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CONNECTICUT REPORTS

Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JOHN B. CLINTON *v.* MICHAEL E. ASPINWALL ET AL.

(SC 20543)

(SC 20544)

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

Syllabus

The plaintiff sought to recover damages from the defendants for their alleged breach of contract and of their fiduciary duties in voting to, inter alia, amend the operating agreement of a limited liability company, C Co., in which the defendants held a controlling interest and of which the plaintiff had been a member. The parties had organized C Co. pursuant to the operating agreement, which was governed by Delaware law. In addition to a claim concerning the allegedly improper vote to amend the operating agreement, the plaintiff also claimed that the defendants improperly had removed him as a member of C Co. and improperly had maintained a sizable capital reserve fund, even though it was no longer needed. The case was tried to a jury, which was directed, pursuant to a jury verdict form, to decide the plaintiff's breach of contract claims first and to decide the breach of fiduciary duty claims only if it found in favor of the defendants on the breach of contract claims. The plaintiff did not object to the jury verdict form. Thereafter, the jury found in

favor of the plaintiff on his breach of contract claims but did not reach the fiduciary duty claims, which remained unadjudicated and never were disposed of by the trial court. The defendants filed two separate appeals with the Appellate Court, which affirmed the trial court's judgment as to the plaintiff's capital reserve fund claim but reversed the judgment as to the plaintiff's claims regarding the vote to amend the operating agreement and his removal as a member of C Co. The Appellate Court remanded the case with direction to render judgment for the defendants on the latter claims. On the granting of certification, the plaintiff and the defendants filed separate appeals with this court. *Held* that the Appellate Court lacked subject matter jurisdiction over the defendants' appeals to that court because there was no final judgment in the trial court, and, accordingly, this court vacated the Appellate Court's judgment and remanded the case with direction to dismiss the defendants' appeals: the issue of whether the defendants appealed from a final judgment was controlled by Connecticut procedural law, pursuant to which a trial court that has not disposed of all of the causes of action against an appellant is presumed to have implicitly disposed of any legally inconsistent, but not legally consistent, alternative theories; moreover, Delaware law controlled the substantive issues in the present case, and, although that state's law requires courts to dismiss fiduciary duty claims that have no independent basis apart from breach of contract claims, nothing about that policy suggested that the plaintiff's breach of contract and fiduciary duty claims were legally inconsistent, insofar as establishing the elements of one of those causes of action did not preclude liability with respect to the other cause of action under either Delaware or Connecticut law; accordingly, rather than being legally inconsistent, breach of contract and breach of fiduciary duty were more akin to legally consistent but alternative theories that prevent double recovery, and the issue of whether the plaintiff's fiduciary duty claims could proceed under Delaware law was left to the trial court; furthermore, the plaintiff did not withdraw or unconditionally abandon his fiduciary duty claims, even though he neither objected to the verdict form nor appealed from the Appellate Court's conclusion that he had abandoned his fiduciary duty claims by failing to object, and this court stressed that, to promote judicial economy, trial courts overseeing jury trials should always have the jury decide all counts of a complaint, except when doing so would result in a legally inconsistent finding that would require a new trial.

Argued April 27—officially released September 20, 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 Hartford, where the

court, *Robaina*, *J.*, granted the plaintiff's motion for summary judgment with respect to the defendants' counterclaim; thereafter, the case was tried to the jury before *Shapiro*, *J.*; verdict for the plaintiff; subsequently, the defendants appealed to the Appellate Court; thereafter, the court, *Shapiro*, *J.*, denied the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict and rendered judgment in accordance with the verdict, and the defendants filed an amended appeal; subsequently, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the plaintiff's motion for attorney's fees and costs, and the defendants filed a second amended appeal and a separate appeal with the Appellate Court, which consolidated the appeals; thereafter, the Appellate Court, *Lavine*, *Alvord* and *Harper*, *Js.*, reversed the trial court's judgment in part and remanded the case with direction to render judgment in part for the defendants and for further proceedings; subsequently, the defendants and the plaintiff, on the granting of certification, filed separate appeals with this court. *Vacated*; *judgment directed.*

Garrett S. Flynn, with whom was *Barbara M. Schellenberg*, for the appellants-appellees (defendants).

Glenn W. Dowd, with whom was *Howard Fetner*, for the appellee-appellant (plaintiff).

Opinion

D'AURIA, J. When a court renders judgment in a multicount civil action with fewer than all counts of a plaintiff's complaint accounted for in that judgment, jurisdictional alarm bells should ring if any party files an appeal, alerting the parties and the trial court to a potential final judgment problem. Before the parties and the appellate courts expend resources resolving the appeal, it is important to examine the rules of practice, statutes and our case law to determine whether an appeal can be taken from that judgment. See General

Statutes §§ 51-197a and 52-263; Practice Book §§ 61-2 through 61-5. In *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 183 A.3d 1164 (2018), we held in the context of a court trial that, when legally consistent theories of recovery have been litigated but not all theories have been ruled on, there is no final judgment. The present appeals require us to determine whether the same threshold jurisdictional rule applies in the context of civil jury trials. We hold that it does and are therefore compelled to vacate the judgment of the Appellate Court and to remand this case to that court with direction to dismiss the appeals for lack of subject matter jurisdiction.

The Appellate Court's opinion contains the relevant facts and procedural history of this case, which we briefly summarize. The plaintiff, John B. Clinton, and the defendants, Michael E. Aspinwall, Steven F. Piaker, and David W. Young, organized CCP Equity Partners, LLC (CCP), as a Delaware limited liability company and executed an amended operating agreement. *Clinton* v. *Aspinwall*, 200 Conn. App. 205, 207, 238 A.3d 763 (2020). The parties founded CCP "to provide management services to, and serve as the general partner of, certain private equity funds. Pursuant to the [operating] agreement, each member was to serve as a manager . . . on the board of managers (board)." Id., 207–208. The operating agreement entrusted the board, but not the members, with the management of CCP. See id., 208 n.2. The board also created a capital reserve fund of $3 million to fund future expenses of the company. Id., 208.

