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we have determined to be grounded on artificial and illusory distinctions, we believe that the better approach is to provide the trial courts with an illustration of the application of the totality of the circumstances test that we adopt today.

We begin with the following additional procedural background. The primary issue at trial was identification. At the start of trial, the defendant filed a motion in limine to preclude the state from introducing Canty's statement to the police identifying the defendant in the video and the still photograph. The defendant argued that the admission of Canty's statement would violate the prohibition in § 7-3 (a) of the Connecticut Code of Evidence against lay opinion testimony that embraces an ultimate issue to be decided by the trier of fact. In support of his argument that such evidence would constitute a statement of opinion, the defendant contended that the facial features of the subject were not discernible in either the video or the still photograph. The state relied on Canty's familiarity with the defendant to argue that, even if the images of the individual in the video and the still photograph were not clear to persons unfamiliar with the defendant, they were discernible to Canty.

The court first determined that, because the video footage shown to Canty preceded the footage showing

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We also take judicial notice of the transcripts in *State v. Bruny*, 342 Conn. 169, A.3d (2022), which we also decide today. See *Karp v. Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) (“[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise”). In *Bruny*, which also involves lay witnesses who identified the defendant in surveillance footage, the trial court spoke more directly about the difficulties of applying *Finan*. Specifically, the court commented on the artificial distinction it was required to draw between video footage that shows the offense being committed and footage that does not, in order to determine whether the identification embraced an ultimate issue. The court further remarked on the uncertainty regarding whether the ultimate issue rule controlled when a witness was familiar with the defendant, thus highlighting the difficulty of the fact/opinion distinction.

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the actual shooting by only twenty seconds or so, Canty's identification of the defendant in the video embraced an ultimate issue in the case—the identification of the shooter. Because § 7-3 (a) of the Connecticut Code of Evidence applies only to opinion testimony, the remaining issue was whether Canty's identification was a matter of fact or opinion. To resolve that question, the trial court turned to this court's decision in *State v. Finan*, supra, 275 Conn. 60, and its progeny. Specifically, relying on the Appellate Court's refinement of *Finan* in *State v. Felder*, 99 Conn. App. 18, 25 n.6, 912 A.2d 1054, cert. denied, 281 Conn. 921, 918 A.2d 273 (2007), the trial court explained that, if there is a sufficient basis for recognition in the video or photograph, a witness' recognition of a subject based on their long-standing association is a statement of fact, not opinion.

Applying that principle from *Felder*, the trial court found that, in the video footage, the suspect was too far away to be recognized. Therefore, the court concluded, Canty's identification of the defendant in the video would constitute lay opinion testimony as to an ultimate issue to be decided by the trier of fact, in violation of § 7-3 (a) of the Connecticut Code of Evidence.

By contrast, the court found that the photograph allowed for recognition because it showed the defendant's face from fairly close up and still. Because Canty indicated in his written statement, however, that he had signed the back of the photograph "to confirm that this was Tron in the video," the court granted the motion in limine as to both the video and the photograph. The court reasoned that, because the person in the video was not recognizable, any testimony stating that the persons depicted in the photograph and the video were one and the same, which inherently required a comparison between the two, was a matter of opinion.

The court subsequently ruled that Placzek's testimony that Canty had told him that the subject in the still photo-

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graph was the defendant was admissible pursuant to § 8-5 (2) of the Connecticut Code of Evidence, which provides that the “identification of a person made by a declarant prior to trial where the identification is reliable” is not excluded from evidence by the hearsay rule, provided the declarant is available for cross-examination at trial. The court noted that Canty was available for cross-examination at trial. Although the court did not expressly state that it found Canty’s identification to be reliable, that finding may be inferred by the court’s reference, in its ruling, to Canty’s “long-standing association with [the defendant].” The court ruled that Placzek’s testimony as proposed by the state could come in for the truth of the matter asserted pursuant to *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Thereafter, at trial, Canty denied that he ever identified the defendant in the still photograph. Consistent with the court’s ruling, Placzek testified that Canty had told him that the subject in the still photograph was the defendant.

In the context of lay witness identifications of a person in surveillance video or photographs, the prohibition against opinion testimony on an ultimate issue in § 7-3 (a) of the Connecticut Code of Evidence sometimes requires courts to draw tortuous distinctions in order to render the rule workable. The present case exemplifies the problem—in order to determine whether the identification of the defendant as the subject in the footage embraced an ultimate issue, the trial court found itself counting the seconds between the footage shown to the witness and the footage depicting the offense. It is debatable whether a longer time gap would always suffice to draw the distinction. In some cases, the nature of the video footage may make it impossible to identify the suspect as the defendant at any point in the footage without also finding that the defendant is depicted in the video as the person committing the

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crime. For instance, if a shooter's movements are depicted without pause in hours of footage, including during the actual shooting, the identification of the suspect as the defendant at the beginning of the video, hours before the offense is recorded, may very well embrace an ultimate issue.

Laborious calculations of the timing in video footage represent only one of the potential hurdles set by § 7-3 (a) of the Connecticut Code of Evidence. The *Finan* decision illustrates a more fundamental challenge created by the ultimate issue rule—distinguishing between testimony that “embraces an ultimate issue” and testimony that is simply material to the state's case. In *Finan*, four officers had identified the defendant as one of two men depicted in video surveillance footage of a convenience store clerk being robbed at gunpoint. *State v. Finan*, supra, 275 Conn. 61–62. The video footage depicted the two men entering the store, one armed and one unarmed. The unarmed man, whom the officers identified as the defendant, walked past the checkout area out of camera range. The armed man, who remained in camera range, aimed his gun at the store clerk. The armed man then exited the store; the unarmed man walked out simultaneously. *Id.*, 62. Each officer testified as to how long he or she had known the defendant, ranging from eight to sixteen years, and also testified as to what enabled him or her to identify the defendant as the unarmed man depicted in the video. *Id.*, 63. The officers cited to details such as the defendant's profile, his mannerisms and his distinctive walk. *Id.*

In its analysis of the defendant's claim that the officers' testimony violated § 7-3 (a) of the Connecticut Code of Evidence, the Appellate Court concluded that the testimony did not embrace an ultimate issue to be decided by the trier of fact. *State v. Finan*, 82 Conn. App. 222, 232, 843 A.2d 630 (2004). The court reasoned that not “every fact that is material to guilt is, for that