with Egan's assertion that the petitioner pleaded guilty to larceny in the second degree to avoid the considerably harsher consequences of being convicted of larceny in the first degree, the court was fully entitled to disbelieve the petitioner's contention that he would not have agreed to that plea if he had known that doing so carried with it such a high risk of deportation.

Finally, the petitioner adduced no evidence, other than his own uncorroborated and self-serving testimony, to support his assertion that, when he entered his guilty plea, he did so only because he understood that he would not be subject to deportation. It is true, of course, that, prior to entering his plea, the petitioner contacted Egan and asked him to speak with his immigration attorney, Conlon. That demonstrates, however, only that the petitioner wanted to know about his prospects for deportation following a conviction of larceny in the second degree, not that he would have refused to enter the plea if he had understood that it almost surely would lead to his removal. In addition, the petitioner informed Egan prior to his sentencing that he

planned to apply for asylum in the United States. The petitioner's expressed intent to seek asylum does not further his claim that he pleaded guilty with the understanding that he would not be deported; in fact, it undermines his claim because asylum is available to those who *are subject to removal* from this country but who can establish that deportation would be sufficiently perilous to warrant their remaining here.

On appeal, the petitioner points to evidence that he presented at the habeas trial which, he claims, supports his assertion that he would have rejected the plea deal and proceeded to trial if he had known that he would be deported. In particular, he adduced evidence that he "faced a serious risk of experiencing violence and persecution" in Nigeria, even from his own family, as a member of the LGBTQ community and because of his conversion to Christianity. The petitioner's contention however, predicated on such evidence, represents precisely the kind of "post hoc assertion" that the United States Supreme Court, in *Lee* v. *United States*, supra, 137 S. Ct. 1967, identified as insufficient to establish prejudice for purposes of an alleged *Padilla* violation. Under *Lee*, a defendant who maintains that he would have refused to plead guilty if he had been advised properly about the near certainty of deportation must substantiate his contention with evidence *contemporaneous* with his plea and sentencing. Id. In the present case, the petitioner presented no such proof, and his failure to do so, especially in view of Egan's testimony that the petitioner was concerned only with the amount of prison time that he would receive, is fatal to his claim of prejudice.

The petitioner further argues that, because the habeas court's evaluation of the petitioner's credibility was predicated on a "cold" record, namely, the transcript of the petitioner's deposition testimony, rather than on a firsthand observation of the petitioner's conduct and

demeanor, a "significantly lower . . . level of deference" to the court's credibility assessment is warranted than the deference to which such an evaluation ordinarily would be entitled. We reject this argument as unsupported by any authority and incompatible with the bedrock principle that fact-finding is the sole responsibility of our trial courts. See *State* v. *Correa*, 340 Conn. 619, 691, 264 A.3d 894 (2021) (appellate tribunal "lacks the authority to find facts"); *Otto* v. *Commissioner of Correction*, 161 Conn. App. 210, 223, 136 A.3d 14 (2015) ("[i]t is axiomatic that, as an appellate court, we do not reevaluate the credibility of testimony"), cert. denied, 321 Conn. 904, 138 A.3d 281 (2016). In the present case, moreover, the court expressly credited Egan's testimony, which the petitioner contradicted in many, if not all, material respects. The court, having had the opportunity to observe firsthand Egan's "highly credible" testimony, had a sound basis for rejecting the petitioner's version of the relevant events. Indeed, as we have explained, some of the petitioner's testimony defied credulity in light of the undisputed facts. In such circumstances, there is no basis whatsoever for second-guessing any of the court's credibility findings.[9]

We conclude, therefore, that the petitioner has failed to establish that his ineffective assistance of counsel claim is debatable among jurists of reason, that a court could resolve the claim in a different manner or that the question presented deserves encouragement to proceed

[9] The petitioner also raised the claim in the habeas court that Egan rendered ineffective assistance by inadequately investigating his case and thereby failing to develop a viable defense. The petitioner did not prevail on this claim, which he renews on appeal, albeit in a single paragraph of his brief in which he fails to cite any authority to support his allegation. The petitioner adduced no expert testimony in the habeas court with respect to this claim and, on appeal, he essentially contends that Egan could have done more by way of an investigation. Suffice it to say that, on appeal, the petitioner has failed to demonstrate why Egan's representation was deficient in this regard or how the petitioner was prejudiced by Egan's allegedly inadequate investigation.

further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

GEORGE BONGIORNO ET AL. *v.*
J & G REALTY, LLC, ET AL.
(AC 42790)
(AC 42791)

Alexander, Clark and Lavine, Js.

Syllabus

The plaintiffs, M and her daughter B, sought, inter alia, the dissolution and winding up of the defendant businesses, which were established by M's husband and his brother. At the time of the commencement of the action, certain of the defendant businesses were held in equal shares by B and her three siblings. The defendants filed a motion to dismiss M's claims for lack of subject matter jurisdiction, alleging that she did not have an ownership interest in any of the defendant businesses and, accordingly, that she lacked standing to bring the action. The trial court granted the defendants' motion. Thereafter, B amended the complaint and cited in M as a plaintiff. In the amended complaint, M and B alleged, inter alia, claims of oppression of a minority member, breach of fiduciary duty, unjust enrichment, and fraud against the defendant businesses and their defendant managers, F and N. B also sought the dissolution of the defendant businesses of which she was a member. M alleged that she had standing to bring the action because she had, inter alia, an economic interest in certain of the defendant businesses. The trial court rendered judgment in favor of the defendants on M's claims, stating that they were barred by res judicata, that there was no proof that any financial distributions had been made to the members or partners of the defendant businesses or that any of the defendant businesses had been dissolved that would entitle M to a distribution of the assets, and that she lacked standing to maintain the action in an individual capacity because any claim she might have could be asserted only in a derivative action. The trial court further found that B lacked standing in her individual capacity to maintain her claims for breach of fiduciary duty, except with respect to her claim that the defendant managers had failed to provide her with access to the books and records of certain of the defendant businesses, a claim that she abandoned on appeal, and that

she had failed to demonstrate that the defendant managers engaged in any act of fraud or self-dealing or had violated their fiduciary duties. On the plaintiffs' appeals to this court, *held*:

1. With respect to M's claims that the trial court erred by disposing of her claims for breach of fiduciary duty on the basis of res judicata and by finding that she lacked standing to directly sue for breach of fiduciary duty, this court could not grant M any practical relief, and her appeal was dismissed as moot: although, on appeal, M acknowledged all four of the independent bases that the trial court articulated for rendering judgment in favor of the defendants on each of her claims, she failed to adequately brief her challenges to the trial court's determinations that no distributions had been made or dissolutions had occurred that would entitle a holder of an economic interest to a distribution, and, therefore, she abandoned those claims; accordingly, because M failed to challenge each independent basis for the trial court's decision, this court lacked subject matter jurisdiction and did not reach the merits of M's claims.
2. With respect to B's claim that the trial court erred when it failed to shift the burden to F and N to prove good faith and fair dealing regarding her breach of fiduciary duty claims, this court could not grant any practical relief, and her appeal as to that issue was dismissed as moot: B failed to appeal from the trial court's conclusion that she did not have standing to sue in her individual capacity, which was an alternative basis for the trial court's judgment on her claim; accordingly, because M failed to challenge each independent basis for the trial court's decision, this court lacked subject matter jurisdiction.
3. This court declined to exercise its supervisory authority with respect to B's claims of oppression of a minority member and for the dissolution and winding up of certain of the defendant businesses and, accordingly, affirmed the judgment of the trial court: the Connecticut Uniform Limited Liability Company Act (CULLCA) (§ 34-243 et seq.) did not apply to B's claims because it applies only to an action commenced, a proceeding brought or a right accrued after July 1, 2017, and B commenced this action in 2012 and failed to present evidence of any events occurring after July 1, 2017, to support her claims; accordingly, contrary to B's assertion, the standard for analyzing oppressive conduct under CULLCA that was set forth in *Manere* v. *Collins* (200 Conn. App. 356) did not apply to her claims.

Argued October 19, 2021—officially released March 22, 2022

Procedural History

Action seeking, inter alia, the dissolution of the defendant entities, and other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Truglia*, *J.*, granted the defendants' motion to dismiss the claims of the plaintiff Marie Bon-

giorno; thereafter, the plaintiff Marie Bongiorno was cited in as a plaintiff; subsequently, the matter was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment for the defendants, from which the plaintiffs filed separate appeals to this court. *Appeal dismissed in Docket No. 42790*; *appeal dismissed in part, judgment affirmed in Docket No. 42791.*

Danielle J. B. Edwards, with whom, on the brief, was *Peter V. Lathouris*, for the appellants in Docket Nos. AC 42790 and AC 42791 (plaintiffs).

Mark F. Katz, for the appellees in Docket Nos. AC 42790 and AC 42791 (named defendant et al.).

Opinion

ALEXANDER, J. These appeals arise out of a decade of litigation among members of the Bongiorno family with respect to certain commercial real property and businesses in Stamford. Following a trial to the court, the plaintiffs Marie Bongiorno (Marie) and her daughter, Bridjay Capone (Bridjay),[1] appeal from the judgment of the trial court rendered in favor of the defendants J & G Realty, LLC; 305 West Avenue, LLC; 24 Ardmore Street, LLC; Bongiorno Gas Island, LLC; Bongiorno Brothers, a general partnership (Bongiorno Brothers); Harxter Realty, LLC; Enterprise Park, L.L.C.; Glenbrook Center, LLC; Bongiorno Supermarket, Inc.; Jane Doe Entities; Frank R. Bongiorno (Frank); and Maurice A. Nizzardo (Maurice).[2] In Docket No. AC 42790, Marie

[1] The underlying action was commenced in 2012 by the late George Bongiorno (George), his wife, Marie, and their daughter, Bridjay. George withdrew from the action in 2013. In this appeal, we refer to Marie and Bridjay collectively as the plaintiffs and individually as Marie and Bridjay.

[2] The plaintiffs brought this action against the following individuals and business entities: J & G Realty, LLC; 24 Ardmore Street, LLC; 305 West Avenue, LLC; Harxter Realty, LLC; Enterprise Park, L.L.C.; Bongiorno Gas Island, LLC; Glenbrook Center, LLC; Bongiorno Brothers; Bongiorno Supermarket, Inc.; The Bongiorno Family, LLC; JGBBNS Realty, LLC; 317 West Avenue, L.L.C.; 317 West Avenue, LLC; Weselleck, LLC; Bongiorno Childrens Joint Venture #3; Jane Doe Entities (other entities unknown to the plaintiffs that were allegedly owned or controlled by the individual defendants); Frank; Maurice; Michele B. Nizzardo; and John A. Bongiorno.

claims that the trial court erred by (1) disposing of her claims for breach of fiduciary duty against Frank and Maurice on the basis of res judicata and (2) finding that she lacked standing to bring claims in her own name for breach of fiduciary duty. We dismiss Marie's appeal as moot. In Docket No. AC 42791, Bridjay claims that (1) the trial court erred by failing to shift the burden to Frank and Maurice to prove good faith and fair dealing on her breach of fiduciary duty claims and (2) this court should exercise its supervisory authority to reverse the judgment of the trial court as to her claims of oppression of a minority member. In regard to her breach of fiduciary duty claims, we dismiss Bridjay's appeal as moot, and we affirm the judgment of the trial court in all other respects.

The following factual background and procedural history are relevant to our resolution of these appeals. The businesses at issue grew out of a partnership initiated between now deceased brothers George Bongiorno (George) and John Bongiorno when they opened Bongiorno Supermarket in Stamford in 1957. The brothers later purchased commercial properties and established a retail gas station, a car wash, a liquor store, and other businesses near the supermarket (Bongiorno businesses).

John Bongiorno had no children and allegedly agreed that, on his death, he would leave his interests in the Bongiorno businesses in equal shares to George's children: Frank, John A. Bongiorno, Bridjay, and Michele B. Nizzardo. John Bongiorno died in 2003, but did not

Prior to trial, the plaintiffs withdrew the action against all of the defendants except J & G Realty, LLC; 24 Ardmore Street, LLC; 305 West Avenue, LLC; Harxter Realty, LLC; Enterprise Park, L.L.C.; Bongiorno Gas Island, LLC; Glenbrook Center, LLC; Bongiorno Brothers; Bongiorno Supermarket, Inc.; Frank; and Maurice. At the time of trial, Bongiorno Supermarket, Inc., and Jane Doe Entities remained defendants but were not represented by counsel of record.

In this opinion, we refer to J & G Realty, LLC, 24 Ardmore Street, LLC, and 305 West Avenue, LLC, collectively as the three LLCs.

leave his interests in the Bongiorno businesses to George's children. George, however, negotiated an agreement pursuant to which his children, Maurice, and Bongiorno Supermarket, Inc., purchased John Bongiorno's interests from John Bongiorno's estate in 2004. As part of the agreement, the estate of John Bongiorno assigned a 12.5 percent membership interest in J & G Realty, LLC, to each of George's children. At the time of the agreement, J & G Realty, LLC, held title to real property that subsequently was owned by 305 West Avenue, LLC, and 24 Ardmore Street, LLC, businesses that were founded in 2004, following John Bongiorno's death. The agreement further provided that the estate of John Bongiorno would transfer 12.5 percent of the shares in those two properties to each of George's four children. Thereafter, George also transferred his 50 percent interest in 305 West Avenue, LLC, and 24 Ardmore Street, LLC, in equal shares to his four children. On January 22, 2012, George transferred his 50 percent interest in J & G Realty, LLC, in equal shares to his four children. Consequently, each of George's four children held a 25 percent interest in each of the three LLCs.

In June, 2012, George, Marie, and Bridjay commenced the underlying action seeking dissolution and winding up of the Bongiorno businesses. In 2013, George withdrew from the litigation. In the original complaint, Marie alleged that she was or had the right to be a member of certain defendant entities, either directly or by virtue of a durable power of attorney executed in her favor by George in 2010, and she sought to wind up and dissolve those entities. In 2013, the defendants filed a motion to dismiss Marie's claims for lack of subject matter jurisdiction, claiming that Marie did not have an ownership interest in any of the four entities[3] she

[3] In her posthearing memorandum, Marie alleged that she held an ownership interest in JGBBNS Realty, LLC, J & G Realty, LLC, Bongiorno Gas Island, LLC, and Bongiorno Brothers.

claimed to be a member of and, thus, lacked standing to bring the action. The trial court, *Truglia*, *J.*, granted the motion to dismiss after determining that George's purported assignment of his interests in these entities was ineffective and that Marie had not "demonstrated a specific, personal or legal interest" in any of the entities that would enable her to bring an action for dissolution and winding up. See *Bongiorno* v. *J & G Realty, LLC*, 162 Conn. App. 430, 435, 131 A.3d 1230, cert. denied, 320 Conn. 924, 133 A.3d 878 (2016).

Thereafter, the court, *Hon. Kevin Tierney*, judge trial referee, granted Bridjay's motion to cite in Marie as a plaintiff and to amend the complaint. In the amended complaint, Marie alleged that she had, inter alia, an economic interest in J & G Realty, LLC, Bongiorno Brothers, and Bongiorno Gas Island, LLC.[4] Marie again relied on the October, 2010 documents that purported to transfer George's interest in these entities to Marie.

The operative complaint is the July 5, 2018 second amended complaint. It contains seventy-two counts, alleging claims of oppression of a minority member/shareholder interest, breach of fiduciary duty, fraud, unjust enrichment, statutory theft, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), Gen-

[4] Marie claimed at trial and in this appeal that "our laws recognize the existence of an economic interest which is separate and distinct from a right to participate in the management/business affairs of an entity."

She relied on, inter alia, General Statutes (Rev. to 2017) § 34-170, which provides in relevant part: "(a) Except as provided in writing in an operating agreement and subject to the provisions of subsections (b) and (c) of section 34-119: (1) A limited liability company membership interest is assignable in whole or in part; (2) an assignment entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled . . . ."