Subsequently, "the members decided not to raise investor capital to create another private equity fund. The members expected all CCP operations to close and that substantially all portfolio companies would be liquidated . . . ." Id. The defendants, "who controlled 61 percent of the interests of CCP, voted to amend § 8.1

of the [operating] agreement, over the objections of the plaintiff" and another member, Preston Kavanagh. Id. "Before the amendment, § 8.1 provided that general distributions [from the capital reserve fund] shall be made pro rata among the members, in proportion to their capital accounts. The amendment added language to the section, providing that distributions could otherwise be determined by the consent of all members. The defendants [enacted] this amendment pursuant to § 2.5[1] of the [operating] agreement." (Footnote added; footnote omitted.) Id., 208–209.

Kavanagh then sued CCP and the remaining members. Id., 209. The defendants held a meeting to vote to remove Kavanagh from CCP. Id. At the same meeting, "the plaintiff challenged the necessity of CCP's $3 million capital reserve. The defendants explained that the reserve was necessary to meet CCP's obligations to investors for several more years, to defend against Kavanagh's lawsuit, and for the possibility that the plaintiff [might] take legal action against CCP." Id. Several years later, "the defendants voted to remove the plaintiff as a member of CCP, also pursuant to § 2.5 of the [operating] agreement." Id., 210.

The plaintiff then brought the present action. After motion practice and amendment, there remained a two count complaint at the time of trial. The operative complaint alleged that the defendants breached their contractual and fiduciary duties based on their having voted to amend the operating agreement (amendment claim), voted to remove the plaintiff as a member of CCP (member removal claim), and maintained a capital reserve

[1] Section 2.5 of the operating agreement provides in relevant part: "In addition to the other matters specified hereunder, subject to the prior approval by the [b]oard of [m]anagers, the consent of [m]embers holding 60 [percent] or more of the [p]ercentage [i]nterests shall be required for . . . (ii) the removal of a [m]ember other than on account of death or voluntary resignation . . . [and] (vii) any amendment to this [a]greement."

fund of $3 million when it was no longer needed (capital reserve claim). Id. The plaintiff alleged that, because of their acts, the defendants had breached the fiduciary duties they owed to him under Connecticut or Delaware law, and breached § 3.4 of the operating agreement, which requires managers to exercise their best judgment in operating the company. Id., 210–11.

Prior to trial, the defendants moved to strike the complaint. Citing *Nemec* v. *Shrader*, 991 A.2d 1120 (Del. 2010), the defendants argued that the breach of fiduciary duty claims failed because Delaware law forecloses those claims when they seek to override contractual terms. The trial court denied the motion, ruling that it did not matter if Connecticut or Delaware law governed the breach of fiduciary duty claims because, in either jurisdiction, members and managers of limited liability companies owe each other fiduciary duties, and the plaintiff had alleged facts sufficient to establish a breach of those duties.

The parties tried the case to a jury. See *Clinton* v. *Aspinwall*, supra, 200 Conn. App. 212. "The jury verdict form first asked the jury to decide the three breach of contract counts. Only if the jury found in favor of the defendants on those counts . . . was it then asked to address the two breach of fiduciary duty counts, related to the member removal and the capital reserve." (Footnote omitted.) Id., 212–13.[2] The plaintiff did not object to the jury instructions or the verdict form.[3] "[T]he jury

[2] "The plaintiff withdrew the breach of fiduciary duty claim related to the amendment to the agreement because the defendants were going to file a motion arguing that the claim was barred by the statute of limitations and, the plaintiff's counsel reasoned: [I]t's an issue that's largely covered by our breach of contract claim that it is going to make the jury deliberations and verdict form and jury interrogatories unduly confusing." (Internal quotation marks omitted.) *Clinton* v. *Aspinwall*, supra, 200 Conn. App. 213–14 n.13.

[3] The defendants objected to the jury instructions, seeking a ruling on whether § 3.4 of the operating agreement is a special defense, on which they have the burden of proof, or an immunity, on which the plaintiff has the burden of proof. The defendants also objected to the verdict form,

returned its verdict in favor of the plaintiff on the three breach of contract counts. The jury, therefore, did not reach the two breach of fiduciary duty counts." Id., 214.

The jury awarded the plaintiff $146,901 for breach of contract on the amendment claim, $672,208 for breach of contract on the member removal claim, and $303,426 for breach of contract on the capital reserve claim. Id. The trial court denied the defendants' motions for judgment notwithstanding the verdict and to set aside the verdict and, after an evidentiary hearing, granted the plaintiff's motion for attorney's fees and costs pursuant to the operating agreement, awarding the plaintiff $716,200 in attorney's fees and $6118.75 in costs. See id. Judgment therefore was rendered in the plaintiff's favor on the breach of contract claim contained in count two. No judgment of any kind was rendered on the fiduciary duty count.

The defendants appealed to the Appellate Court, which affirmed in part and reversed in part the judgment of the trial court and remanded the case for a new hearing on the issue of attorney's fees and costs. See id., 229. Specifically, the Appellate Court reversed the judgment as to the plaintiff's amendment and member removal claims and ordered the trial court to render judgment in favor of the defendants on those two claims. Id., 222. The Appellate Court affirmed the judgment as to the plaintiff's capital reserve claim. Id., 228. In a footnote, the Appellate Court also declined the plaintiff's invitation to remand the case to the trial court with direction to render judgment in favor of the plaintiff on the parallel fiduciary duty claim in the event that the judgment as to any of the three breach of contract claims was reversed. See id., 222 n.19. The Appellate Court concluded that, because the plaintiff had not objected to the verdict form instructing the jury to

seeking a verdict form that separately delineated their special defenses. The defendants have not raised any of these issues before this court.

bypass the fiduciary duty counts, "the plaintiff failed to preserve [that] claim." Id.

The plaintiff and the defendants sought certification to appeal from the Appellate Court's judgment. We granted both petitions.[4] Prior to oral argument before this court, and citing *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 709, we ordered the parties to file supplemental briefs providing "reasons, if any, why the appeal[s] should not be dismissed for lack of a final judgment because the jury did not reach, and the trial court did not render judgment on, the first count of the complaint, which alleged that the defendants had breached their fiduciary duty."[5] We now determine that the defendants did not appeal from a final judgment, and, therefore, the Appellate Court lacked jurisdiction to hear the defendants' appeals.