Essentially, Marie argued that, although George had failed to transfer his full membership interest in the entities to her, which would have given her all the rights of a member, such as voting rights, the transfer was effective in granting her the status of an economic transferee, which includes the right to receive distributions.

eral Statutes § 42-110a et seq.[5] Bridjay also sought the dissolution of the three LLCs. The remaining individual defendants were Frank and Maurice (individual defendants), who are the comanagers of certain defendant entities and co-property managers of the real property owned by certain defendant entities. Frank and Maurice are Marie's son and son-in-law, respectively.

The case was tried to Judge Tierney on eighteen dates between May 31, 2018, and July 24, 2018. In their posttrial brief, the plaintiffs claimed that they had identified eight separate "suspicious" transactions, which included (1) awarding management fees to the individual defendants, (2) paying the legal fees of other businesses and members, (3) paying real estate commissions to the individual defendants, (4) failing to pay distributions despite showing impressive profits, (5) failing to collect rents from M & F Car Wash, LLC, another entity managed by the individual defendants, and Bongiorno Gas Island, LLC, (6) failing to collect loans due from Bongiorno Brothers, (7) failing to give Bridjay access to the books and records of the businesses, and (8) failing to disclose George's transfer of membership interests to his children. On March 12, 2019, the court issued a 107 page memorandum of decision, rejecting each of the plaintiffs' allegations of " 'suspicious transactions' " and finding "the issues on all counts, count one through and including count seventy-two, in favor of all of the defendants . . . ."

In rendering judgment in favor of the defendants on Marie's claims, the court relied on the independent grounds that (1) her claims were barred by the doctrine of res judicata, (2) there was no proof that any financial distributions had been made to any of the members or

[5] In their posttrial brief, the plaintiffs expressly abandoned "all claims sounding in statutory theft and breach of the [CUTPA] as alleged in the second amended complaint."

partners of the defendant businesses after the date of the alleged transfer of interests to Marie, (3) there was no proof that any of the businesses had been dissolved that would entitle her to a distribution of the assets, and (4) she lacked standing to maintain the action in her individual capacity because any claim that she might have would be common to all members and partners of the defendant entities and may be asserted only in a derivative action.[6]

[6] "It is axiomatic that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [When], for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them. . . .

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name . . . or may be a party to an action brought in its name by a member or manager. . . . A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company. . . . [A] member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement . . . ." (Citations omitted; internal quotation marks omitted.) *Scarfo* v. *Snow*, 168 Conn. App. 482, 497–98, 146 A.3d 1006 (2016).

"A corporation is a separate legal entity, separate and apart from its stockholders. . . . It is an elementary principle of corporate law that . . . corporate property is vested in the corporation and not in the owner of the corporate stock. . . . That principle also is applicable to limited liability companies and their members. . . .

"[T]he law [permits] shareholders to sue derivatively on their corporation's behalf under appropriate conditions. . . . [I]t is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding secondarily, deriving his rights from the corporation which is alleged to have been wronged. . . . [I]n order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation." (Citation omitted; internal quotation marks omitted.) Id., 501.

With respect to Bridjay's claims, the court determined that she lacked standing in her individual capacity to maintain claims of breach of fiduciary duty with respect to all of the alleged " 'suspicious transactions,' " except for her claim that the individual defendants had failed to provide her with access to the books and records of the three LLCs. The court found that none of the injuries Bridjay allegedly sustained was " 'separate and distinct' " from those suffered by other members of the three LLCs, and such claims could be asserted only in a derivative action. Bridjay, therefore, had standing only to maintain her breach of fiduciary duty claim with respect to the individual defendants' alleged failure to provide her access to the books and records of the businesses. The court found that Bridjay had failed to demonstrate that Frank and Maurice had engaged in any act of fraud or self-dealing or had a conflict of interest and that neither individual defendant had violated his fiduciary duty. The court, therefore, rendered judgment in favor of the defendants.

Thereafter, the plaintiffs filed a motion for articulation, which the court denied. The plaintiffs then filed a motion for review with this court. This court granted

Our Supreme Court, in *Saunders* v. *Briner*, 334 Conn. 135, 158–59, 221 A.3d 1 (2019), concluded that the "[Connecticut Limited Liability Company Act (CLLCA), General Statutes (Rev. to 2017) § 34-100 et seq.] does not permit members or managers to file derivative actions but, rather, authorizes them to collectively commence an action in the name of the limited liability company upon a requisite vote of disinterested members or managers (member initiated action). . . . [General Statutes (Rev. to 2017) §] 34-187 provides the procedure that members or managers must follow if they wish to file a lawsuit in the name of the company." (Citation omitted; footnote omitted.) The court stated that, "because of the closely held nature of many [limited liability companies] there may be little difference between the derivative remedy and the one proposed in this section." (Internal quotation marks omitted.) Id., 162 n.28. The court noted the general rule that prohibits a member of a limited liability company from bringing a direct action when the injury sustained affects all of the shareholders collectively and stated that, although the CLLCA did not authorize derivative actions, it "provided a substitute to the derivative remedy" in the form of the member initiated action. Id., 167–69.

the motion for review and denied in part and granted in part the relief requested.[7] Additional facts with be set forth as necessary.

I

AC 42790

We first address Marie's appeal in AC 42790, in which she argues that the trial court erred by (1) disposing of her claims for breach of fiduciary duty against Frank and Maurice on the basis of res judicata and (2) finding that she lacked standing to sue directly for breach of fiduciary duty. Marie has failed, however, to challenge the second and third bases of the trial court's decision because she has briefed them inadequately. Because Marie has failed to challenge each independent basis for the trial court's decision, her appeal is moot.

This appeal implicates two important doctrines of justiciability: standing and mootness. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 381, 254 A.3d 330 (2021). "[O]nce the question of the court's subject matter jurisdiction is raised, it must be resolved before the

[7] In this court's order granting in part the relief requested in the plaintiffs' motion for review, this court ordered the trial court to "reconcile its statements on pages 40 and 42–43 of its March 12, 2019 memorandum of decision by articulating whether it found that [Maurice] received any assets pursuant to the 2004 purchase agreement with the estate of John Bongiorno."

In its rectification, the trial court stated: "On page 43 line 1, the trial court makes the following changes to the first partial sentence at the top of page 43: (A) Eliminate 'any assets' and substitute therefore 'any real property at issue in this litigation,' immediately before the phrase, 'in the settlement of the Estate of John Bongiorno,' and (B) add the following sentence immediately after the above sentence: 'The real property at issue in this litigation [is] the three parcels of real property described on page 40 in paragraph numbered (5).' "

court addresses the merits of the plaintiff's claims." *Sosa* v. *Robinson*, 200 Conn. App. 264, 276, 239 A.3d 1228 (2020); see also *Kelly* v. *Albertsen*, 114 Conn. App. 600, 607, 970 A.2d 787 (2009) ("[a]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made" (internal quotation marks omitted)).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 603, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018). "Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214, 982 A.2d 1053 (2009). "The question of standing does not involve an inquiry into the merits of the case." (Internal quotation marks omitted.) *State* v. *Gaston*, 201 Conn. App. 276, 281, 241 A.3d 209, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020).

Although we recognize the trial court's important obligation to decide issues regarding standing prior to addressing the merits of a claim, we also are mindful of this court's obligation to consider its own subject matter jurisdiction and whether we can afford a party any practical relief. In other words, we also must deter-

mine whether an appeal is moot. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . A determination regarding . . . [this court's] subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; internal quotation marks omitted.) *Fairfield Shores, LLC* v. *DeSalvo*, 205 Conn. App. 96, 104–105, 256 A.3d 716 (2021).

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on [her] claim, even if this court were to agree with the appellant on the issues that [she] does raise, we still would not be able to provide [her] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017); see also *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal").

Given the facts and circumstances of the present case, we resolve Marie's appeal on the basis of appellate mootness. This appeal presents two justiciability questions that implicate both this court's and the trial court's subject matter jurisdiction, and we are cognizant of the

importance of resolving issues of standing prior to addressing the merits of a plaintiff's claims. In the present case, however, the issue of Marie's standing as the holder of an economic interest was not clearly analyzed or decided by the trial court in its memorandum of decision. Because Marie failed to challenge each independent basis for the trial court's decision, we conclude that this court lacks subject matter jurisdiction. Accordingly, we do not reach the merits of her claims and dismiss her appeal as moot.

As previously stated, the trial court articulated four independent bases for rendering judgment in favor of the defendants on each of Marie's claims. In her brief, Marie challenges only the first and fourth grounds for the court's decision. Although she acknowledges the second and third grounds for the court's decision, she failed to brief these issues adequately, and, therefore, we deem those claims abandoned.[8] "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Traylor* v. *State*, 332 Conn. 789, 804–805, 213 A.3d 467 (2019). "Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions

[8] Marie stated with respect to the trial court's second and third bases for its decision: "First, this court should take note of the trial court's second and third grounds for dismissal, which are cabined under res judicata: (2) there are presently no distributions to dispute, and (3) there is presently no dissolution to dispute. Read together with the court's opening statement that 'it is not necessary for [it] to determine whether or not the plaintiff . . . possesses an economic interest in the three entities,' these two issues serve as a very serious warning: should any of the entities make distributions or dissolve, there will immediately be cause for new litigation in order to ascertain [the] very issue on appeal here: the validity of the plaintiff's claimed economic interest."

regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 358 n.1, 241 A.3d 133 (2020); see also *Barros* v. *Barros*, 309 Conn. 499, 503 n.4, 72 A.3d 367 (2013) (claim deemed abandoned when defendant merely referenced actions by trial court but failed to provide any legal analysis).

The trial court had determined that no distributions had been made and no dissolution had occurred that would entitle a holder of an economic interest to a distribution. Because Marie has not challenged these independent bases for the court's decision, we cannot grant her any practical relief, and, thus, we dismiss her appeal as moot.

II

AC 42791

We now turn to Bridjay's appeal in AC 42791. At trial, the parties agreed that Bridjay holds a 25 percent interest in the three LLCs. The parties also agreed that, as managers of the three LLCs, Frank and Maurice owed a fiduciary duty to the members of the three LLCs, including Bridjay. On appeal, Bridjay first claims that the trial court erred by failing to shift the burden to Frank and Maurice to prove good faith and fair dealing regarding her breach of fiduciary duty claims. Second, she argues that this court should exercise its supervisory authority to reverse the judgment of the trial court as to her claims of oppression of a minority member. We conclude that Bridjay's first claim is moot. With respect to her second claim, we decline to exercise our supervisory authority and, accordingly, affirm the judgment of the trial court.

A

Bridjay first claims that the trial court erred when it failed to shift the burden to Frank and Maurice to prove

good faith and fair dealing on her breach of fiduciary duty claims. We conclude that her appeal as to this issue is moot because she failed to challenge all independent bases for the trial court's decision in favor of Frank and Maurice.

As discussed in part I of this opinion, Bridjay set forth eight categories of allegedly "suspicious" transactions to support her claims for breach of fiduciary duty against Frank and Maurice as the managers of the three LLCs in her posttrial brief. In its memorandum of decision, the court stated that Bridjay "failed to show that [Frank and Maurice] engaged in any act of fraud, self-dealing or conflict of interest. The court finds that the burden has not shifted to the two fiduciaries, to demonstrate the evidence by the clear and convincing standard." Additionally, it concluded that, "[o]f the eight 'suspicious transactions' . . . all but . . . inspection of books and records, are common to all of the members of the three LLCs. None of these claims, damages and 'suspicious transactions' are 'separate and distinct' as to [Bridjay], except for the inspection of books and records . . . claim . . . . The court finds that [Bridjay] has no standing to maintain this lawsuit against any of the defendants given it is not a derivative action. The court finds that [Bridjay] has standing to maintain the claims that she has brought as to [the] issue . . . relating to the inspection of the books and records of the three LLCs for which she has a [25 percent] interest."

On appeal, Bridjay claims that the court improperly failed to shift the burden to Frank and Maurice on her claims of breach of fiduciary duty. She contends that, once a fiduciary relationship was shown, together with "only an *allegation*, rather than proof, of fraud . . . self-dealing or conflict of interest"; (emphasis in original); the trial court should have shifted the burden to Frank and Maurice to prove good faith and fair dealing

by clear and convincing evidence.[9] She then sets forth the first six of the original eight suspicious transactions as evidence of the breach of fiduciary duty.

Pursuant to our analysis in part I of this opinion, we recognize that, once the trial court determined that Bridjay lacked standing to bring her claims of breach of fiduciary duty in an individual capacity, the court should have dismissed those claims rather than address them on the merits. See *Sosa* v. *Robinson*, supra, 200 Conn. App. 276. Because Bridjay failed to appeal from each independent basis for the court's judgment, we conclude that this court lacks subject matter jurisdiction and resolve this appeal on the basis of appellate mootness.

In its findings, the court determined that each of the " 'suspicious transactions' " Bridjay alleged in support of her breach of fiduciary duty claims, except the claim regarding inspection of the books and records,[10] were

[9] "The elements which must be proved to support a conclusion of breach of fiduciary duty are: [1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Manere* v. *Collins*, supra, 200 Conn. App. 366–67.

"Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence. . . . Proof of a fiduciary relationship, therefore, generally imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence. . . . Such burden shifting occurs in cases involving claims of fraud, self-dealing or conflict of interest." (Citation omitted; internal quotation marks omitted.) *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 754, 161 A.3d 603 (2017).

[10] The court concluded that Bridjay had standing to bring her claim of breach of fiduciary duty as to the allegation that the defendants did not allow her to inspect the books and records, which was set forth as the seventh "suspicious" transaction in Bridjay's reply to the defendants' posttrial brief.

common to all members of the three LLCs, and, therefore, that she did not have standing to sue in her individual capacity. This conclusion was one independent basis for the court's ruling in favor of the defendants. As an alternative basis for its judgment, the court concluded that Bridjay had failed to meet her burden of proof in establishing her breach of fiduciary duty claims and, therefore, that the burden of proving fair dealing did not shift to Frank and Maurice. Bridjay has not appealed from the court's conclusion that she does not have standing to sue in her individual capacity. Thus, we cannot afford her any practical relief and conclude that her appeal as to this issue is moot.

B

Bridjay's second claim on appeal asks this court to exercise its supervisory authority to reverse the judgment of the trial court as to her claims of oppression of a minority member against the three LLCs, Frank, and Maurice and as to her claims for the dissolution and winding up of the three LLCs. In the alternative, she requests that the case should be remanded for a new trial as to those claims. Specifically, she claims that the standard set forth in *Manere* v. *Collins*, supra, 200 Conn. App. 384–85, for analyzing oppressive conduct in limited liability companies applies to her claims. We decline to exercise our supervisory power because we conclude that the standard for analyzing oppressive conduct set forth in *Manere* is not applicable in the present case.

The following additional facts are relevant to the resolution of this claim. In counts one through five

The court, however, rejected this claim, stating that it "made inquiry daily at the beginning of the trial day, if there were any other discovery matters that needed to be resolved. The plaintiffs made no claim of lack of discovery during the trial. Until the plaintiffs' posttrial brief . . . was filed, this court was not aware that there was a continuing claim that [Bridjay] and her experts were denied discovery in the form of lack of access to the books and records . . . ." Bridjay has not raised the issue of inspecting the books and records in her appellate brief and, therefore, has abandoned that claim.

of the operative complaint, Bridjay alleged claims of oppression of a minority member against the three LLCs, Frank, and Maurice. In addition, in counts seventy through seventy-two, Bridjay requested that the three LLCs be dissolved and wound up and that all of their assets be distributed to the rightful owners. The ground for this requested relief was, inter alia, oppressive conduct pursuant to General Statutes (Rev. to 2017) §§ 34-207 and 34-208 (a) (2)[11] and General Statutes § 34-267 (a) (5).[12]

[11] Hereinafter, unless otherwise indicated, all references to §§ 34-207 and 34-208 in this opinion are to the 2017 revision of the statute.