I

To address the question of appellate jurisdiction properly, we must first determine whether Connecticut or Delaware law guides our final judgment analysis. In

[4] We certified the following issues for the defendants' appeal: (1) "Did the Appellate Court correctly conclude that § 3.4 of the limited liability company operating agreement imposes an affirmative duty on the managers to exercise 'best judgment' but does not impose an affirmative duty on the managers to act in 'good faith'?" And (2) "[i]f the answer to the first question is in the affirmative, did the Appellate Court correctly conclude that the trial court's instruction to the jury that § 3.4 of the agreement 'prohibits actions that are taken in bad faith' constituted harmless error?" *Clinton* v. *Aspinwall*, 335 Conn. 980, 241 A.3d 703 (2020).

We also certified the following issue for the plaintiff's appeal: "Did the Appellate Court correctly conclude that the limited liability company operating agreement unambiguously provides that an action to amend the agreement or to involuntarily remove a member shall be performed by the consent of members controlling 60 percent or more of the company, without requiring approval by the board of managers?" *Clinton* v. *Aspinwall*, 335 Conn. 979, 241 A.3d 704 (2020).

[5] We also ordered that the parties' supplemental briefs should "address whether Delaware or Connecticut law applies to the final judgment issue. See *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 603–604, 211 A.3d 976 (2019)."

their supplemental briefs to this court, both parties agree that Connecticut law applies to the question of whether there is an appealable final judgment. We agree with the parties. Notwithstanding which substantive law might apply to the merits of a dispute, it is well established that we apply the procedural law of Connecticut to "matters of judicial administration and procedure." *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 593, 211 A.3d 976 (2019). Thus, Connecticut law governs procedural issues, such as standing, which affect our subject matter jurisdiction to hear appeals. See, e.g., *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017). It is similarly well established that, because the right of appeal is purely statutory, "[t]he lack of a final judgment is a jurisdictional defect that mandates dismissal." *Blondeau* v. *Baltierra*, 337 Conn. 127, 135, 252 A.3d 317 (2020). Connecticut law therefore governs whether the defendants appealed from a final judgment in this case, in which there has never been an adjudication of the fiduciary duty count. The jury, following the trial court's instructions, never considered the count containing the fiduciary duty claims because it found in favor of the plaintiff on his breach of contract claims. The court never disposed of the fiduciary duty count in any fashion.

Under Connecticut law, a judgment that "disposes of only a part of a complaint is not final, unless it disposes of all of the causes of action against the appellant." *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 717. When the "trial court disposes of one count in the plaintiff's favor, such a determination implicitly disposes of legally inconsistent, but not legally consistent, alternative theories." Id., 723. Claims are legally inconsistent, or mutually exclusive, when establishing the elements of one claim precludes liability on the other claim; it is then "fair to infer that a judgment in favor of the plaintiff on one count legally implies a judgment

in favor of the defendant on the other count." (Emphasis omitted.) Id., 722. On the other hand, the plaintiff may establish legally consistent alternative theories but may not recover twice for the same injury. Id. In that case, a ruling in the plaintiff's favor on one count "does not imply as a matter of fact or law whether the plaintiff has established the defendant's liability under the other count"; id., 723; and, therefore, presents a final judgment problem.

Although Connecticut procedural law governs the final judgment issue, both parties also appear to agree that Delaware law applies to the substantive claims pursuant to the choice of law provision contained in the operating agreement. We agree with the parties that Delaware law governs the substantive matters in the present case, including whether the plaintiff's breach of contract and breach of fiduciary duty counts are legally consistent or inconsistent. See id., 721 (looking to elements necessary to establish claims to determine whether claims are legally consistent or inconsistent). We therefore must determine whether, under Delaware law, a claim of breach of contract and a claim of breach of fiduciary duty are legally inconsistent, such that establishing the elements of one claim precludes liability on the other claim.

Whether contractual or fiduciary principles govern a particular claim is a fact specific and contextual determination that does not lend itself to a bright line rule. *Moore Business Forms, Inc.* v. *Cordant Holdings Corp.*, Docket No. Civ. A. 13911, 1995 WL 662685, *6 (Del. Ch. November 2, 1995). The leading Delaware case is *Nemec* v. *Shrader*, supra, 991 A.2d 1120, in which the plaintiffs raised claims of breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment. Id., 1125. The defendants moved to dismiss the complaint on grounds including that the plaintiffs' breach of fiduciary duty claim had to be adju-

dicated as a breach of contract claim. See id., 1125, 1129. The Court of Chancery granted the defendants' motion and dismissed the complaint. Id., 1125. In upholding the judgment of the Court of Chancery, the Delaware Supreme Court explained that, when "a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous." Id., 1129; see id., 1129 n.31, citing *Blue Chip Capital Fund II Ltd. Partnership* v. *Tubergen*, 906 A.2d 827, 833 (Del. Ch. 2006). The Delaware Court of Chancery has explained the reasoning behind this rule: to allow a fiduciary duty claim to "coexist in parallel with [a contractual] claim" would undermine "the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations." (Internal quotation marks omitted.) *Grayson* v. *Imagination Station, Inc.*, Docket No. Civ. A. 5051-CC, 2010 WL 3221951, *7 (Del. Ch. August 16, 2010), quoting *Gale* v. *Bershad*, Docket No. Civ. A. 15714, 1998 WL 118022, *5 (Del. Ch. March 4, 1998). The Delaware Court of Chancery has characterized the rule as requiring that breach of fiduciary duty claims "must be dismissed" when they are "duplicative of [a party's] breach of contract claims." *In re WeWork Litigation*, Docket No. 2020-0258-AGB, 2020 WL 6375438, *11 (Del. Ch. October 30, 2020). When "those rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties." *Grunstein* v. *Silva*, Docket No. C.A. 3932-VCN, 2009 WL 4698541, *6 (Del. Ch. December 8, 2009).

Delaware law does allow for both a breach of contract claim and a breach of fiduciary duty claim to move forward, even though both claims arise from the same

nucleus of operative fact: When "there is an independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct . . . the fiduciary duty claims will survive." (Internal quotation marks omitted.) *Grayson* v. *Imagination Station*, *Inc.*, supra, 2010 WL 3221951, *7. There is an independent basis for breach of fiduciary duty claims when (1) they depend on additional facts, (2) are broader in scope, and (3) involve different considerations in terms of a potential remedy. *Bäcker* v. *Palisades Growth Capital II*, *L.P.*, 246 A.3d 81, 109 (Del. 2021); *Schuss* v. *Penfield Partners*, *L.P.*, Docket No. Civ. A. 3132-VCP, 2008 WL 2433842, *10 (Del. Ch. June 13, 2008). Some courts have declined to dismiss as duplicative fiduciary duty claims when the parties' contract itself imposes fiduciary duties. See *RJ Associates*, *Inc.* v. *Health Payors' Organization Ltd. Partnership*, *HPA*, *Inc.*, Docket No. 16873, 1999 WL 550350, *9–10 (Del. Ch. July 16, 1999); see also *In re Mobilactive Media*, *LLC*, Docket No. Civ. A. 5725-VCP, 2013 WL 297950, *20 n.219 (Del. Ch. January 25, 2013). Neither party argues in this court that these conditions apply.

The reason that Delaware law requires that courts dismiss fiduciary duty claims when there is no independent basis apart from the contractual claim is not because they cannot, as a matter of law, be tried together. Instead, to honor parties' expectations in drafting agreements, Delaware law evidently requires courts to dismiss these claims in certain circumstances for policy reasons. See, e.g., *Moore Business Forms*, *Inc.* v. *Cordant Holdings Corp.*, supra, 1995 WL 662685, *6 ("[T]he [fiduciary] duties sought to be enforced have a clearly contractual source. This dispute among these parties relates to an event specifically anticipated and expressly provided for in their contract."). Nothing about this policy suggests that the claims in the present case are legally inconsistent such that establishing the

elements of breach of contract, as provided by Delaware law, precludes liability on the breach of fiduciary duty count. The elements of breach of contract and breach of fiduciary duty do not conflict under Delaware law or under Connecticut law.[6] As the Delaware Court of Chancery has recognized, although a plaintiff may advance alternative theories or claims, such as breach of contract and breach of fiduciary duty at the pleading stage, a plaintiff can recover only "a single judgment, and a plaintiff cannot recover duplicative remedies." *Garfield ex rel. ODP Corp.* v. *Allen*, 277 A.3d 296, 360 (Del. Ch. 2022). These cases make clear that claims of breach of contract and breach of fiduciary duty are more akin to legally consistent alternative theories that prevent double recovery, not legally inconsistent as that phrase is defined under Connecticut procedural law—with the elements of breach of contract precluding liability on a breach of fiduciary duty claim. Therefore, under *Meribear Productions, Inc.*, there is no final judgment, and we leave the resolution as to whether the fiduciary duty claim can proceed under Delaware law to the trial court. See *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 723–24.

[6] Compare *Connelly* v. *State Farm Mutual Automobile Ins. Co.*, 135 A.3d 1271, 1279 n.28 (Del. 2016) (elements of breach of contract are (1) existence of contract, (2) breach of obligation imposed by that contract, and (3) resultant damage to plaintiff), and *Beard Research, Inc.* v. *Kates*, 8 A.3d 573, 601 (Del. Ch.) (elements of breach of fiduciary duty are (1) existence of fiduciary duty, and (2) defendant's breach of that duty), aff'd sub nom. *ASDI, Inc.* v. *Beard Research, Inc.*, 11 A.3d 749 (Del. 2010), with *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017) (elements of breach of contract are "the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages" (internal quotation marks omitted)), and *Rendahl* v. *Peluso*, 173 Conn. App. 66, 100, 162 A.3d 1 (2017) (elements of breach of fiduciary duty are (1) existence of fiduciary relationship that gives rise to duty of loyalty, obligation to act in best interests of plaintiff, and obligation to act in good faith in any matter relating to plaintiff, (2) defendant advanced his interests to detriment of plaintiff, (3) plaintiff sustained damages, and (4) damages were proximately caused by breach).

Nevertheless, the defendants contend that they properly appealed from a final judgment because the plaintiff did not object to the jury verdict form and did not appeal from the Appellate Court's conclusion that the plaintiff effectively abandoned his fiduciary duty claims by failing to object to the verdict form. See *Clinton* v. *Aspinwall*, supra, 200 Conn. App. 222 n.19. We disagree for two reasons.

First, in posttrial motions, the plaintiff contested the defendants' characterization of his fiduciary duty claims as no longer relevant. He argued that the verdict form was devised to avoid an inconsistent verdict because a finding in his favor on the breach of contract claim implied a finding in his favor on his breach of fiduciary duty claim. Consistent with this position and citing *Meribear Productions, Inc.*, the plaintiff argued in supplemental briefing to this court that there was no final judgment because the breach of contract and breach of fiduciary duty claims were legally consistent. The jury never reached the fiduciary duty claims, and the trial court never ruled on them. There is no record of whether the trial court ever considered whether, under Delaware law, the claims are superfluous or duplicative or whether the fiduciary duty claim can coexist with the contract claim. The fact that the defendants contest the plaintiff's characterizations serves to strengthen, rather than to undercut, the conclusion that there has not yet been a final judgment.

Second, under our case law, appeals from nonfinal judgments are void ab initio. See, e.g., *Stroiney* v. *Crescent Lake Tax District*, 197 Conn. 82, 86 n.3, 495 A.2d 1063 (1985). That is to say, we must measure whether there is a final judgment based on the record at the time the appeal was taken. See id. Recalling that it was the *defendants* who appealed from the adverse jury verdict on the plaintiff's breach of contract claims, as

discussed previously, the judgment in this case was not final under Connecticut law.

In the same way, any attempt by the plaintiff to render the judgment final, nunc pro tunc, is ineffectual under *Stroiney*. Specifically, although he took the position in his supplemental brief that the judgment was not final, the plaintiff's counsel represented at oral argument before this court that his client "would like nothing better than for [this court] to bring finality to this case that he's been trying to get finality on for ten years. If that costs the fiduciary duty claim, he's willing to pay that price." In *Stroiney*, this court rejected a more explicit offer by counsel at oral argument to cure a final judgment defect by withdrawing "claims for injunctive relief and for damages . . . [while] reserving the right to bring a separate suit to obtain such relief." *Stroiney* v. *Crescent Lake Tax District*, supra, 197 Conn. 86 n.3. We explained that it was "futile for the plaintiffs to attempt to waive their claims for additional relief in order to meet the final judgment requirement, because a jurisdictional defect renders the appeal void ab initio and is, therefore, not waivable. . . . [T]here is a complete lack of jurisdiction, and the only power this court has over such a case is to dismiss for lack of jurisdiction. This court has no power to allow the plaintiff to, in effect, amend his complaint by waiving any claims for further relief." (Citation omitted.) Id.; cf. *Zamstein* v. *Marvasti*, 240 Conn. 549, 555–56, 692 A.2d 781 (1997) (judgment became final after trial court granted motion to strike four of six counts because plaintiff, in motion for judgment, abandoned remaining claims, representing that he would withdraw counts and did so after court rendered judgment). No party has asked us to overrule *Stroiney* or that line of cases.