[12] In the operative complaint, Bridjay stated the grounds for dissolution, winding up and distribution of assets as being found in §§ 34-207 and 34-208 (a) (2) and General Statutes §§ 33-896 (a) (1) (B) and (D), 34-267, and 34-372 (5).

In its decision, the court stated that "§ 34-372 (5) and . . . § 33-896 (a) (1) (B) and (D) are not applicable since the LLCs are not governed by the partnership statutes or corporate statutes after July 1, 2017. Only . . . § 34-267 is applicable for LLCs after July 1, 2017."

"Our common law does not recognize LLCs, which were first created by statute in Connecticut in 1993. . . . The provisions of the [Connecticut Limited Liability Company Act (CLLCA), General Statutes (Rev. to 2017) § 34-100 et seq.] relating to winding up an LLC's affairs inextricably link the winding up process to a dissolution, and therefore must be read together with the statutes governing the dissolution of an LLC." *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317–18, 138 A.3d 257 (2016). "The [CLLCA] provides only a single mechanism for triggering a winding up of an LLC's affairs: an event of dissolution." Id., 318.

Sections 34-206 and 34-207 set forth multiple dissolution events. General Statutes (Rev. to 2017) § 34-206 provides: "A limited liability company is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following: (1) At the time or upon the occurrence of events specified in writing in the articles of organization or operating agreement; (2) unless otherwise provided in writing in the articles of organization or operating agreement, upon the affirmative vote, approval or consent of at least a majority in interest of the members; or (3) entry of a decree of judicial dissolution under section 34-207."

Pursuant to General Statutes (Rev. to 2017) § 34-207, "[o]n application by or for a member, the superior court for the judicial district where the principal office of the limited liability company is located may order dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."

In her posttrial brief, Bridjay argued that the defendants "have engaged in a pattern of conduct aimed at suppressing her minority membership interest in the [entities of which she is a member]." In support of her claim of oppression, Bridjay argued that she "has been generally frozen out of the business" and relied on the aforementioned eight "suspicious" transactions to support her claims of breach of fiduciary duty. Furthermore, Bridjay claimed that Frank and Maurice are managing members of other entities, namely, Harxter Realty, LLC, Glenbrook Center, LLC, and 317 West Avenue, LLC, and that these entities have provided distributions to both Frank and Maurice. Therefore, Frank and Maurice have "the financial wherewithal to sustain withholding distributions from [the three LLCs] because they have alternative income streams which are uncontrovertibly independent of Bridjay . . . . [S]aid information, given the totality of the circumstance[s], allows [the trial] court to draw inferences that the foregoing

Section 34-208 describes the winding up of a limited liability company. It provides in relevant part: "(a) Except as otherwise provided in writing in the operating agreement, the business and affairs of the limited liability company may be wound up . . . (2) on application of any member or legal representative or assignee thereof, by the superior court for the judicial district where the principal office of the limited liability company is located, if one or more of the members or managers of the limited liability company have engaged in wrongful conduct, or upon other cause shown." General Statutes (Rev. to 2017) § 34-208.

As an additional basis for dissolution, Bridjay cited General Statutes § 34-267 (a), which provides in relevant part: "A limited liability company is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following . . . (4) On application by a member, the entry by the Superior Court . . . of an order dissolving the company on the grounds that: (A) The conduct of all or substantially all of the company's activities and affairs is unlawful; or (B) it is not reasonably practicable to carry on the company's activities and affairs; (5) On application by a member, the entry by the Superior Court . . . of an order dissolving the company on the grounds that the mangers or those members in control of the company: (A) Have acted, are acting or will act in a manner that is illegal or fraudulent; or (B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant . . . ." As explained later in this opinion, we conclude that this section is not applicable to Bridjay's claim.

conduct has impacted [Bridjay] the most severely and was done with the specific intention of suppressing her interests and/or to punish her for aligning herself with her mother, [Marie], in the various Bongiorno legal battles." (Footnote omitted.)

In its memorandum of decision, the court noted that, as a member of the three LLCs, Bridjay had standing to seek the dissolution and winding up of the three LLCs. The court then discussed the evidence offered by the plaintiffs at trial, which included federal income tax returns for the three LLCs. "Exhibit 67 contained the tax returns for 24 Ardmore Street, LLC, for the years 2005 through and including 2017. Exhibit 68 contained the tax returns for 305 West Avenue, LLC, for the years 2007 through and including 2017. Exhibit 69 contained the tax returns for J & G Realty, LLC, for the years 2000 through and including 2017. . . . Nowhere in those three 2017 federal income tax returns is there any allocation of events, income, expenses, deductions, and credits after July 1, 2017. The monetary evidence before this court of any financial breaches after July 1, 2017, was missing from this trial. No doubt rent was received and management fees were paid from and after July 1, 2017, but no evidence was offered as to the amounts from and after July 1, 2017. The three federal income tax returns for 2017 failed to allocate and differentiate pre-July 1, 2017 finances from post-July 1, 2017 finances. This court has insufficient evidence, likewise, to do the same. This court, confronted by the very limited evidence of post-July 1, 2017 finances, will not apply the Connecticut [Uniform] Limited Liability Company Act [(CULLCA), General Statutes § 34-243 et seq.], in this memorandum of decision. . . . This court will apply the dissolution and winding up statutes, both pre-July 1, 2017 and post-July 1, 2017, to those three counts."[13] (Citation omitted.)

[13] Although the court stated it would apply the post-July 1, 2017 dissolution and winding up statutes in its decision, the court does not use these statutes in its analysis.

The court stated that "[Bridjay], as the member of the three LLCs has filed three counts seeking dissolution of each of the three LLCs . . . . Those claims are rejected . . . since [Bridjay] has failed to sustain her burden of proof. . . . As a factual allegation in support of her dissolution and winding up counts, [Bridjay] alleges: 'The conduct of all or substantially all of the defendant[s'] . . . activities and affairs are unlawful and/or it is not reasonably practicable to carry on the business in conformity with its operating agreement, articles of organization and/or the interests of the members.' . . . The three operating agreements were in evidence. No 'articles of organization' were placed in evidence. . . . The operating agreements contain only two provisions for dissolution in Article XIV, Section 14.01 Termination: (1) the unanimous decision of the Members to dissolve the LLC or, (2) the sole Member of the LLC being a Dissociating Member. . . .

"This court has discussed in detail the claim of mismanagement alleged by the plaintiffs and has found no support for those claims in this trial. . . . The court finds that no event of dissolution has occurred as set forth in the operating agreement. The court finds that [Bridjay] has failed to satisfy the proof required for the dissolution and winding up of the three LLCs. The court finds insufficient evidence that 'it is not reasonably practicable to carry on the business in conformity with its operating agreement . . . or the interests of the members.' The court finds that neither [Frank] as a member or manager of the three LLCs [nor Maurice] as manager of the three LLCs has engaged in any 'unlawful conduct . . . .' " (Citations omitted.) It further stated that it "cannot find as a matter of fact that there [were] any financial misdealings by [Frank] or [Maurice] in any fashion whatsoever. . . . [Bridjay has] failed to sustain [her] burden of proof as to the counts alleging . . . oppression."

On appeal, Bridjay asks this court to exercise its supervisory power to reverse the decision of the trial court in regard to her claims of oppression and dissolution or, in the alternative, to order a new trial, in light of this court's decision in *Manere* v. *Collins*, supra, 200 Conn. App. 356.[14] We decline to exercise our supervisory power and affirm the judgment of the trial court.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Citation omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

"Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the

[14] Bridjay has not challenged the trial court's factual findings or its conclusion that she failed to meet her burden of proof regarding her claims of oppression. Instead, she contends that "[n]either the parties nor the trial court had the benefit of this guidance [set forth in *Manere* v. *Collins*, supra, 200 Conn. App. 384–85] before the judgment was issued . . . ." Therefore, she argues that "the court's exercise of supervisory authority is necessary in order to restore the integrity of the outcome of the case . . . ."

integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015).

In *Manere* v. *Collins*, supra, 200 Conn. App. 378, this court interpreted the meaning of the word " 'oppression' " as used in CULLCA. Specifically, this court interpreted the meaning of that word as used in § 34-267 (a) (5). Id. The plaintiff in *Manere* was a member and manager of a limited liability company, BAHR. Id., 359–60. On appeal, the plaintiff claimed, inter alia, that the trial court improperly rejected his application for a dissolution of BAHR pursuant to § 34-267 (a) (5) on the ground of oppressive conduct by BAHR's only other member and manager. Id., 360, 376.

In *Manere*, this court adopted the " 'reasonable expectations' " test as the applicable standard when analyzing a claim of oppression under § 34-267 (a) (5). Id., 384. Under that standard, "a majority member's conduct is oppressive if that conduct substantially defeats the minority member's expectations which, objectively viewed, were both reasonable under the circumstances and were central to his or her decision to join the venture or developed over time." Id., 389. Further, if the court makes a finding of oppression, it must also determine whether the oppressive conduct " 'was, is, or will be directly harmful to the applicant . . . .' " Id., 392.

We do not agree with Bridjay's contention that this court's decision in *Manere* warrants the exercise of our supervisory power to reverse the trial court's judgment as to her claims of oppression and dissolution. In *Manere*, the court interpreted the meaning of the word " 'oppression' " as used in § 34-267 (a) (5), which is part of CULLCA. Id., 378. General Statutes § 34-283b states that "Sections 34-243 to 34-283d, inclusive, do not affect

an action commenced, proceeding brought or right accrued before July 1, 2017." In her own posttrial brief, Bridjay argued that the legislature did not intend for the CULLCA to apply retroactively.[15] Therefore, because Bridjay failed to present evidence of events occurring after July 1, 2017, to support her claims of oppression and dissolution, § 34-267 does not apply to her claims.

Bridjay commenced the present action in 2012. The trial court discussed that, in the evidence presented by Bridjay to the court in the form of tax returns, there were no allocations of "events, income, expenses, deductions, and credits after July 1, 2017." It further stated that it would not apply CULLCA in its decision. Therefore, the provisions of CULLCA, and specifically § 34-267 (a) (5), do not apply in the present case. Because the " 'reasonable expectations' " standard set forth in *Manere* v. *Collins*, supra, 200 Conn. App. 384–85, applies to claims of oppression arising under § 34-267 (a) (5), that standard does not apply in the present case. We, therefore, affirm the judgment with respect to this claim.

The appeal in Docket No. AC 42790 is dismissed; the appeal in Docket No. AC 47291 is dismissed as to Bridjay Capone's breach of fiduciary duty claims, and the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[15] "[The] plaintiffs take the position that the legislature did not intend to apply [CULLCA] retroactively and that, despite being repealed, [General Statutes (Rev. to 2017) §§ 34-100 to 34-242] apply to any act which occurred prior to July 1, 2017; for any claim which occurred subsequent to July 1, 2017, the proper statutory application is [CULLCA]."

SALLY KELLOGG *v.* MIDDLESEX MUTUAL ASSURANCE COMPANY (AC 43421)

Moll, Alexander and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendant insurance company for breach of contract, a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) arising from a violation of the Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.), and promissory estoppel, in connection with a restorationist insurance policy issued by the defendant. The plaintiff, the owner of a historic property, had filed a claim pursuant to that policy for loss to her property resulting from a tree falling on her home during a storm. In a prior action, the plaintiff sought to vacate an arbitration award setting the amount of the insured loss to her property. The trial court in that action, *Tierney, J.*, granted the plaintiff's application to vacate the arbitration award on the basis that it violated the applicable statute (§ 52-418). In the defendant's appeal from that judgment, *Kellogg* v. *Middlesex Mutual Assurance Co.* (326 Conn. 638), our Supreme Court reversed Judge Tierney's decision and remanded the case with direction to render judgment denying the plaintiff's application to vacate the arbitration award, concluding, inter alia, that Judge Tierney had improperly substituted his judgment for that of the appraisal panel that had decided the amount of the loss. In the present action, commenced during the pendency of the appeal from Judge Tierney's decision, the defendant filed a motion to dismiss the plaintiff's amended complaint, claiming that, in light of the pending appeal, this action was not ripe or, alternatively, was barred pursuant to the prior pending action doctrine. The trial court, *Heller, J.*, denied the defendant's motion to dismiss. The defendant filed a motion for summary judgment on the plaintiff's second revised and amended complaint, in which it argued that the breach of contract claim was barred pursuant to the doctrine of res judicata and the suit limitation provision of the restorationist policy, the CUTPA/CUIPA claim was time barred and failed as a matter of law, and the promissory estoppel claim was barred pursuant to the suit limitation provision of the policy and failed as a matter of law. The trial court, *Hernandez, J.*, denied the defendant's motion for summary judgment, relying entirely on Judge Tierney's findings in his decision granting the plaintiff's application to vacate the arbitration award in the prior proceeding, even though that decision already had been reversed by our Supreme Court, and on Judge Heller's denial of the defendant's motion to dismiss, pursuant to the law of the case doctrine. On the defendant's appeal to this court, *held*:

1. Contrary to the plaintiff's claim, this court had subject matter jurisdiction to consider the denial of the defendant's motion for summary judgment in its entirety as an appealable final judgment: the trial court relied on the same rationale in rejecting all of the defendant's claims raised in its motion for summary judgment, and, consequently, all of the defendant's claims were inextricably intertwined.
2. The trial court erred in denying the defendant's motion for summary judgment, as that court improperly relied on Judge Tierney's findings and Judge Heller's ruling: the law of the case doctrine did not apply to Judge Tierney's findings, as they were made in a decision issued in a separate matter concerning the plaintiff's application to vacate the arbitration award, and, even if the law of the case doctrine were applicable, Judge Tierney's findings became a nullity in light of our Supreme Court's reversal of Judge Tierney's decision in *Kellogg* v. *Middlesex Mutual Assurance Co.*; moreover, the court's reliance on Judge Heller's denial of the defendant's motion to dismiss was improper because the motion to dismiss and the motion for summary judgment concerned wholly separate claims and involved different legal standards; furthermore, under the circumstances of this case, the appropriate remedy was for this court to remand the case for further proceedings and to provide the defendant with another opportunity to pursue its motion for summary judgment, rather than for this court to delve into the merits of the defendant's claims.

Argued September 20, 2021—officially released March 22, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the trial court, *Hernandez, J.*, denied the defendant's motion for summary judgment on the plaintiff's second revised and amended complaint, and the defendant appealed to this court. *Reversed*; *further proceedings.*

Kathleen F. Adams, with whom, on the brief, was *Peter J. Ponziani*, for the appellant (defendant).

Frank W. Murphy, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Middlesex Mutual Assurance Company, appeals from the judgment of the trial court

denying its motion for summary judgment on the second revised and amended complaint filed by the plaintiff, Sally Kellogg, in which she raised claims of breach of contract, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., arising from a violation of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., and promissory estoppel. On appeal, the defendant claims that the court improperly denied its motion for summary judgment because (1) the breach of contract claim was barred pursuant to (a) the doctrine of res judicata and (b) the suit limitation provision of a "restorationist" property insurance policy issued by the defendant, (2) the CUTPA/CUIPA claim (a) was barred pursuant to General Statutes § 42-110g (f), the applicable statute of limitations, and (b) failed as a matter of law, and (3) the promissory estoppel claim (a) was barred pursuant to the suit limitation provision of the policy and (b) failed as a matter of law. We reverse the judgment of the trial court.