Although the statement by the plaintiff's counsel before this court manifests an understandable fatigue with this litigation, we are reluctant to take counsel's

belated representations—that the plaintiff "would like nothing better than . . . finality" even if it "costs [him] the fiduciary duty claim"—to constitute an effective withdrawal or abandonment of his claims. This is especially so given that the plaintiff has consistently taken the position (including in his supplemental brief to this court) that the fiduciary duty claims remain undecided. If we were to reach the merits of the contractual claim and find favorably for the defendants, perhaps the plaintiff will want the opportunity to pursue the fiduciary duty claim.

Because, under Delaware law, breach of fiduciary duty is a legally consistent alternative theory of recovery to breach of contract, and the plaintiff has not withdrawn or unconditionally abandoned his fiduciary duty claims contained in count one of his complaint, those claims remain unadjudicated, and the trial court has not disposed of them. Accordingly, there was no final judgment for the defendants to have appealed from, and, thus, the Appellate Court lacked jurisdiction over the defendants' appeals.[7]

II

Litigation involving multiple causes of action, counts, and theories of recovery presents case management challenges unique to each controversy, including whether all causes of action, counts, or theories should be adjudicated at once. In the context of a court trial, we have suggested that "the far better practice" is "for the trial court to fully address the merits of all theories litigated, even those that are legally inconsistent. If the trial court determines that the plaintiff has established more than one theory of recovery for the same injury,

[7] The plaintiff may, of course, choose to withdraw his fiduciary duty count to create a final judgment. But, consistent with *Meribear Productions, Inc.*, he may do so only after the Appellate Court dismisses the defendants' appeals. See, e.g., *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 718.

the trial court would render judgment in the plaintiff's favor on the primary count and render judgment for the defendant on the other(s), albeit solely due to the nature of the alternative claims." (Footnote omitted.) *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 724. We have explained that, "[b]y so doing, we envision several economies that would inure to the benefit of the parties and the judicial system," including that, "[i]f the appeal proceeds, the case would typically be resolved in that appeal, thus substantially reducing the number of retrials and successive appeals."[8] Id.

The same wisdom applies to jury trials to protect against appeals from nonfinal judgments. Counsel and the trial court must consider precisely what information is needed from the jury to maximize the efficiency of the system in the event of an appeal. Toward that end, the trial court should always have the jury decide all counts of a complaint, except in the uncommon situation when doing so would result in a legally inconsistent finding that requires a new trial. See, e.g., *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 693, 846 A.2d 849 (2004) ("[i]ntentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive" (citation omitted; internal quotation marks omitted)). Jury instructions and jury interrogatories are useful tools to facilitate this exercise, keeping the jury focused while avoiding confusion. To do so, the jury instructions and jury interrogatories must be carefully crafted with this in mind. The trial court will then be equipped, after the jury is excused and after comment and briefing from counsel, with the information necessary to eliminate any duplication or other aspects of the verdict that cannot be entered by law as part of the judgment. In this

[8] For example, if the trial court had rendered judgment in favor of the defendants on the fiduciary duty count, the plaintiff could have appealed from that adverse ruling.

case, for example, the trial court could have accepted verdicts on both the breach of contract count and the breach of fiduciary duty count and later determined whether it was necessary under Delaware law to vacate or set aside the verdict as to the fiduciary duty count.[9]

The judgment of the Appellate Court is vacated and the case is remanded to that court with direction to dismiss the defendants' appeals.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ADRIAN FLORES (SC 20512)

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

Syllabus

Convicted of home invasion, burglary in the first degree, attempt to commit robbery in the first degree, and conspiracy to commit home invasion, the defendant appealed to this court. The defendant and his friend, B, had agreed to steal drugs and money from the home of the defendant's drug dealer, D. After ingesting cocaine and acquiring various tools and supplies from B's workplace, the defendant and B drove to D's home, which they entered through the basement. The defendant and B were wearing facemasks and armed with box cutters, and B also held a machete. After they were confronted by D and other occupants of D's home, the defendant and B fled and were later apprehended by the police. Prior to trial, the defendant moved to suppress a written statement he made after being brought to the police station, claiming that it was inadmissible pursuant to the statute (§ 54-1o) governing the admissibility of statements made in the course of an unrecorded custodial interrogation at a place of detention. Following a hearing, at which the defendant and several police officers testified, the court denied the motion to suppress. The court concluded that, although the electronic recording of the encounter in which the defendant had made his statement was not preserved, the state had overcome the statute's presumption of

[9] This process might function similar to that set out in *State* v. *Polanco*, 308 Conn. 242, 260–63, 61 A.3d 1084 (2013), which requires that, when a defendant is found guilty of greater and lesser included offenses in violation of the double jeopardy clause, the trial court must vacate the verdict on the lesser included offense.

inadmissibility of the defendant's written statement under § 54-1o (h) because the failure to preserve the electronic recording was not in bad faith and because the state had established, by a preponderance of the evidence, that the defendant's statement was voluntary and reliable. At trial, the prosecutor also sought to admit into evidence a cooperation agreement that the state had entered into with B. Pursuant to that agreement, B agreed to testify truthfully, and the state agreed that it would "make known to the sentencing court [in B's criminal case] the nature, extent, value, and truthfulness of [B's] information and testimony." Defense counsel objected to the admission of that agreement, claiming that the portions of the agreement regarding B's obligation to testify truthfully constituted improper vouching for B's credibility. The trial court overruled defense counsel's objection and admitted the agreement in its entirety. *Held*:

1. The trial court correctly determined that the state had established, by a preponderance of the evidence, that the defendant's written statement to the police was both voluntary and reliable and, therefore, admissible under § 54-1o, and, accordingly, the court properly denied the defendant's motion to suppress:

a. The defendant could not prevail on his claim that the trial court's findings were clearly erroneous insofar as the court determined that, while the defendant was in a holding cell and without any prompting, he told a police sergeant that he wanted to give a statement: there was no evidence that the sergeant approached the defendant in his cell, as the sergeant testified that he had joined the defendant in the processing room, and this court therefore declined to rely on that subsidiary factual finding in determining whether the defendant's statement was voluntary; moreover, because there was at least some evidence in the record that the defendant's offer to make a statement was not prompted by the police, that subsidiary finding was not clearly erroneous, and, regardless of whether the statement was unprompted, it was undisputed that the defendant responded affirmatively when the police asked if he would provide a statement.

b. The defendant's statement was voluntary insofar as he implicitly gave a knowing, voluntary waiver of his rights under *Miranda* v. *Arizona* (384 U.S. 436): the defendant responded affirmatively and without any reservations when asked whether he would provide a statement, he received two *Miranda* warnings before making his statement, at all times, he stated that he understood his rights and had a calm and cooperative demeanor, and the facts demonstrated, and the defendant specifically testified, that he was not coerced or threatened in any manner; moreover, the trial court specifically discredited the defendant's testimony that he had been cold, tired, under the influence of alcohol and narcotics, and not proficient in English at the time he made his statement, the court instead credited the police officers' testimony that the defendant spoke and understood English and did not appear to be tired or under the

influence of alcohol or drugs, and, because the defendant did not dispute the trial court's findings in that regard as clearly erroneous, this court would not second-guess the trial court's credibility determinations; furthermore, this court declined the defendant's request to read a requirement into § 54-1o that the state provide a valid explanation for its failure to record and preserve a custodial interrogation for the defendant's statement to be admissible, the legislature having declined to require the state to provide such an explanation in order to overcome the presumption of inadmissibility set forth in that statute.

c. In view of the totality of the circumstances, the defendant's statement was voluntary under due process principles: the record supported the trial court's findings, which the defendant did not claim were clearly erroneous, that he spoke and understood English at the time of the interrogation, the interrogation occurred only a few hours after the defendant's arrest and lasted for only about thirty minutes, and there was no evidence of physical or psychological punishment or the use of any potentially coercive interrogation methods.

d. The trial court did not abuse its discretion in determining that the defendant's statement was reliable: the testimony of B, D, and the occupants of D's home corroborated the defendant's statement, the defendant testified that the substance of the statement was accurate, and none of the undisputed facts demonstrated that the defendant was coerced into giving a false confession.

2. The defendant could not prevail on his claim that the truthfulness provisions contained in the cooperation agreement between B and the state constituted improper vouching for B's credibility, as a matter of both evidentiary law and prosecutorial impropriety: truthfulness provisions do not constitute impermissible vouching when they merely reveal that a witness has an obligation to testify truthfully and explain the consequences of a breach of that obligation, but such provisions constitute impermissible vouching when the prosecutor explicitly or implicitly indicates that he or she has verified the truth of the testimony presented to the fact finder, when they refer to facts not in evidence, or when they offer the prosecutor's personal opinion of the truthfulness of the witness' testimony; in the present case, the provisions stating that B had a duty to "truthfully disclose" and "truthfully testify," and that he could be charged with perjury if he lied, did not constitute impermissible vouching, as they merely stated B's obligation to testify truthfully and explained the consequences of his failure to do so; moreover, although the provision stating that the prosecutor would "make known to the sentencing court [in B's criminal case] the nature, extent, value, and truthfulness of [B's] information and testimony" came very close to impermissibly suggesting to the jury that the prosecutor had access to tools or information, not available to the jury, that the prosecutor would use to ensure that the witness tells the truth, nothing in the agreement suggested that the prosecutor already had verified the truth of B's testi-

mony, the determination of the truthfulness of B's testimony was left to the jury, and the state's role in determining credibility under the agreement would not arise until the sentencing hearing in B's separate criminal case; furthermore, although it would have been better if the trial court had omitted the reference to the provision regarding what the prosecutor would have made known to the sentencing court in B's criminal case, this court stopped short of concluding that the trial court abused its discretion, as an evidentiary matter, in admitting it; accordingly, because the trial court did not abuse its discretion in admitting the truthfulness provisions as a matter of evidentiary law, the defendant's claim that the admission of the truthfulness provisions constituted prosecutorial impropriety also failed; nevertheless, this court emphasized that the state must take care in drafting cooperation agreements and that trial courts must carefully examine their language before admitting them fully into evidence, it cautioned the state not to insinuate in future cooperation agreements or in argument to the jury that it has verified testimony or that it is in a position to monitor and accurately verify a witness' testimony, and it encouraged courts to address concerns about improper vouching in cooperative agreements by making appropriate redactions.

3. The evidence was sufficient to prove beyond a reasonable doubt that the defendant committed the crimes of which he was convicted:

a. The evidence was sufficient to convict the defendant of attempt to commit robbery in the first degree: contrary to the defendant's argument that the state had to prove beyond a reasonable doubt both that he intended to commit a larceny and that he intended to do so through the use or threatened use of force, it was well settled that the intent element of robbery relates to the commission of the larceny and not to the use or threatened use of physical force; moreover, even if the evidence was insufficient to establish that the defendant actually used or threatened the use of a box cutter, the defendant was charged and convicted of only attempt to commit robbery, and the defendant's conduct in asking B to procure weapons, kicking down the door to D's basement knowing that at least one person was home, and stating that he would do whatever it took to get money and drugs, including using force and tying up the occupants, was sufficient to establish that he took a substantial step in using or threatening to use the box cutter.

b. The evidence was sufficient to convict the defendant of burglary in the first degree: the defendant conceded that, to establish the particular offense of burglary in the first degree with which he was charged, the state had to prove beyond a reasonable doubt only that he was armed with a dangerous instrument, not that he used or displayed a dangerous instrument; moreover, the jury reasonably could have found that the defendant used or attempted to use a box cutter in circumstances such that its use or attempted use was capable of causing death or serious physical injury.

c. The evidence was sufficient to support the defendant's conviction of conspiracy to commit home invasion, predicated on his attempt to commit robbery in the first degree: because conspiracy is a specific intent crime, specific intent is required for every element of home invasion, including, in this case, the predicate felony of attempt to commit robbery in the first degree, and, although the defendant relied on his own testimony in support of his claim that he and B had agreed only to enter and commit a larceny in D's home and not to hurt anyone therein, the jury was not required to credit his testimony; moreover, there was sufficient other evidence, which the jury was entitled to credit, that the defendant had the specific intent to use or threaten the use of physical force against another person for the purpose of compelling that person to deliver property, including B's testimony that the defendant had agreed to use whatever force was necessary to force the occupants of D's home to comply and that he had asked B to gather the machete, box cutters, and other supplies, including zip ties and duct tape, the defendant's own statement to the police, in which he indicated those supplies would be used in case they needed to tie up D, and the testimony of D's brother that the defendant was holding a sharp object or knife when the occupants of D's home confronted the defendant after he forced his way into their basement.