The following facts, as set forth by our Supreme Court in a prior decision addressing a separate matter involving the parties, and procedural history are relevant to our resolution of this appeal. "The plaintiff . . . is the owner of a historic property in the city of Norwalk (property). She insured the property through a '[r]estorationist' policy issued by the defendant . . . . This restorationist policy was different from a typical homeowners policy in that it had no monetary policy limit, and it covered the replacement or restoration cost of the property without deduction for depreciation. Under the policy, payment of the full restoration cost would not be immediate, but would be made in two parts, with depreciation initially withheld. The policy required the defendant to first pay the actual cash value of the loss. Once the restoration or replacement was complete, the policy required the defendant to pay the amount

'actually spent to repair, restore or replace the damaged building.' This two step process is typical in replacement cost policies, intended to address concerns that a homeowner might accept the full restoration cost but not actually restore the property, thus receiving a windfall.

"While the restorationist policy was in effect [in 2010], the property suffered a casualty loss when a four and one-half ton tree fell onto the roof and chimney during a storm, damaging the interior, exterior, and foundation of the home. Shortly after the incident, the plaintiff filed a claim on her restorationist policy. Because the plaintiff's and the defendant's adjusters were unable to agree on the amount of the loss, the plaintiff invoked the policy's appraisal provision.[1] That provision required the loss amount to be determined through an unrestricted arbitration proceeding, meaning that the arbitrators are empowered to decide issues of law and fact, and the award is not conditioned on judicial review. . . .

"To establish the appraisal panel, the plaintiff and the defendant, pursuant to the restorationist policy, each appointed one appraiser to serve as an arbitrator, and these two appraisers chose a neutral third arbitrator to act as an umpire. The appraisers each independently set the loss and submitted their valuations to the umpire. The plaintiff's appraiser claimed the damage was in excess of $1.6 million, but the defendant's appraiser believed the property could be restored for approximately $476,000. The appraisers fundamentally disagreed on two issues: the extent of damage caused by the tree, and the cost to repair the covered damage. The defendant's appraiser believed not all of the claimed damage was related to the incident and that much of the damage that was related could be fixed

[1] In their respective appellate briefs, the parties represent that the defendant invoked the appraisal provision. This discrepancy is of no moment.

for less than the plaintiff's appraiser had claimed. The umpire evaluated the differences between the two appraisers' submissions and set the loss, which was an amount between the two submissions. Before setting the loss, the umpire visited the property seven times to evaluate the damage to the building and its contents. The umpire also reviewed and considered more than 300 pages of the plaintiff's submissions. He conducted hearings with multiple witnesses, including two asbestos abatement experts and a property damage expert. He also reviewed written submissions from other experts and consultants, all of which he considered when determining the award. On certain items, the umpire agreed with the valuations of the plaintiff's appraiser, and on other items he agreed with the defendant's appraiser. He then gave both appraisers his preliminary assessment of the loss and gave them an opportunity to challenge his assessment and to advocate for their respective positions.

"The defendant's appraiser accepted the umpire's valuation, which became the appraisal panel's decision on the amount of the loss, and the panel issued its arbitration award in two parts: first, it awarded $578,587.64 for 'replacement or restoration cost' of the building on the property, which the panel depreciated to its actual cash value of $460,170.16, with the difference withheld until the plaintiff completed repairs, and, second, the panel later awarded an additional $79,731.68 for the actual cash value loss to the plaintiff's personal property." (Citation omitted; footnote added and footnotes omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 640–43, 165 A.3d 1228 (2017).

In September, 2013, the plaintiff filed in the Superior Court an application to vacate the arbitration award pursuant to General Statutes § 52-418.[2] Id., 643; see *Kellogg* v. *Middlesex Mutual Assurance Co.*, Superior

[2] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which

Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6019847-S. On February 5, 2016, following eight days of trial, the trial court, *Hon. Kevin Tierney*, judge trial referee, granted the application to vacate the award and remanded the matter for a new arbitration hearing on the basis of its conclusion that the award violated § 52-418 (a) in two ways. *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 643–44. First, "[r]elying on a valuation based on its own conclusions," the court determined that the amount of the award was insufficient, thereby prejudicing the plaintiff's " 'substantial monetary rights' " in violation of § 52-418 (a) (3). Id., 644–45. In support of its analysis, "[t]he court identified thirty-four instances in which the plaintiff had claimed damage to a specific portion of the property and the [appraisal] panel awarded less than the plaintiff had requested, sometimes awarding nothing at all." Id., 644. Second, the court concluded that the award reflected a manifest disregard of the law in violation of § 52-418 (a) (4). Id., 645. "More specifically, the court concluded, based on its own interpretation of the [restorationist] policy language, that the panel's decision '[was] in obvious error' when it calculated depreciation in a policy that 'provides for no depreciation . . . .' " Id. On February 19, 2016, the defendant appealed from Judge Tierney's decision to this court, and, subsequently, our Supreme Court transferred the appeal to

one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 (appraisal appeal). Id.

On March 7, 2016, less than one month after the defendant had filed the appraisal appeal, the plaintiff commenced the present action against the defendant. The plaintiff's original complaint set forth six counts: breach of contract (count one); breach of the covenant of good faith and fair dealing (count two); negligence[3] (count three); a CUTPA/CUIPA claim[4] (count four); negligent infliction of emotional distress (count five); and promissory estoppel (count six). By way of an amended complaint filed on April 14, 2016, the plaintiff added a seventh count asserting a separate CUTPA violation untethered to CUIPA (count seven). In support of all of her claims, the plaintiff alleged, inter alia, that the defendant had failed to compensate her adequately for the damage caused to the property and to properly implement the terms of the restorationist policy.

On April 27, 2016, the defendant filed a motion to dismiss the plaintiff's amended complaint, claiming that, in light of the appraisal appeal pending at the time, the present action was (1) not ripe or, alternatively, (2)

[3] The plaintiff labeled this count as "negligence in settling claim."

[4] "CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes] § 42-110g (a) of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . . CUIPA, which specifically prohibits unfair business practices in the insurance industry and defines what constitutes such practices in that industry . . . does not authorize a private right of action but, instead, empowers the [Insurance Commissioner] to enforce its provisions through administrative action. . . . In *Mead* v. *Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986), [however, our Supreme Court] determined that individuals may bring an action under CUTPA for violations of CUIPA." (Citations omitted; internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015).

barred pursuant to the prior pending action doctrine. On November 7, 2016, the court, *Heller*, *J.*, denied the motion to dismiss. The court first rejected the defendant's ripeness argument, determining "that the plaintiff's claims in this action were not before the appraisal . . . panel. They are independent of the claims asserted in the proceeding to vacate the [arbitration] award, and they are not contingent on the outcome of the [appraisal] appeal . . . . They are ripe for adjudication, and, therefore, they are justiciable." The court then rejected the defendant's claim invoking the prior pending action doctrine, concluding that a pending appeal is not a prior pending action.

On August 22, 2017, while the present action was pending, our Supreme Court issued a decision in the appraisal appeal concluding that Judge Tierney improperly had vacated the arbitration award because (1) his disagreement with the amount of the award did "not establish that the arbitrators violated § 52-418 (a) (3) and was not a proper ground for vacating the arbitration award," and (2) the appraisal panel did not manifestly disregard the law in violation of § 52-418 (a) (4). *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 647–51. Accordingly, our Supreme Court reversed Judge Tierney's decision and remanded the case with direction to deny the plaintiff's application to vacate the award. Id., 651.

In the present action, on August 17, 2018, the plaintiff filed a second revised and amended complaint (i.e., the operative complaint). Following rulings by the court, *Jacobs*, *J.*, adjudicating motions to strike filed by the defendant, the second revised and amended complaint (1) reasserted counts one and six, (2) repleaded count four, and (3) intentionally left blank counts two, three, five, and seven to preserve the plaintiff's rights to appellate review.[5]

[5] On December 22, 2017, the defendant filed a motion to strike the plaintiff's amended complaint. On June 1, 2018, the court, *Jacobs*, *J.*, granted in part

On August 24, 2018, the defendant filed a motion for summary judgment accompanied by a supporting memorandum of law and exhibits. With respect to count one, the defendant argued that the plaintiff's breach of contract claim was barred pursuant to (1) the doctrine of res judicata and (2) the suit limitation provision of the restorationist policy.[6] With respect to count four, the defendant contended that (1) the plaintiff's CUTPA/CUIPA claim was time barred pursuant to § 42-110g (f), and (2) the plaintiff did not have an actionable CUTPA/CUIPA claim because the defendant did not make any misrepresentations regarding coverage afforded under the policy. With respect to count six, the defendant asserted that (1) the plaintiff's promissory estoppel claim was barred pursuant to the suit limitation provision of the policy, (2) the policy constituted a written enforceable contract between the parties, thereby barring the promissory estoppel claim, and (3) the plaintiff

the defendant's motion to strike, striking counts two, three, five, and seven. The court declined to strike count one on the basis that the defendant was asking the court to "look beyond the four corners of the amended complaint to judicially notice the disposition of related issues between the same parties in [the appraisal appeal]," which the court deemed to be improper. The court also declined to strike count four, concluding that the plaintiff alleged sufficient facts to support one part of her CUTPA/CUIPA claim predicated on a violation of General Statutes § 38a-816 (1); however, the court observed that the plaintiff failed to allege sufficient facts to support the other part of her CUTPA/CUIPA claim predicated on a violation of § 38a-816 (6). In addition, the court declined to strike count six, concluding that the plaintiff had alleged sufficient facts to support her promissory estoppel claim.

On June 15, 2018, the plaintiff filed a substituted and amended complaint in which she (1) reasserted counts one and six, (2) repleaded counts two, four, and seven, and (3) intentionally left blank counts three and five to preserve her rights to appellate review. On June 29, 2018, the defendant filed a motion to strike counts two, four, and seven of the substituted and amended complaint, which the court granted on August 16, 2018.

[6] The defendant also argued that it was entitled to summary judgment on count one on the basis that its request for an appraisal under the restorationist policy barred the plaintiff's breach of contract claim. The defendant does not address that ground in its appellate briefs and, therefore, we need not further discuss it.

could not establish the elements of a promissory estoppel claim. On October 12, 2018, the plaintiff filed a memorandum of law in opposition to the motion for summary judgment, with accompanying exhibits. On October 25, 2018, the defendant filed a reply brief.[7]

On February 4, 2019, after having heard argument from the parties, the court, *Hernandez*, *J.*, denied the defendant's motion for summary judgment, summarily determining that "genuine issues as to material facts exist." On March 1, 2019, the defendant filed a motion for reargument and/or reconsideration as to the court's denial of its motion for summary judgment. On March 29, 2019, the plaintiff filed an objection. On September 13, 2019, after having heard argument from the parties, the court issued an order adhering to its decision. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

As a threshold matter, we consider whether the denial of the defendant's motion for summary judgment is an appealable final judgment. "The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . We therefore must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citations omitted; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020).

[7] In its reply brief, the defendant further asserted that the plaintiff had failed to disclose an expert vis-à-vis her CUTPA/CUIPA claim.

We begin by setting forth the following relevant procedural history. On October 2, 2019, the plaintiff filed a motion to dismiss this appeal for lack of a final judgment, and, in turn, the defendant filed an objection. On January 8, 2020, this court denied the motion to dismiss without comment. In their respective appellate briefs filed between September and December, 2020, the parties again addressed the finality of judgment question. Thereafter, on August 25, 2021, prior to hearing oral argument in this matter, we sua sponte ordered the parties to file supplemental briefs "addressing, separately as to each claim, whether or not the trial court's denial of the defendant's motion for summary judgment with respect to (1) the policy's contractual limitation, (2) the plaintiff's promissory estoppel claim, and (3) the plaintiff's CUTPA/CUIPA claim is 'inextricably intertwined' with the court's denial of the motion on res judicata grounds. See *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354 n.9, [63 A.3d 940] (2013)." The parties submitted supplemental briefs in compliance with our order

Notwithstanding that this court denied the plaintiff's motion to dismiss this appeal for lack of a final judgment, "we may choose to reevaluate the jurisdictional question at this juncture. See, e.g., *Governors Grove Condominium Assn., Inc.* v. *Hill Development Corp.*, 187 Conn. 509, 511 and n.6, 446 A.2d 1082 (1982), overruled on other grounds by *Morelli* v. *Manpower, Inc.*, 226 Conn. 831, 628 A.2d 1311 (1993); *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 687 n.2, 950 A.2d 1, cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008), and cert. denied, 289 Conn. 942, 959 A.2d 1008 (2008); *Rocque* v. *Sound Mfg., Inc.*, 76 Conn. App. 130, 132 n.3, 818 A.2d 884, cert. denied, 263 Conn. 927, 823 A.2d 1217 (2003); *Groesbeck* v. *Sotire*, 1 Conn. App. 66, 67–68, 467 A.2d 1245 (1983)." *Village Mortgage Co.* v. *Veneziano*, 203 Conn. App. 154, 165, 247 A.3d 588 (2021). Following

a review of the case upon full briefing and oral argument, we conclude that it is prudent to revisit the issue and to reaffirm that we have subject matter jurisdiction to consider the denial of the defendant's motion for summary judgment in its entirety.

"[O]rdinarily, the denial of a motion for summary judgment is not an appealable final judgment. . . . When the decision on a motion for summary judgment, however, is based on the doctrine of collateral estoppel, the denial of that motion does constitute a final judgment for purposes of appeal. . . . That precept applies to the doctrine of res judicata with equal force." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 174 Conn. App. 573, 578 n.4, 166 A.3d 716 (2017), aff'd, 331 Conn. 379, 204 A.3d 664 (2019). Accordingly, insofar as the defendant appeals from the denial of its motion for summary judgment on count one vis-à-vis the doctrine of res judicata, we conclude that this appeal is jurisdictionally sound.

In its motion for summary judgment, the defendant did not contend that counts four and six were barred pursuant to the doctrine of res judicata; rather, the defendant argued that (1) count four (a) was time barred pursuant to § 42-110g (f), and (b) failed as a matter of law, and (2) count six (a) was barred pursuant to the suit limitation provision of the restorationist policy and (b) failed as a matter of law. The defendant also argued that the suit limitation provision of the policy barred count one. The defendant maintains these claims on appeal. Additional analysis is necessary to determine whether we have subject matter jurisdiction over these claims.

"[A]lthough normally the court's denial of a motion for summary judgment on grounds other than those that fully conclude the rights of the parties would not be

considered a final judgment for appeal purposes, if summary judgment is sought primarily on the basis of res judicata . . . but the movants move unsuccessfully for summary judgment on an alternative ground as well, the court may review the denial of such a claim along with the denial of the res judicata defense when the two are inextricably intertwined with one another." *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 648, 164 A.3d 731 (2017), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019); see also *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 354 n.9 (claim regarding denial of statute of limitations defense reviewable when inextricably intertwined with claim regarding denial of res judicata defense).

Although it did not address a res judicata claim, we are guided by our Supreme Court's decision in *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 836 A.2d 1124 (2003). In *Collins*, the plaintiffs, several orthopedic surgeons and groups of orthopedic surgeons, brought an action claiming breach of contract, tortious interference with business expectations, and a violation of CUTPA on the basis of allegations that the defendant, among other things, had failed to pay adequately for medical procedures pursuant to the terms of written agreements executed between the parties. Id., 16–17. Subsequently, the plaintiffs filed a motion for class certification, which the trial court granted only as to three subparagraphs of factual allegations contained in the plaintiffs' complaint that were alleged in support of each of the plaintiffs' claims. Id., 20. The defendant appealed from the class certification order to this court, and our Supreme Court transferred the appeal to itself pursuant to § 51-199 (c) and Practice Book § 65-1.[8] Id., 16 n.1.

[8] In addition, the plaintiffs cross appealed from the class certification order. *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 16 n.1.

Before reaching the merits of the defendant's claims in *Collins*, our Supreme Court considered whether it had subject matter jurisdiction to entertain the portion of the appeal challenging the class certification order vis-à-vis the plaintiffs' non-CUTPA counts. Id., 28. The court determined that, by statute, an order granting class certification for an action brought pursuant to CUTPA was subject to immediate appellate review, and, therefore, "there [was] no question about the appealability of the CUTPA counts . . . ." Id., 29; see General Statutes § 42-110h. The court further concluded that it would review the defendant's claims as to the non-CUTPA counts pursuant to the "inextricably intertwined" rationale. *Collins* v. *Anthem Health Plans, Inc.*, supra, 266 Conn. 29. As the court explained: "[T]he trial court granted class certification with respect to three subparagraphs of the plaintiffs' complaint that contained factual allegations supporting *each count of the complaint*; and the certification order did not differentiate among, or even address, the individual counts of the complaint. Therefore, in a realistic, if not a formal, sense, our analysis of the court's class certification order would apply to all counts of the complaint, because each count depends upon the same factual issues certified for class representation in the court's order. Any restriction of our review of this class certification order with respect to the CUTPA count would, therefore, be purely hypothetical. Consequently, we conclude that where, as here, the factual and legal bases of the class certification issues do not differ among the CUTPA and [non-CUTPA] claims, and where they are, therefore, inextricably intertwined with each other, our conclusions regarding the class certification of the CUTPA counts will, as a matter of law, govern the class certification of the [non-CUTPA] counts as well." (Emphasis in original.) Id., 30.

We consider the circumstances in this case to be comparable to *Collins*. As we will discuss in detail in

part II of this opinion, in denying the defendant's motion for summary judgment, the trial court did not separately address each of the defendant's claims; rather, it denied the motion for summary judgment in toto on the basis of its reliance on (1) Judge Tierney's findings in his decision granting the plaintiff's application to vacate the arbitration award and (2) Judge Heller's denial of the defendant's motion to dismiss the plaintiff's amended complaint. In other words, the court relied on the same rationale in rejecting all of the defendant's claims raised in its motion for summary judgment, including its res judicata defense directed to count one. As such, our analysis as to the defendant's res judicata claim is equally applicable to the rest of its claims, and, consequently, we deem all of the defendant's claims to be inextricably intertwined. As in *Collins*, restricting our review on appeal to the defendant's res judicata claim would be "purely hypothetical." Id.; cf. *Rockwell* v. *Rockwell*, 196 Conn. App. 763, 772–73, 230 A.3d 889 (2020) (denial of so-called "motion to dismiss and/or motion for summary judgment" raising statute of limitations defense was not inextricably intertwined with denial of motion for summary judgment predicated on doctrines of res judicata and/or collateral estoppel when claims were presented in two separate motions and no "meaningful connection" was discerned between claims). Accordingly, we conclude that we have subject matter jurisdiction to consider all of the defendant's claims on appeal directed to the trial court's denial of its motion for summary judgment.

II

With respect to the merits of this appeal, the defendant claims that the trial court improperly denied its motion for summary judgment. For the reasons that follow, we conclude that the court committed error in denying the motion for summary judgment and that, as a result, the denial of the motion for summary judgment

must be reversed and the matter must be remanded for further proceedings.

"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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, supra, 174 Conn. App. 578–79. Accordingly, we exercise plenary review over the court's denial of the defendant's motion for summary judgment. Id., 579.

In a decision issued on July 31, 2020, further articulating its rationale for denying the defendant's motion for summary judgment,[9] the court briefly summarized (1) Judge Tierney's decision granting the plaintiff's application to vacate the arbitration award, (2) our Supreme Court's decision in *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638, reversing Judge Tierney's decision, and (3) Judge Heller's denial of the defendant's motion to dismiss the plaintiff's amended

[9] On November 20, 2019, pursuant to Practice Book § 66-5, the defendant filed a motion for articulation as to the court's February 4, 2019 order denying the motion for summary judgment. On July 31, 2020, in response to the motion for articulation, the court issued a memorandum of decision further articulating the basis of its denial of the motion for summary judgment.

complaint. Thereafter, the court determined that "[t]he law of the case in this action precludes a finding that there exist no triable issues of fact with respect to [counts one, four, and six of the plaintiff's second revised and amended complaint]." Specifically, relying entirely on Judge Tierney's findings and Judge Heller's ruling,[10] the court concluded that (1) counts one, four, and six "state[d] viable causes of action," (2) counts one, four, and six "were not before the appraisal . . . panel, and, therefore, were not before [our] Supreme Court [in the appraisal appeal]," and (3) "the evidence [that] resulted in the factual findings of Judge Tierney [in his decision granting the plaintiff's application to vacate the award], if presented at trial, would present material issues of fact regarding [counts one, four, and six]." With regard to Judge Tierney's findings, the court explained that Judge Tierney had "recognized the historic and unique nature of the subject property, the sweeping promises contained in the restorationist policy and identified thirty-four instances in which the defendant failed to pay the plaintiff under the policy for the dwelling or its contents. . . . These findings set forth the manner in which the defendant allegedly failed to carry out the terms of its sweeping policy [that] it marketed to the plaintiff. As such, those findings raise justiciable factual issues regarding [counts one, four, and six]." (Citation omitted.) Although the court acknowledged that Judge Tierney's decision had been reversed by our Supreme Court in *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638, it determined that (1) Judge Tierney's findings were not before our Supreme Court in the appraisal appeal, (2) our

[10] Earlier in its decision, in setting forth the background of the case, the court made a passing reference to Judge Jacobs' rulings on the defendant's motions to strike. See footnote 5 of this opinion. Although the court expressly referenced Judge Tierney's findings and Judge Heller's ruling in setting forth the basis of its denial of the motion for summary judgment, the court did not mention Judge Jacobs' rulings in its analysis.

Supreme Court reversed Judge Tierney's judgment vacating the award only on procedural grounds, and (3) our Supreme Court's decision did not invalidate any of Judge Tierney's findings.

The defendant claims that, in denying its motion for summary judgment, the court improperly relied on (1) Judge Tierney's findings in his decision granting the plaintiff's application to vacate the arbitration award and (2) Judge Heller's denial of its motion to dismiss. We agree.

Before addressing the merits of the defendant's claims, we note that the court's reliance on Judge Tierney's findings and Judge Heller's ruling stemmed from its application of the law of the case doctrine. "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case . . . . [T]he law of the case doctrine does not preclude a judge from deciding an issue in a way contrary to how it was decided by a predecessor judge in the same case. . . . [It] provides that judges may treat a prior ruling as the law of the case if they agree with the determination. He or she may, however, decide the issue differently if he or she is convinced that the prior decision is wrong." (Citation omitted; internal quotation marks omitted.) *Sullivan* v. *Thorndike*, 137 Conn. App. 223, 227–28, 48 A.3d 130 (2012).

A

We first address the defendant's claim that the court committed error in predicating its denial of the defendant's motion for summary judgment on Judge Tierney's

findings in his decision granting the plaintiff's application to vacate the arbitration award because Judge Tierney's decision was reversed by our Supreme Court in *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638. We conclude that the court's reliance on Judge Tierney's findings was improper.

Initially, we observe that the court incorrectly determined that Judge Tierney's findings were subject to the law of the case doctrine in this matter. At a minimum, "[t]he law of the case doctrine applies only to subsequent proceedings *in the same case*." (Emphasis in original.) *Forte* v. *Citicorp Mortgage, Inc.*, 66 Conn. App. 475, 481, 784 A.2d 1024 (2001). Thus, the law of the case doctrine did not apply to Judge Tierney's findings, which were made in a decision issued in a separate matter concerning the plaintiff's application to vacate the arbitration award.

Even if the law of the case doctrine were applicable, the court erred in basing its denial of the motion for summary judgment on Judge Tierney's findings in light of our Supreme Court's reversal of Judge Tierney's decision in *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638. "[W]e note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered." (Internal quotation marks omitted.) *Hospital Media Network, LLC* v. *Henderson*, 209 Conn. App. 395, 409, A.3d (2021). As such, factual findings set forth in a judgment that has been unconditionally reversed have no precedential value. See, e.g., id., 410–11 (trial court acted within scope of remand order by making independent factual findings on basis of entire record when prior judgment was reversed and matter was remanded for new hearing in damages); cf. *Fazio* v. *Fazio*, 199 Conn. App. 282, 287, 289–90, 235 A.3d 687 (prior finding of cohabitation was binding on

trial court on remand when that finding was not challenged in prior appeal and this court in prior appeal, instead of remanding for new trial, issued "limited remand" directing trial court " 'to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the [separation] agreement' "), cert. denied, 335 Conn. 963, 239 A.3d 1213 (2020).

In *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638, our Supreme Court reversed Judge Tierney's decision in full and remanded the matter with direction to deny the plaintiff's application to vacate the arbitration award. Id., 651. The court's decision rested on its conclusion that Judge Tierney improperly substituted his judgment for that of the appraisal panel and failed to properly defer to the panel. Id., 640, 645, 647–51. As the court explained, "[w]hen considering a motion to vacate an unrestricted arbitration award, a trial court should not substitute its judgment for that of the arbitrators. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus, the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact." (Emphasis omitted; internal quotation marks omitted.) Id., 645–46.

Put simply, Judge Tierney's findings became a nullity as a result of *Kellogg*. It follows that the court erred in relying on Judge Tierney's findings to deny the defendant's motion for summary judgment.

B

The defendant also claims that, in denying its motion for summary judgment, the court improperly relied on

Judge Heller's denial of its motion to dismiss the plaintiff's amended complaint notwithstanding that its motion to dismiss and its motion for summary judgment concerned wholly separate claims. We agree.

First, as posited by the defendant, the motion to dismiss and the motion for summary judgment raised distinct claims. In its motion to dismiss, the defendant asserted that the present action was (1) not ripe or, alternatively, (2) barred pursuant to the prior pending action doctrine. In contrast, the defendant's motion for summary judgment was predicated on, among others, a res judicata defense.

Additionally, "[a] trial court applies different principles and a different analysis when ruling on a motion to dismiss as opposed to a motion for summary judgment." *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 339, 85 A.3d 53 (2014). "Whereas a motion to dismiss is decided only on the allegations in the complaint and the facts implied from those allegations, summary judgment is decided by looking at all of the pleadings, affidavits and documentary evidence presented to the court in support of the motion. The latter standard, therefore, takes account of the facts that have been developed through discovery, rather than merely relying on the plaintiffs' allegations at the outset of the action." (Emphasis omitted; internal quotation marks omitted.) Id., 340. In short, the law of the case doctrine is inapplicable to the circumstances of this case. See *Sidorova* v. *East Lyme Board of Education*, 158 Conn. App. 872, 878–79 n.7, 122 A.3d 656 (rejecting claim that denial of motion to dismiss and denial in part of motion to strike, directed to prior versions of operative complaint, constituted law of case that should have resulted in denial of motion for summary judgment, deeming law of case doctrine inapplicable), cert. denied, 319 Conn. 911, 123 A.3d 436 (2015); *Henderson* v. *Lagoudis*, supra, 339–41 (law of case doctrine was inapplicable to situation when

trial court granted defendants' motion for summary judgment on basis that plaintiff lacked standing notwithstanding prior court's denial of defendants' motion to dismiss predicated on standing).

In sum, we conclude that the court's reliance on Judge Heller's denial of the defendant's motion to dismiss to support its denial of the defendant's motion for summary judgment was improper.

C

Having concluded that the court improperly denied the defendant's motion for summary judgment, we now consider the appropriate remedy. In its appellate briefs, the defendant asks us to conclude that it is entitled to summary judgment as to counts one, four, and six of the plaintiff's second revised and amended complaint. Under the circumstances of this case, we believe that the appropriate recourse is to remand the case for further proceedings and to provide the defendant with another opportunity to pursue its motion for summary judgment. In essence, by improperly basing its denial of the defendant's motion for summary judgment on Judge Tierney's findings in his decision granting the plaintiff's application to vacate the arbitration award and Judge Heller's denial of the defendant's motion to dismiss the plaintiff's amended complaint, the court failed to properly address the defendant's motion for summary judgment. Rather than delving into the merits of the defendant's claims, we are inclined to permit the court to address them on remand following a proper consideration of the motion for summary judgment, should the defendant choose to renew it. See, e.g., *Greene* v. *Keating*, 156 Conn. App. 854, 861–62, 115 A.3d 512 (2015) (vacating denial of motion for summary judgment and granting of cross motion for summary judgment and remanding case for proper consideration of motions when trial court, in ruling on motions, sua

sponte raised and considered ground not presented or briefed by parties); *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 234–37, 4 A.3d 851 (2010) (reversing denial of motions for summary judgment and remanding for further proceedings when trial court summarily denied motions without determining whether genuine issue of material fact existed regarding res judicata and collateral estoppel defenses and without giving parties opportunity to argue merits of those defenses); *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 123, 891 A.2d 106 (2006) (reversing denial of motion for summary judgment and remanding case for further proceedings when trial court improperly treated motion for summary judgment as motion to dismiss in relation to claim that court lacked subject matter jurisdiction).[11]

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

In this opinion the other judges concurred.

RICHARD BUEHLER *v.* LILACH BUEHLER
(AC 44080)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court issuing a postsecondary educational support order pursuant to statute ((Rev. to 2015) § 46b-56c). On appeal, the plaintiff claimed, inter alia, that the court misconstrued § 46b-56c (d) when it entered the support order,

[11] In the portion of its principal appellate brief setting forth the nature of the proceedings and the facts of the case, the defendant states that the plaintiff submitted inadmissible evidence in support of her memorandum of law in opposition to the defendant's motion for summary judgment. The defendant raised this issue in its reply brief filed in response to the plaintiff's memorandum of law in opposition to its motion for summary judgment, but this issue was not addressed by the court. Insofar as the defendant is raising this issue as a claim of error on appeal, we need not address it in light of our resolution of this appeal.

because the defendant had excluded him from the college selection process of their daughter, H, and, therefore, failed to satisfy the requirement of § 46b-56c (d) that both parents participate in and agree upon the institution of higher education that H would attend. *Held*:

1. The plaintiff could not prevail on his claim that the trial court, in ordering him to pay a portion of H's college education expenses, misconstrued § 46b-56c (d): although the language of the statute creates a mandatory duty on both parents to participate in and reach an agreement upon which college a child will attend, the court found that the plaintiff had excluded himself from H's college selection process, as the evidence showed that the defendant informed the plaintiff of the colleges to which H had applied but that the plaintiff never discussed this information with either the defendant or H, did not object to any of the colleges or suggest alternative institutions, and did not timely open messages from the defendant asking him to complete financial aid forms for H; moreover, the defendant was not required to seek an order resolving the issue of which institution of higher education H would attend before seeking a support order, as the plaintiff's refusal to participate in H's college selection process did not provide the defendant with notice that the plaintiff would disagree with H's choice of college, and, in granting the defendant's motion, the court exercised its authority pursuant to § 46b-56c (d) to resolve any disagreement between the parties.
2. The plaintiff could not prevail on his claim that the trial court improperly predicated its decision on factual findings from the parties' dissolution of marriage or a consideration of his relationship with H in issuing its support order; the court's memorandum of decision clearly stated that its order was based on the facts surrounding H's college selection process and the plaintiff's failure to participate in that process, not the historical facts regarding the breakdown of the parties' marriage; moreover, the court's finding that the plaintiff did not reach out to H about her high school graduation or ask her about her college preferences merely pointed out one way the plaintiff could have been involved in the college selection process but did not form the basis of the court's decision to enter the educational support order.
3. The trial court's finding that the defendant attempted to include the plaintiff in H's college selection process was not clearly erroneous; evidence in the record showed that the defendant sent the plaintiff e-mails about H's interest in colleges beginning in H's junior year of high school and through the fall of H's senior year of high school.

Argued December 6, 2021—officially released March 22, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Gordon, J.*; judgment dissolving the marriage and granting

certain other relief; thereafter, the court, *Sommer*, *J.*, granted the defendant's postjudgment motion for postsecondary educational support, and the plaintiff appealed to this court. *Affirmed.*

Jon T. Kukucka, with whom were *Nicole M. Riel*, and, on the brief, *Johanna S. Katz*, for the appellant (plaintiff).