(*Two justices concurring separately in one opinion*)

Argued March 28—officially released September 20, 2022

Procedural History

Substitute information charging the defendant with two counts each of the crimes of home invasion, burglary in the first degree, conspiracy to commit home invasion and conspiracy to commit burglary in the first degree, and with one count each of the crimes of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Windham, where the court, *Swords*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Swords*, *J.*; verdict of guilty; subsequently, the court vacated the verdict as to one count each of conspiracy to commit home invasion and conspiracy to commit robbery in the first degree, and two counts of conspiracy to commit burglary in the first degree; judgment of guilty of two counts each of home invasion and burglary in the first degree,

and one count each of attempt to commit robbery in the first degree and conspiracy to commit home invasion, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assigned counsel, for the appellant (defendant).

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Louis J. Luba, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Adrian Flores, directly appeals from the judgment of conviction, rendered after a jury trial, of home invasion in violation of General Statutes § 53a-100aa (a) (1); home invasion in violation of General Statutes § 53a-100aa (a) (2); burglary in the first degree in violation of General Statutes § 53a-101 (a) (1); burglary in the first degree in violation of General Statutes § 53a-101 (a) (3); attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (3); and conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa (a) (1). On appeal, he claims that (1) the trial court improperly denied his motion to suppress his written statement to the police, who failed to comply with the requirements of General Statutes § 54-1o, (2) the trial court improperly admitted into evidence the entirety of the cooperation agreement between the state and his accomplice, Benjamin J. Bellavance, including portions regarding Bellavance's obligation to testify truthfully, and (3) there was insufficient evidence to convict him of attempt to commit robbery in the first degree, home invasion predicated on attempt to commit robbery in the first degree, burglary in the first degree, home invasion predicated on burglary in

the first degree, and conspiracy to commit home invasion. We affirm the judgment of conviction.

Based on the evidence admitted at trial, the jury reasonably could have found the following facts. The defendant approached his friend, Bellavance, about a plan to steal drugs and money from the residence of the defendant's drug dealer, Daniel Bowling (Daniel). The defendant knew where Daniel lived because he previously had been to the residence to buy drugs from him. Bellavance, who was addicted to cocaine at the time, agreed to the defendant's plan.

On the day of the incident, December 21, 2017, the defendant and Bellavance ingested cocaine and then drove to A.J. Manufacturing, LLC, where Bellavance worked. Both men went inside and obtained two box cutters, zip ties, duct tape, two chisels, and plastic gloves. Once it was dark outside, Bellavance drove the defendant to Daniel's residence in Woodstock, a single-family house where he resided with his mother, Rhonda Bowling, and his father, Raymond M. Bowling, Jr. (Raymond Jr.). The defendant directed Bellavance not to park near Daniel's house but, rather, to park about one mile down the road. The defendant and Bellavance, who took turns holding a black duffel bag containing the items gathered at the store, then walked toward Daniel's house. Both men wore partial facemasks, and each had a box cutter. Bellavance also carried a machete, which he concealed in his pants, although the defendant was aware that he carried it. The men walked to the back basement door of Daniel's house. The defendant kicked in the door, and they entered the residence.

Daniel, whose bedroom was located in the basement of the house, was home with his mother and father. Daniel's older brother, Raymond Bowling III (Raymond III), also was at the residence visiting his family. All four family members were upstairs when they heard a

loud noise from the basement. Daniel, Raymond Jr., and Raymond III ran down the basement stairs while Rhonda grabbed a kitchen knife and called 911. When Daniel, Raymond Jr., and Raymond III reached the bottom of the basement steps, they saw the defendant and Bellavance standing inside the basement with masks partially covering their faces. Bellavance was holding a machete and carrying a black duffel bag. The defendant was holding "[s]ome type of knife" or "something else sharp . . . ." Raymond III asked the intruders what they were going to do. Bellavance raised the machete, but, when Raymond III repeated his question, the defendant and Bellavance remained quiet, and then turned and ran out of the basement door. Raymond III grabbed a shovel and chased the intruders down the driveway. The defendant slipped and fell on the driveway, causing his facemask to slip and allowing Raymond III to see his face. Raymond III hit the defendant in the chest with the shovel. Bellavance, seeing this altercation, swung the black duffel bag at Raymond III but missed him. The defendant grabbed the shovel from Raymond III, threw it in the woods and, with Bellavance, ran toward their vehicle.

Raymond III got into his vehicle and drove in the direction that the defendant and Bellavance had run until he encountered their unoccupied vehicle parked down the road. He drove back to his parents' residence and gave the license plate number to Rhonda, who remained on the telephone with the police. He then drove back to the intruders' unoccupied vehicle to prevent them from fleeing. Meanwhile, the defendant and Bellavance hid in the woods near their vehicle. They remained in the woods for approximately one to one and one-half hours until the police discovered them. While being taken into custody, the defendant stated that Daniel was his drug dealer. A patdown of the defendant revealed that he had a box cutter in the front

pocket of his jacket. Additionally, the police found the machete and the black duffel bag containing the zip ties, duct tape, two chisels, and plastic gloves on the ground by a tree near the defendant and Bellavance. The defendant was arrested and transported to the police station, where he gave a statement to the police.

Following his arrest, the defendant was charged with two counts of home invasion, two counts of burglary in the first degree, one count of attempt to commit robbery in the first degree, and five conspiracy counts.[1] After a jury trial, the defendant was found guilty on all ten counts. At sentencing, the court vacated the verdict as to four of the five conspiracy counts,[2] leaving intact only the verdict on the count of conspiracy to commit home invasion predicated on robbery. The court sentenced the defendant to a total effective term of twenty-five years of incarceration, execution suspended after fifteen years, ten years of which was a mandatory minimum, followed by five years of probation. The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3). We will discuss additional facts and procedural history as necessary.