Lilach Buehler, self-represented, the appellee (defendant).

Opinion

CLARK, J. This appeal arises out of the trial court's judgment issuing a postsecondary educational support order (support order) pursuant to General Statutes (Rev. to 2015) § 46b-56c[1] in favor of the defendant,

[1] General Statutes (Rev. to 2015) § 46b-56c titled "Educational support orders" provides in relevant part: "(a) For purposes of this section, an educational support order is an order entered by a court requiring a parent to provide support for a child or children to attend for up to a total of four full academic years an institution of higher education or a private occupational school for the purpose of attaining a bachelor's or other undergraduate degree, or other appropriate vocational instruction. An educational support order may be entered with respect to any child who has not attained twenty-three years of age and shall terminate not later than the date on which the child attains twenty-three years of age.

"(b) (1) On motion or petition of a parent, the court may enter an educational support order at the time of entry of a decree of dissolution . . . and no educational support order may be entered thereafter unless the decree explicitly provides that a motion or petition for an educational support order may be filed by either parent at a subsequent date. . . .

"(c) The court may not enter an educational support order pursuant to this section unless the court finds as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education or private occupational school if the family were intact. After making such finding, the court, in determining whether to enter an educational support order, shall consider all relevant circumstances, including: (1) The parents' income, assets and other obligations, including obligations to other dependents; (2) the child's need for support to attend an institution of higher education or private occupational school considering the child's assets and the child's ability to earn income; (3) the availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the higher education to be funded considering the child's academic record and the financial resources available; (5) the child's prepa-

Lilach Buehler, and against the plaintiff, Richard Buehler. On appeal, the plaintiff claims that the court (1) misconstrued and misapplied § 46b-56c (d) when it entered the support order, (2) improperly predicated the support order on factual findings made by the dissolution court with respect to the breakdown of the parties' marriage, (3) improperly considered the nature of the plaintiff's relationship with the parties' eldest daughter, Hannah, and (4) erroneously found that the defendant attempted to include him in Hannah's college selection process. We affirm the judgment of the trial court.

The following procedural history provides context for the present appeal. The marriage of the parties was dissolved by order of the trial court, *Gordon*, *J.* (dissolution court), on June 4, 2008. At that time, the dissolution

ration for, aptitude for and commitment to higher education; and (6) evidence, if any, of the institution of higher education or private occupational school the child would attend.

"(d) At the appropriate time, *both parents shall participate in, and agree* upon, the decision as to which institution of higher education or private occupational school the child will attend. The court may make an order resolving the matter if the parents fail to reach an agreement.

"(e) To qualify for payments due under an educational support order, the child must (1) enroll in an accredited institution of higher education or private occupational school . . . (2) actively pursue a course of study commensurate with the child's vocational goals that constitutes at least one-half the course load determined by that institution or school to constitute full-time enrollment, (3) maintain good academic standing in accordance with the rules of the institution or school, and (4) make available all academic records to both parents during the term of the order. The order shall be suspended after any academic period during which the child fails to comply with these conditions.

"(f) The educational support order may include support for any necessary educational expense, including room, board, dues, tuition, fees, registration and application costs, but such expenses shall not be more than the amount charged by The University of Connecticut for a full-time in-state student at the time the child for whom educational support is being ordered matriculates, except this limit may be exceeded by agreement of the parents. An educational support order may also include the cost of books and medical insurance for such child. . . ." (Emphasis added.)

All references herein to § 46b-56c are to the 2015 revision of the statute.

court reserved jurisdiction regarding orders for the postsecondary education of the parties' three minor children pursuant to § 46b-56c. The postdissolution relationship between the parties has been litigious.[2]

In April, 2016, Hannah, then a junior in high school, began the process of choosing a college to attend. The defendant informed the plaintiff by e-mail[3] that, during spring break, she and their children were going to visit maternal relatives in North Carolina and that they would visit some colleges along the way. The plaintiff responded by asking for a list of colleges Hannah planned to visit and stated that he might join the trip if he were provided with adequate information in a timely manner. The defendant declined to provide the plaintiff with the list of colleges and suggested that the plaintiff contact Hannah directly to arrange his own college tours with her. In its memorandum of decision, the trial court, *Sommer*, *J.*, found that, "[g]iven the acrimonious character of the parties' relationship, it was not remotely realistic for the plaintiff to accompany them on these early visits . . . ."

In October, 2016, the defendant informed the plaintiff that Hannah had sent her SAT scores to the colleges and universities she was considering. The defendant also requested that the plaintiff complete financial aid applications required for Hannah to receive financial

[2] See *Buehler* v. *Buehler*, 117 Conn. App. 304, 978 A.2d 1141 (2009); *Buehler* v. *Buehler*, 138 Conn. App. 63, 50 A.3d 372 (2012); *Buehler* v. *Buehler*, 175 Conn. App. 375, 167 A.3d 1108 (2017). At the present time, there are more than 510 entries on the trial court docket.

[3] Given the contentious nature of the parties' relationship, the dissolution court had ordered the parties to communicate with each other by e-mail using the "Our Family Wizard" website. Our Family Wizard is a website offering web and mobile solutions for divorced or separated parents to communicate, reduce conflict, and reach resolutions on everyday coparenting matters, available at https://www.ourfamilywizard.com/about (last visited March 9, 2022). See *Dufresne* v. *Dufresne*, 191 Conn. App. 532, 535 n.5, 215 A.3d 1259 (2019).

assistance. The plaintiff did not respond to those requests. He also did not discuss with Hannah her academic interests and career aspirations or offer to take her to visit colleges.

In the fall of 2017, Hannah matriculated at Quinnipiac University, majoring in health sciences. Hannah received an academic scholarship, and the defendant and Hannah paid the balance of her tuition and associated fees with their assets and loans. On October 17, 2017, the defendant filed a motion for order re: postsecondary educational support, postjudgment (motion).

Judge Sommer held a hearing on the defendant's motion on April 17 and September 14, 2018. At the hearing, the plaintiff objected to the motion, arguing that the defendant had excluded him from Hannah's college selection process and therefore had failed to satisfy the requirements of § 46b-56c (d), which provides in relevant part that, "[a]t the appropriate time, both parents shall participate in, and agree upon, the decision as to which institution of higher education or private occupational school the child will attend. . . ." General Statutes (Rev. to 2015) § 46b-56c (d).

The court issued a memorandum of decision on February 8, 2019. In its decision, the court noted that, at the time of dissolution, the dissolution court had found that " '[t]here is no doubt given the premium placed on education and the talents of these parents—and the pride in which they both spoke of their children's educational accomplishments' " that the parents would have provided support to their children for higher education if the family were intact. The dissolution court, therefore, reserved jurisdiction regarding an educational support order pursuant to § 46b-56c. Judge Sommer thus concluded that the "conditions precedent for an educational support order to enter pursuant to . . . § 46b-56c (c)" had been met. See footnote 1 of this opinion.

The court understood the defendant to be seeking an order to establish the percentage of responsibility each of the parties had for Hannah's postsecondary education expenses, including room, board, tuition, books, fees, registration, and application costs. The defendant was not seeking reimbursement for the expenses she already had incurred and had paid at the time the motion was filed. She sought contribution only for expenses incurred for Hannah's future college expenses.

In issuing its order, the court considered the criteria identified in § 46b-56c (c): (1) the parents' income, assets, and other obligations, including obligations to other dependents; (2) the child's need for support to attend an institution of higher education considering the child's assets and ability to earn income; (3) the availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the higher education to be funded considering the child's academic record and the financial resources available; (5) the child's preparation and aptitude for and commitment to higher education; and (6) evidence, if any, of the educational institution the child would attend.

With respect to Hannah's college selection process, the court found that, when Hannah was in high school, she expressed an interest in pursuing a career in the health sciences and that her guidance counselor helped her identify institutions that offered that course of study. One of the institutions identified was Quinnipiac University, which accepted Hannah as a student and offered her an academic scholarship. The court also found that Hannah diligently had prepared for college and that she had the academic aptitude for success at Quinnipiac University. At the time of the hearing, Hannah successfully had progressed to her sophomore year with a goal of becoming a physician's assistant and had qualified for a partial academic scholarship. As a result,

the court found that Hannah met the statutory criteria of § 46b-56c (e). See footnote 1 of this opinion.

The court also found that Hannah needed financial assistance to attend Quinnipiac University. The defendant had paid a portion of Hannah's tuition and assisted Hannah by cosigning a loan from Sallie Mae[4] and obtaining federal financial assistance. On the basis of the parties' financial affidavits and testimony, the court calculated the parties' respective net weekly incomes and expenses and found that both parties had the financial ability to contribute to the cost of Hannah's education at Quinnipiac University. The plaintiff's ability, however, was greater than the defendant's.[5]

The plaintiff objected to the defendant's motion, alleging that the defendant had excluded him from the college application process. He argued that the requirement in § 46b-56c (d) that "both parents shall participate in, and agree upon, the decision as to which institution of higher education . . . the child will attend"; General Statutes (Rev. to 2015) § 46b-56c (d); is a condition precedent to a parent's obligation to contribute to the cost of a child's postsecondary education. He contended that because he did not participate in or agree to Hannah's decision to attend Quinnipiac University, he could not be ordered to contribute to the cost of her attending that institution. He testified at the hearing that he was left out of the process when Hannah was deciding which college to attend and that, in his view, the University of Connecticut would have been a better college for her. The court found that the plaintiff made that claim without any knowledge of the academic program Hannah had selected. Although the plaintiff acknowledged that the defendant had informed him

[4] SLM Corporation, which offers private education loans, is commonly known as Sallie Mae.

[5] On appeal, the plaintiff does not challenge the court's findings regarding the parties' financial assets and incomes.

that Hannah was applying to college, he did not make any attempt to determine Hannah's interests and reasons for applying to Quinnipiac University.

The court found that the parties have not communicated effectively since the time of dissolution. The court reviewed the Our Family Wizard records entered into evidence and placed responsibility for the problem primarily on the plaintiff. The e-mail communications by the defendant established that she had sought the plaintiff's participation in the application process. In April, 2016, during Hannah's junior year in high school, the defendant informed the plaintiff that she was taking their children to visit maternal relatives in North Carolina and that they would visit some colleges along the way.[6] According to the court, "rather than focus on Hannah's interests and academic goals that were a key

[6] An exhibit concerning the communication between the parties on Our Family Wizard was entered into evidence. On April 3, 2016, at 7:51 a.m., the defendant sent the plaintiff a message that stated in part: "Richard, The children and I will be going away to North Carolina on April 9 returning April 13. During this time we will be visiting colleges with Hannah."

The plaintiff responded on April 9, 2016, at 7:51 a.m., stating in part: "Lilach, May I reiterate to you once again that you do not have the authority to unilaterally dictate a modification to a court order by hijacking my parenting time whenever you so choose. You must consult with me and gain agreement PRIOR to making any arrangements that deviate from the court ordered parenting schedule. Moreover, what makes you think I would not want to fully participate in Hannah's college search by attending these campus visits along with her?! Why have you deliberately excluded me from this process to this point? Have you considered that I may too have ideas and plans to assist her in her search? Have you once stopped to consider the devastating message you are sending to our daughter? A smidgen of inclusion and consideration for all would be greatly appreciated in this regard."

At 8:25 a.m. on April 9, 2016, the defendant replied to the plaintiff stating in part: "Richard, As far as Hannah's college search is concerned, I'd like to make one thing very clear. You are responsible for your own communication. You know Hannah is a junior and has begun this process. Have you once inquired with me or with her about what she might be interested in? What she might like to do or study? What schools she'[s] interested in? NO. You haven't." (Emphasis in original.)

part of her [selection] process or offer to take [Hannah] on . . . college visits, the plaintiff berated the defendant, accusing her in the April 9, 2016 e-mail of deliberately excluding him." The court found that there was ample time after April, 2016, for the plaintiff to have become involved in the college selection process, if he had made the effort to establish a positive relationship with Hannah. In an e-mail dated November 11, 2016, the plaintiff told the defendant that he would discuss Hannah's college applications during his parenting time, but it does not appear that he ever had such a discussion.[7] The court found no evidence that the plaintiff ever offered to take Hannah to visit colleges.

The court also found that the communications between the parties on Our Family Wizard contradicted the plaintiff's claims that the defendant had excluded him from Hannah's college application and selection process. The court found that, "according to the Our Family Wizard records, the defendant informed him via Our Family Wizard of the schools to which Hannah sent her SAT scores, and those to which she applied: Stony Brook University, Quinnipiac University, Drexel University, Marymount College, the University of Connecticut, West Virginia, Loyola College (Maryland), High Point University and the University of Delaware. Our Family Wizard records indicate that the plaintiff refused each of these communications." On the basis of all the evidence it heard, the court found that the defendant did not exclude the plaintiff from the college selection process. Rather, the court found that the plaintiff excluded himself from that process by refusing to engage with the defendant about Hannah's college choices.

Having determined that the defendant satisfied all of the statutory criteria for a postsecondary educational

[7] The court found that it was undisputed that the plaintiff had no relationship or communication with Hannah.

support order, the court granted the motion and ordered the plaintiff to pay (1) the full amount of the spring, 2019 Quinnipiac University invoice, net of the scholarships and financial aid listed therein, up to the statutory cap set forth in § 46b-56c (f),[8] and (2) two-thirds of the balance of Hannah's postsecondary education expenses, net of scholarships and grants, but including two-thirds of the parental responsibility for Sallie Mae loans. The court further ordered that its financial orders also shall apply to invoice charges by Quinnipiac University for tuition, room, board, books and fees for Hannah's junior and senior year at Quinnipiac University or an equivalent institution. Lastly, the court ordered that the plaintiff fully and timely cooperate in any financial aid or loan applications for Hannah and maintain medical insurance for her while she is enrolled in college.[9]

After the court issued its decision, the plaintiff filed a motion to reargue, which the court denied in a memorandum of decision dated March 13, 2020. The court determined that the plaintiff's arguments in his motion to reargue were essentially the same as those he made at the hearing on the motion for the support order. In denying the motion to reargue, the court stated that § 46b-56c (d) requires both parents to participate in the college application and selection process and that the defendant did everything she could to engage the plaintiff as early as Hannah's junior year of high school. The court found that the plaintiff "removed himself from the college application process [and] cannot rely on [§] 46b-56c (d) to avoid contributing to Hannah's college expenses when the evidence is overwhelming that he chose not to participate on the decision with the defen-

[8] See General Statutes (Rev. to 2015) § 46b-56c (f), set forth in footnote 1 of this opinion.

[9] On appeal, the plaintiff does not claim that the court improperly ordered him to maintain medical insurance for Hannah as long as she is enrolled as a college student.

dant." The plaintiff appealed. Additional facts will be addressed as needed.

I

The plaintiff first claims that the court misconstrued § 46b-56c (d) when it ordered him to pay a portion of Hannah's college education expenses. He argues that the court improperly disregarded the statute's requirement that both parents participate in and agree upon the decision about which educational institution a child will attend. He also contends that the court improperly found that he refused to participate in Hannah's college selection. We disagree with both of these contentions.

To the extent that the plaintiff's claim challenges the court's construction and application of § 46b-56c, our review is plenary. *Schreck* v. *Stamford*, 250 Conn. 592, 597, 737 A.2d 916 (1999) (when question on appeal involves issue of statutory construction, review is plenary); see also *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010) (application of statute to particular set of facts is question of law, over which court exercises plenary review). To the extent that his claim challenges the court's factual finding that he refused to participate in Hannah's college selection process, we review it under the clearly erroneous standard. "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." (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, 186 Conn. App. 431, 441, 199 A.3d 1082 (2018).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Bender* v. *Bender*, 292 Conn. 696, 708, 975 A.2d 636 (2009).

The plaintiff's claim is predicated, in part, on the language of § 46b-56c (d), which provides: "At the appropriate time, *both parents shall participate in, and agree upon*, the decision as to which institution of higher education or private occupational school the child *will attend*. The court may make an order resolving the matter if the parents fail to reach an agreement." (Emphasis added.) General Statutes (Rev. to 2015) § 46b-56c (d). The plaintiff argues that § 46b-56c (d) must be strictly construed because it is in derogation of the common law. See *Loughlin* v. *Loughlin*, 93 Conn. App. 618, 635, 889 A.2d 902 (obligation of parent to support child terminates when child attains age of majority, which is eighteen in Connecticut), aff'd, 280 Conn. 632, 910 A.2d 963 (2006). "[W]hen a statute is in derogation of common law . . . 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." (Internal quotation marks omitted.) *Chada* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 788–89, 865 A.2d 1163 (2005). He also argues that the legislature's use of the word *shall* in § 46b-56c (d) creates a mandatory duty. See *Langan* v. *Weeks*, 37

Conn. App. 105, 121, 655 A.2d 771 (1995) (general rule is that word shall is mandatory, not directory). Although we agree generally with the plaintiff's statement of legal principles, we disagree with his claim that the court misapplied the statute when it issued the support order.

Our Supreme Court has recognized "that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . . [I]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . . [It has] often . . . stated that, when the ordinary meaning [of a word or phrase] leaves no room for ambiguity . . . the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Citations omitted; internal quotation marks omitted.) *In re Jusstice W.*, 308 Conn. 652, 660–61, 65 A.3d 487 (2012).

"The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. . . . If, however, the . . . provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory . . . ." (Internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 790, 961 A.2d 349 (2008).

Section 46b-56c (d) provides in relevant part that "both parents *shall participate in, and agree upon*, the decision as to which institution . . . the child will attend. . . ." (Emphasis added.) The word *participate* is a verb, meaning to take part. See Webster's Ninth New Collegiate Dictionary (1985) p. 858. Section 46b-56c (d) therefore mandates that, "[a]t the appropriate

time," both parents participate, or take part in, and agree upon the decision as to which institution of higher education their child will attend. See General Statutes (Rev. to 2015) § 46b-56c (d). Participate and agree are matters of substance as they are the means by which parents are to decide the institution their child will attend. Thus, the word "shall" in § 46b-56c (d) creates a mandatory duty on both parents to both participate in and reach an agreement upon the college their child will attend.

In the present case, however, the court found that the plaintiff refused to participate and, thus, excluded himself entirely from the college selection process. The record supports the court's finding. The evidence discloses that the defendant informed the plaintiff of the colleges and universities to which Hannah's SAT scores were sent and where she had applied. The plaintiff did not respond by asking for information about those institutions and never discussed the matter with the defendant or Hannah. In addition, the plaintiff did not voice an objection to any of the institutions to which Hannah had applied or suggest alternative institutions before the defendant filed the motion. The defendant also sent multiple requests to the plaintiff asking him to complete financial aid forms.[10] The plaintiff did not

[10] On October 26, 2016, the defendant wrote to the plaintiff, in part: "Richard, You will need to provide your financial information for Hannah's college applications. She will need it to fill out her financial aid application within the next 2 weeks. Please provide a financial affidavit and your 2015 tax returns."

On October 26, 2016, the defendant wrote to the plaintiff with respect to the CSS Financial Aid application login information: "Richard, Please complete the noncustodial parent section of the application. Here are the instruction[s] for the first time log in. . . . Please do so ASAP."

On November 11, 2016, the plaintiff responded to the defendant: "I know NOTHING about this. Please explain." (Emphasis in original.)

The defendant replied to the plaintiff: "This is the financial aid application so that Hannah can receive financial aid for college. Surely you would want to minimize our out of pocket cost for her education. Please go in and complete your section."

timely open the messages, provide the financial information Hannah needed to complete her college applications,[11] or reimburse the defendant for Hannah's SAT preparation and the dissemination of her scores.

In sum, the plaintiff has failed to identify any evidence that he attempted to participate in Hannah's college selection process. On the basis of the evidence in the record, therefore, we agree with the court that the defendant did not exclude the plaintiff from the college selection process; he excluded himself. In so doing, he violated the requirement in § 46b-56c (d) that both parents participate in a child's college selection process.

The plaintiff nevertheless maintains that, in the absence of an agreement between the defendant and him about Hannah's college choice, the defendant was required

[11] On September 27, 2017, the defendant sent the plaintiff an e-mail stating: "Richard, I have tried many times to engage in a discussion regarding Hannah's college expenses. I have let you know which schools she was applying to, requested that you be involved in the application for financial aid (which you refused to do and cost her an award to a great school), [and sent] you her decision on which school she felt she really wanted to attend, and sent you numerous inquiries regarding you[r] intentions to contribute to her college education. The only response I received from you is that you would discuss this with [H]annah.

"As of today's date, I am not aware that you have discussed any of this with her. I am very disappointed that you have been completely disinterested in this most important state of our daughter's life.

"While I understand that your relationship with the children has been very strained (see Dr. Israel's court mandated report), I would have hoped that you would have taken this opportunity to demonstrate to [H]annah your commitment to her and her future by showing interest in participating in insuring that her college was paid for by both her parents.

"As things stand now, Hannah has made it clear to me that you have not reached out to her to congratulate her (via phone call, text, [e-mail], or any written correspondence) on her high school graduation or on her college acceptance.

"Hannah is leaning towards a bachelor's degree in health science and Quinnipiac University has an excellent program.

"This will be my last attempt to reach out to you regarding this most important matter. I have tried for a year to engage you in some sort of discussion, but you have opted, for the most part to remain silent."

to seek an order resolving the matter pursuant to § 46b-56c (d) *before* seeking a support order. We disagree.

The plaintiff in this case violated his statutory duty to participate in the decision about which institution of higher education Hannah would attend. That violation naturally made it impossible for the parties to reach an agreement about Hannah's college choice. That is precisely why § 46b-56c (d) requires both parties to participate in a child's college selection process. Without mutual participation, there can be no agreement. We do not construe the statute to permit a party to evade responsibility for contributing to a child's education by engaging in acts or omissions that violate his statutory obligation. Moreover, by refusing to participate, the plaintiff gave the defendant no indication that he would disagree with Hannah's decision to attend Quinnipiac University or any of the other institutions he knew she was considering. On the contrary, the first time the plaintiff voiced any disagreement with Hannah's decision to attend Quinnipiac University was at the hearing on the defendant's motion, when he testified that he would have preferred Hannah attend the University of Connecticut. There is nothing in the record indicating that he previously had expressed such a preference to the defendant or to Hannah. Under such circumstances, § 46b-56c (d) did not require the defendant to presume a disagreement existed about Hannah's college choice and to seek an order resolving a hypothetical dispute prior to seeking a support order. In addition, by granting the defendant's motion, the court, in effect, exercised its authority under § 46b-56c (d) to resolve any disagreement that had become apparent *after* the defendant had filed her motion.

The plaintiff has cited a number of Superior Court decisions that he argues support his claims on appeal. In its memorandum of decision, the court found that

each of those cases was distinguishable from the present case. Although we are not bound by the decisions of the Superior Court, we have reviewed the cases cited by the plaintiff and agree that they are either factually distinguishable or actually support the defendant's position on appeal. The plaintiff's claim that the court misconstrued and misapplied § 46b-56c (d) and improperly issued the support order therefore fails.

II

The plaintiff's second claim is that the court improperly (1) predicated its decision on factual findings from the parties' dissolution of marriage and contentious relationship, and (2) considered his relationship with Hannah when issuing its support order. We do not agree.

A

The plaintiff claims that the court's decision improperly was predicated on factual findings from the parties' dissolution of marriage and contentious relationship, with particular fault placed on him. We disagree that the court predicated its support order on those facts.

In its February 8, 2019 memorandum of decision, the court noted that the dissolution court "attributed the breakdown of the marriage to the plaintiff's long history of emotional and occasional physical abuse of the defendant, much of which occurred in front of the parties' three young daughters and ordered the defendant to have sole legal and physical custody of the minor children. The record of earlier proceedings indicates that the plaintiff's pattern of behavior has also taken an emotional toll on the parties' children and, consequently, his relationship with them. This is especially true in the case of . . . Hannah. [The dissolution] court further ordered the parties to communicate by e-mail and to use the 'Our Family Wizard' website. On April 26, 2016, [Judge Pinkus] entered orders pursuant to an

executed stipulation . . . for family therapy . . . . The defendant testified . . . that the plaintiff did not follow [the therapist's] recommendations. The plaintiff did not offer credible testimony contradicting the defendant.

"Review of the record in this case, both as introduced during the two hearing dates, and as reflected by the court's review of the file with almost 500 entries, reflects that the parties continue to have challenges whereby they are unable to communicate civilly regarding even their children's basic needs and that the plaintiff has not healed the rift in his relationship with [Hannah]. The court makes these preliminary findings to establish a factual background for consideration of the subject motion. The defendant seeks an order establishing the percentage [of] responsibility of each parent for postsecondary education expenses and that such order include room, board, tuition, books, fees, registration and application costs. She also asks the court to order the plaintiff to pay the cost of medical insurance for Hannah while she is in college. The court has considered the [previously stated] facts in the context of their relevance to the application of the statutory criteria for issuance of postsecondary education support orders."

On appeal, the plaintiff argues that by reciting the long and acrimonious history of the parties' predissolution and postdissolution proceedings, the court improperly predicated its support order on the dissolution court's factual findings, including fault, which are irrelevant to an adjudication under § 46b-56c (d). He contends that the parties' dissolution of marriage concerns § 46b-56c only to the extent that the court retained jurisdiction to enter a postsecondary educational support order.

We disagree that the court improperly predicated its decision on the circumstances surrounding the breakdown of the parties' marriage and the dissolution court's

finding of fault. The history of the parties' relationship, especially their inability to communicate civilly about their children's basic needs and why they were ordered to communicate via Our Family Wizard, provided the background relevant to the court's understanding of the parties' communications (or lack thereof) about Hannah's college selection process and *why* it was necessary for the court to resolve the issues surrounding Hannah's postsecondary education. The court's memorandum of decision makes clear that its support order is predicated on the facts surrounding Hannah's college selection process and the plaintiff's failure to participate in that process, not the historical facts found by the dissolution court regarding the breakdown of the parties' marriage. The plaintiff's claim, therefore, fails.

B

The plaintiff also claims that the court improperly considered the nature of his relationship with Hannah in contravention of § 46b-56c (d), which requires the parents to agree on the college their child will attend. We do not agree.

The plaintiff takes exception to that portion of the court's decision stating that there was ample time after April, 2016, for the plaintiff to become involved in the college selection process if he had made an effort to establish a positive relationship with Hannah. The court found that the plaintiff did not ask Hannah about her college preferences and did not reach out to Hannah to congratulate her on her high school graduation and college acceptance. The plaintiff argues that, even though the court itself acknowledged that the legislature did not include the nature or quality of the parent-child relationship as a factor to be considered in fashioning postsecondary orders, the court improperly placed the onus on him to communicate with Hannah. We disagree that the court put an improper onus on the

plaintiff. The court's decision to enter an educational support order was not based on the plaintiff's relationship with Hannah. The court found that the plaintiff refused to participate in Hannah's college selection process. The court merely pointed out one way the plaintiff could have attempted to become involved in the college selection process. The plaintiff's claim is without merit.

III

The plaintiff's final claim is that the court's finding that the defendant attempted to include him in the college selection process is not supported by the evidence. He takes exception to the court's finding that the Our Family Wizard "e-mail communications by the defendant establish that she did reach out to the plaintiff seeking his involvement in the application process and at other stages in the application process." He claims that the court's finding is clearly erroneous and contends that the defendant only contacted him about the colleges to which Hannah had applied and only in the context of seeking reimbursement for expenses incurred.

An "[a]ppellate [court's] review of a trial court's findings of fact is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, supra, 186 Conn. App. 441.

On the basis of our review of the record and as set forth more fully in part I of this opinion, we conclude that the court's finding that the defendant attempted to include the plaintiff in the college selection process is supported by evidence in the record. The defendant sent the plaintiff an e-mail about Hannah's interest in attending college in the spring of the child's junior year of high school. She sent the plaintiff additional communications throughout the following summer and into the fall of Hannah's senior year. The court's factual finding that the defendant attempted to include the

plaintiff in the college selection process was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

EDUARDO ORTIZ, JR. *v.* COMMISSIONER OF CORRECTION
(AC 44047)

Elgo, Suarez and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crime of murder, appealed to this court from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The habeas petition had been filed more than six years after the petitioner's guilty plea was determined to be a final judgment due to the expiration of the time period allowed for appeal and after October 1, 2017. The respondent Commissioner of Correction filed a request, pursuant to statute (§ 52-470), for an order to show cause for the petitioner's delay in filing the habeas petition. Following a hearing, the habeas court found that the petitioner, who claimed that mental health and cognitive disabilities had prevented him from timely filing his habeas petition, had failed to show good cause as required by § 52-470 for the late filing. Thereafter, the 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 involved in his appeal were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further: the only evidence that the petitioner relied on to support his claim that his mental health conditions constituted good cause for filing an untimely habeas petition were health and educational records dated between eight and fourteen years prior to the hearing before the court, and the petitioner did not provide the court with any insight into how or whether the mental health deficiencies described in the records affected the filing of the petition, thus, the court properly concluded that the petitioner did not demonstrate whether a present condition affected his ability to file a habeas petition in a timely manner; moreover, as the petitioner filed his petition for a writ of habeas corpus as a self-represented litigant, there was no authority upon which the court was bound to infer that any deficiency

documented in the health and education records caused or contributed to the untimely filing.

Argued October 5, 2021—officially released March 22, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Chaplin, J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *David J. Reich*, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. Following the denial of his petition for certification to appeal, the petitioner, Eduardo Ortiz, Jr., appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the court abused its discretion in denying his petition for certification to appeal and erred in its determination that he failed to demonstrate good cause for the untimely filing of his petition for a writ of habeas corpus under General Statutes § 52-470 (e). Our examination of the record and briefs and consideration of the oral arguments of the parties persuades us that the habeas court acted properly and, therefore, the appeal should be dismissed.

The following procedural history is relevant to our analysis. On May 31, 2012, before the trial court, *Damiani, J.*, the petitioner pleaded guilty to murder in violation of General Statutes § 53a-54a. On July 27, 2012, the

trial court, *Prescott*, *J.*, sentenced the petitioner to serve thirty-eight years of incarceration. The petitioner did not bring a direct appeal. On September 4, 2018, the petitioner, for the first time, filed a petition for a writ of habeas corpus related to the conviction in which he alleged that the public defender who represented him during the criminal proceedings, Tashaun Lewis, had not rendered effective assistance in that she failed to adequately investigate matters concerning the case. The petitioner filed the petition in a self-represented capacity.

On October 9, 2019, the respondent, the Commissioner of Correction, filed a request for order to show cause for the petitioner's delay in filing the habeas petition. Specifically, the respondent argued that, pursuant to § 52-470 (c),[1] a rebuttable presumption arose that the habeas petition challenging the conviction had been delayed without good cause because it was filed more than six years after the judgment of conviction became final and after October 1, 2017. The respondent, therefore, sought an order, pursuant to § 52-470 (e),[2] to show

[1] General Statutes § 52-470 (c) provides: "Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction."

[2] General Statutes § 52-470 (e) provides: "In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good

cause why the untimely petition should be permitted to proceed.

On November 8, 2019, the habeas court, *Chaplin*, *J.*, held a hearing on the respondent's request. At the hearing, the petitioner, then represented by counsel, attempted to demonstrate good cause for the untimely filing. Specifically, the petitioner sought to prove that he filed the habeas petition late because of his "mental health issues and his cognitive disabilities . . . ." The petitioner relied exclusively on health and educational records that were dated between 2005 and 2011, and which were admitted as a sealed exhibit.[3] Relying on these records, the petitioner's attorney argued that it would be unfair to hold the petitioner to the statutory filing deadlines in this action.

Counsel for the respondent replied that the petitioner's health and educational records, which she had reviewed, were generated many years prior to the hearing and, more importantly, they did not specifically address the issue of whether any mental health issue affected the petitioner's ability "to comply with the rules [related to filing a habeas petition in a timely manner]." Counsel for the respondent argued that, in the absence of additional evidence, the petitioner had not demonstrated that a mental health issue led to an inability to file his petition in a timely manner.

The petitioner's counsel, acknowledging that he had not provided the court with recent assessments of the petitioner's mental condition, nonetheless argued that

cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."

[3] Because the court has sealed the exhibit, we have reviewed it in camera and necessarily describe the documents within it only generally. See, e.g., *State* v. *Kosuda-Bigazzi*, 335 Conn. 327, 358 n.13, 250 A.3d 617 (2020).

the records revealed deficiencies that began early in the petitioner's life, stated that he had provided the court with "the full mental health history" of the petitioner, and reasoned that "it's not like he's gotten better, if anything he's deteriorated."

On January 28, 2020, the court dismissed the habeas petition. In its memorandum of decision, the court discussed the relevant procedural history and legal principles that applied to the issue before it. The court then stated: "Based on the information before the court, the court finds that the petition was filed more than six years after the petitioner's guilty plea was deemed to be a final judgment due to the expiration of the time period allowed for appeal. Upon review of the medical and educational records . . . the court finds that the mental health and education records address the petitioner's mental health condition at various points between 2005 and 2011. The court finds the petitioner's mental health and educational records unpersuasive as to the petitioner's contention that his mental health deficiencies constitute good cause for filing an untimely [habeas] petition. The records . . . do not support the proposition that the petitioner labored under such significant mental health deficiencies that prevented him from filing the petition within the five years allowed by statute, or prior to October 1, 2017. . . . Therefore, the court finds that the petitioner has failed to show good cause for filing the current petition more than six years after the guilty plea became a final judgment, or after October 1, 2017." (Citation omitted; footnote omitted.)

On appeal, the petitioner essentially argues that the court abused its discretion in denying the petition for certification to appeal because he successfully demonstrated at the hearing that good cause existed for the late filing of the habeas petition. The petitioner argues that the evidence he presented to the court demonstrated that he suffers from lifelong mental health issues

that impaired his ability to file a habeas petition in a timely manner. The petitioner argues that he "has an extremely low IQ and would be unable to organize himself in order to prepare and present a habeas petition to the court. [The petitioner] has never advanced past the second grade regarding his reading and writing [skills]. Due to the fact that he cannot read or write well, he would have difficulty getting along without help from people who can help him prepare and present a habeas petition in a timely manner." The petitioner extrapolates from the evidence that "[t]his is not a case where [he] is not keeping his eye on the time to file the petition. [The petitioner] was not able to file the habeas petition on time." The petitioner appears to argue that the court did not appropriately gauge the severity of his mental health issues and their detrimental effect on his ability to file a habeas petition in a timely manner.

The respondent argues that "[t]he petitioner cannot demonstrate an abuse of discretion [in denying the petition for certification to appeal] because the [habeas] court's finding that [the petitioner] failed to demonstrate 'good cause' under the statute was based entirely on a rejection of the petitioner's evidence, which served as the sole factual basis for his claim of good cause. Thus, the petitioner lacks any credible facts to support a claim of 'good cause' and, necessarily, he did not carry his burden of satisfying that standard." On the basis of its findings, the court dismissed the petition and subsequently denied the petition for certification to appeal.

Although they are in agreement with respect to the standard of review that applies to the court's denial of the petition for certification to appeal, the parties have presented this court with diverging legal arguments concerning the standard of review that applies to the subordinate issue of whether the court properly determined

that good cause was not shown for the late petition. The respondent urges us to apply the abuse of discretion standard, and the petitioner urges us to apply the plenary standard of review.

"Our Supreme Court has made clear that an appellate court need not reach the merits of a habeas appeal following a denial of certification unless the petitioner can demonstrate that the habeas court abused its discretion in doing so. *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994). In determining whether a habeas court abused its discretion in denying certification to appeal, the petitioner must demonstrate that the issues 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. . . .

"In ascertaining whether the habeas court abused its discretion in a denial of certification case, 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 . . . 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.) *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 794, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel *caused or*

contributed to the delay." (Emphasis added.) *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34, 244 A.3d 171 (2020), cert. granted, 336 Conn. 941, 250 A.3d 41 (2021). This court has ruled that the abuse of discretion standard of review applies to a habeas court's dismissal of a habeas petition following its determination that the petitioner failed to demonstrate good cause for its untimely filing pursuant to § 52-470. Id., 38. In *Kelsey*, this court explained: "[I]n evaluating whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay in filing a late petition under § 52-470, the habeas court does not make a strictly legal determination. Nor is the court simply finding facts. Rather, it is deciding, after weighing a variety of subordinate facts and legal arguments, whether a party has met a statutorily prescribed evidentiary threshold necessary to allow an untimely filed petition to proceed. This process is a classic exercise of discretionary authority, and, as such, we will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to serve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . ." (Internal quotation marks omitted.) Id. The court in *Kelsey* also stated that "a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the

various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony." Id., 35–36.[4]

In the present case, the court's decision was the result of its evaluation of the evidence and its finding that the petitioner had not presented persuasive evidence with respect to why his habeas petition was untimely. Because this factual determination is not clearly erroneous, the parties' disagreement with respect to the standard of review that applies to the habeas court's ultimate determination concerning good cause does not affect our analysis. Stated otherwise, regardless of whether we review the court's ultimate determination concerning good cause under an abuse of discretion standard of review, as our case law dictates and the respondent argues, or under the plenary standard of review, as the petitioner argues, the outcome would be the same. It is well settled that this court does not disturb the factual findings of the habeas court unless

[4] As we stated previously in this opinion, the petitioner asserts that the plenary standard of review applies to the habeas court's dismissal of the habeas petition following its determination that he failed to demonstrate good cause for his untimely filing. Notably, the petitioner argues that the respondent's reliance on *Kelsey* is unavailing because our Supreme Court has granted certification in *Kelsey* with respect to the issue of whether this court correctly determined that the abuse of discretion standard of review applied. *Kelsey* v. *Commissioner of Correction*, 336 Conn. 941, 250 A.3d 41 (2021). Insofar as the petitioner suggests that the fact that our Supreme Court has granted certification to appeal in *Kelsey* detracts from its precedential value, he is incorrect as a matter of law. As this court has observed, "there is no reason to conclude that a granting of certification by our Supreme Court necessarily signifies disapproval of the decision from which certification to appeal was granted. There is no authority to support the proposition that a grant of certification by our Supreme Court immediately invalidates or overrules this court's decision; a grant of certification stays further proceedings and subjects this court's decision to further review. In such circumstances, prior to a final determination of the cause by our Supreme Court, *a decision of this court is binding precedent on this court*." (Emphasis added.) *State* v. *Andino*, 173 Conn. App. 851, 874–75 n.12, 162 A.3d 736, cert. denied, 327 Conn. 906, 170 A.3d 3 (2017).

they are clearly erroneous. See, e.g., *Coward* v. *Commissioner of Correction*, 143 Conn. App. 789, 803, 70 A.3d 1152, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013). Even when a determination made by the habeas court is subject to plenary review, "[t]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 838, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008). Thus, if the court correctly found that there was no evidence sufficiently linking the claimed mental deficiency to the late filing, the petitioner cannot prevail under either standard.

In the present case, the habeas court's decision reflects its finding that the petitioner failed to present evidence to support a finding that he labored under such a significant mental health deficiency that it prevented him from filing the petition within the time afforded by statute. The habeas court noted that the petitioner's reliance on the mental health and educational records, without more, was unavailing because the records addressed his condition at various points between 2005 and 2011, many years before the present hearing in November, 2019, and they did not shed any light on whether a present condition affected his ability to file a habeas petition in a timely manner.

Having carefully reviewed the records presented to the court, which constituted the only evidence presented in support of the issue of good cause, we conclude that the court's finding, that the petitioner failed

to demonstrate that the deficiencies discussed therein were of such a nature that they contributed to the delay in the filing of his petition, was supported by the evidence. As the court aptly observed, the records described mental deficiencies that were documented at various points between 2005 and 2011. The respondent argues that the court could have inferred that the records were essentially stale and thereby conclude that the deficiencies did not continue to affect the petitioner through the relevant time period in which he could have filed the habeas petition in a timely manner. Because the court did not expressly rely on this rationale, however, we will assume for purposes of our analysis that the mental deficiencies at issue continued to affect the petitioner during the time in which he could have timely filed a habeas petition.

The court stated that the records did not support the proposition that the petitioner labored under such significant mental health deficiencies that they prevent him from timely filing a habeas petition. It is unreasonable to infer that all mental deficiencies are so significant as to interfere with the ability to file a timely habeas petition. See, e.g., *Dull* v. *Commissioner of Correction*, 175 Conn. App. 250, 254, 167 A.3d 466 (upholding habeas court's conclusion that petitioner's claim of mental impairment did not constitute good cause for untimely filing of habeas petition), cert. denied, 327 Conn. 930, 171 A.3d 453 (2017). In the present case, the petitioner did not provide the habeas court with any insight into how or whether the mental health deficiencies described in the records affected the filing of the petition. Contrary to the petitioner's arguments, and also in light of the fact that the petitioner filed the petition for a writ of habeas corpus that is the subject of this appeal as a self-represented litigant, there is no authority upon which the court was bound to infer that any deficiency documented in the health and educational

records submitted to the court caused or contributed to the untimely filing. See, e.g., *Velez* v. *Commissioner of Correction*, 203 Conn. App. 141, 153, 247 A.3d 579 (holding that habeas court did not err in concluding that petitioner's documented significant mental impairments did not necessarily contribute to delay in filing habeas petition), cert. denied, 336 Conn. 942, 250 A.3d 40 (2021). The court, therefore, did not err in its determination that the petitioner failed to satisfy his evidentiary burden of demonstrating that something outside of his control, in this case, a mental deficiency, caused or contributed to the delay in the filing of his petition. Because the court's finding was proper, we conclude that the court did not err in determining that the petitioner did not rebut the statutory presumption of unreasonable delay.

In light of the foregoing, we conclude that the petitioner has failed to demonstrate that the issues involved in this appeal 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. See *Ricardo R.* v. *Commissioner of Correction*, supra, 185 Conn. App. 794. Thus, the petitioner has not shown that the habeas court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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VOL. 211

U.S. BANK NATIONAL ASSOCIATION,
TRUSTEE *v.* J & M HOLDINGS, LLC, ET AL.
(AC 44839)

Alvord, Alexander and Suarez, Js.

Argued March 8—officially released March 22, 2022

Defendants' appeal from the Superior Court in the judicial district of Windham at Putnam, *Auger*, *J.*; *Lynch*, *J.*

Per Curiam. The appeal is dismissed.

TORREY TERRIAL TOWNSEND *v.* STEPHEN
J. LIBRANDI ET AL.
(AC 44464)

Alvord, Alexander and Flynn, Js.

Submitted on briefs March 2—officially released March 22, 2022

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Kamp*, *J.*

Per Curiam. The judgment is affirmed.

MICHAEL J. KEDERSHA *v.* ANNA C.
FREITAG-KEDERSHA
(AC 44550)

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

Argued March 9—officially released March 22, 2022

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Stewart*, *J.*

Per Curiam. The judgment is affirmed.

CTPPS, LLC *v.* JOHN MATAVA ET AL.
(AC 44556)

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

Argued March 10—officially released March 22, 2022

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Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of an Application for a Certificate of Affordable Housing Completion (aka for a Moratorium) in the Town of Brookfield

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (March 10, 2022) for a Certificate of Affordable Housing Project Completion (aka, a Moratorium) for the Town of Brookfield. As per Connecticut General Statutes Section 8-30g(1)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on March 22, 2022 and end on April 21, 2022. Under the statute, DOH has ninety (90) days to review the completed application, along with any public comments submitted during the thirty (30) day comment period. DOH will accept electronic input/ comment on the completed application at CT.HOUSING.PLANS@ct.gov.DOH will not act as intermediary but shall take into consideration all input and comments received. A copy of this completed application, along with all comments received will be available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please e-mail Laura Watson, Economic and Community Development Agent, at laura.watson@ct.gov

PERSONNEL NOTICE

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

CHIEF STATE'S ATTORNEY
STATE OF CONNECTICUT

Applications are being accepted for the full-time position of Chief State's Attorney for the Division of Criminal Justice, State of Connecticut (PCN 4853).

Pursuant to Article XXIII of the Connecticut Constitution, the Chief State's Attorney shall be the administrative head of the Division of Criminal Justice, and with the thirteen State's Attorneys, shall be in charge of the investigation and prosecution of all criminal matters within the State of Connecticut. For a full job description, follow this link:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/Chief-States-Attorney

Appointment shall be made by the Criminal Justice Commission in accordance with Sec. 51-278 of the Connecticut General Statute. The successful applicant shall hold office from the date of appointment through June 30, 2026, and thereafter be subject to re-appointment to a five (5) year term. The annual salary is $191,408.00

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three (3) years; residency in the State of Connecticut is a prerequisite to appointment. Applicants must be admitted to practice law in the State of Connecticut at the time of appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en. A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: Chief State's Attorney (PCN 4853) and must be postmarked no later than March 25th 2022. In addition, an electronic copy (pdf) of application materials should be sent to DCJ.HR@ct.gov**.** Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in February 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Baloche, David of Brooklyn, NY
Betz, Jacqueline Elizabeth of Hartford, CT
Chung, Crystal S of Hyde Park, NY
Gordon, Channa Malika of Bristol, CT
Grosett, Melissa Rose of Mahopac, NY
Ki, Ashley Yunah of Washington, DC
Losito, Christopher Charles of Stamford, CT
Ricciardi, Giulio Vincent of Stamford, CT
Sauer, Michael Aron of Henderson, NV
Tamborra, Rebecca Maria of Northampton, MA
Taylor, Christine Ella of Albany, NY
Wallach, Andrew L. of Katonah, NY
Wei, Ke of Brooklyn, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in February 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Carr, Sara Jane of Poughquag, NY
Ceppos, Andrew David of West Hartford, CT
Dontigney, Shawn Peter of Middletown, CT
Dykes, Daniel Paul of Oakdale, CT
Hammond, Scott Morrison of Larchmont, NY
Itaya, Catherine Akiko of West Hartford, CT
Kiser, Brian Michael of Warwick, RI
Klausner, Paul J. of West Cornwall, CT
Lese, Gabrielle C. of Scarsdale, NY
Levy, Meryl Iris of Tuxedo Park, NY
Nayowitz, Seth Aaron of Englewood, NJ
Ozaruk, Bohdan Stephan of Croton on Hudson, NY
Solano, Rebecca Wilen Berg of Weston, CT
Sullivan, Daniel Martin of Riverside, CT
Zuckerman, Esther Joy of New York, NY

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on January 31, 2022, in Docket Number HHD-CV21-6149778-S, Robert Ibraham, Juris No. 418792 is suspended from the practice of law in Connecticut for a period of five (5) years retroactive to January 1, 2018.

The respondent has not practiced law in the State of Connecticut and does not maintain and IOLTA account in Connecticut. Accordingly, no trustee will be appointed.

The Respondent shall comply with all terms and conditions of Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Any application for reinstatement shall be made pursuant to the provisions of Practice book § 2-53.

Susan Quinn Cobb
Presiding Judge