I

The defendant claims that the trial court improperly denied his motion to suppress his written statement to

[1] Specifically, the defendant was charged with two counts of home invasion in violation of § 53a-100aa (a) (1) and (2); two counts of burglary in the first degree in violation of § 53a-101 (a) (1) and (3); attempt to commit robbery in the first degree in violation of §§ 53a-49 (a) (2) and 53a-134 (a) (3); two counts of conspiracy to commit home invasion in violation of §§ 53a-48 (a) and 53a-100aa (a) (1) and (2); two counts of conspiracy to commit burglary in the first degree in violation of §§ 53a-48 (a) and 53a-101 (a) (1) and (3); and one count of conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (3).

[2] The trial court vacated the verdict as to the counts of the information that charged the defendant with conspiracy to commit home invasion in violation of §§ 53a-48 (a) and 53a-100aa (a) (2); conspiracy to commit burglary in the first degree in violation of §§ 53a-48 (a) and 53a-101 (a) (1); conspiracy to commit burglary in the first degree in violation of §§ 53a-48

the police because the police had failed to comply with the requirements of § 54-1o. Specifically, he argues that the state failed to prove that he voluntarily made the statement and that the statement was reliable. We disagree.

The following additional facts and procedural history are relevant to this claim. After the defendant was arrested and brought to the police station, he provided a written statement to the police. Prior to trial, the defendant filed a motion to suppress this statement, arguing that it was inadmissible under § 54-1o because it was made as part of a custodial interrogation, which the state had failed to electronically record. The trial court then held a hearing on the motion during which several police officers and the defendant testified. The trial court later issued an oral decision on the record denying the defendant's motion to suppress.

In ruling on the defendant's motion, the trial court made the following subsidiary findings, which we quote at length: "[The defendant and Bellavance] were . . . transported to [the state police] Troop D [barracks in Danielson] and placed in individual cells at approximately 11:30 p.m. While the defendant was in his cell, Sergeant John Gregorzek . . . approached his cell and asked the defendant his name and date of birth; at that time, the defendant, unprompted, told Gregorzek that he wanted to give a statement; Gregorzek followed up by asking if the defendant would provide a statement, and the defendant responded yes, and . . . then . . . the defendant, unprompted, proceeded to give . . . a rundown of the events . . . of that night. Gregorzek then assigned Trooper Michael P. Gibson to advise the defendant of his rights. Accordingly, Gibson removed the defendant from the cell and brought him into the processing room . . . . At approximately 3:10 a.m.

(a) and 53a-101 (a) (3); and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (3).

Gibson . . . advised the defendant, inter alia, of his right[s] to [remain] silen[t], to an attorney, and to be interviewed about the conditions of his release. State's exhibit 3 sets out those rights in both English and in Spanish. After Gibson read this form to the defendant, the defendant was allowed to read state's exhibit 3 for himself; after doing so, the defendant signed his name in the box at the bottom of the form. This entire procedure was witnessed by Gregorzek.

"The defendant told Gibson that he wanted to give a statement. Commencing at 3:20 a.m., therefore, Gibson read to the defendant state's exhibit 2, titled 'Notice and Waiver of Rights.' Gibson started by reading verbatim the top portion of the form, which advised the defendant, inter alia, of his right to remain silent, right to an attorney, right to have an attorney present during any questioning, and the right to stop answering questions at any time. The defendant told Gibson he understood these rights; he then signed the notice of rights form, and Gibson signed as a witness. Gibson then read the defendant the lower portion of the form, state's exhibit 3, consisting of three separate waivers of rights. These waivers included the desire to speak with the state police without consulting with an attorney or having an attorney present and the defendant's acknowledgment that he was waiving his rights freely, voluntarily, and without threats or promises. Gibson read each of these rights one by one, and the defendant placed his initials after each one. . . .

"After the defendant signed his waiver of rights form, Gibson then began to fill in the blanks at the top of the form, including the date, location, case number, etc. At this point, the case officer, Trooper Jana R. Mazzarella . . . entered the room and took over questioning the defendant while Gibson left to help process the evidence.

"The defendant told Mazzarella what had occurred during the [incident]. Simultaneously, Mazzarella typed this information onto the statement form . . . [then] put the events in chronological order. . . . According to Mazzarella, this information was consistent with the facts reported by the residents and found by state police investigators.

"The written statement was completed at 3:48 a.m. After the statement was completed, Mazzarella read the entire statement verbatim to the defendant, including the preprinted notice at the top, which again advised the defendant, inter alia, of his right[s] to remain silent, to consult with an attorney, to have an attorney present, and to terminate questioning at any time. . . . The defendant then read his statement himself; after doing so, he signed it in Mazzarella's presence. . . .

"At no time during the various advisements of rights or during his interview did the defendant ask any questions about his rights or indicate that he didn't understand his rights. At all times, he spoke with Gibson, Gregorzek and Mazzarella in English, and he never asked for a Spanish interpreter. The defendant did not appear to be under the influence of alcohol, drugs, or any other substance, and he never indicated that he was in any way under the influence or . . . incapacitated. At all times, he appeared to understand and be aware of what was happening. He never indicated that he was cold or uncomfortable or injured or that he wanted to take a break or was tired. No threats or promises were made to the defendant by Gregorzek, Gibson, or Mazzarella; nor is there any evidence of physical or mental coercion being exerted against him. The defendant never asked for an attorney, never asked to stop answering questions, and never indicated that he wanted to stop talking to the state police. His demeanor was calm and cooperative throughout. . . .

"In his testimony, the defendant claimed that, in 2017, his English was not very good and that, on the night he was arrested by the police, he was under the influence of alcohol, cocaine and Percocet. He further claimed that he was confused, cold, tired, and scared when questioned by the police. Moreover, he claims that, prior to December 21, [2017], he had never heard of *Miranda*[3] rights . . . [and] that he didn't understand he had the right to an attorney or the right not to talk to the police. . . .

"At the time of his arrest, the defendant was the manager of a restaurant in Putnam. At no point during the hearing before this court did the defendant use the assistance of a Spanish language interpreter, even though one was available and sitting in the courtroom. Throughout his testimony, it was obvious to the court that the defendant understands English very well. Additionally, consistent with his multiyear upbringing in California, where he undoubtedly attended public school, the defendant speaks English without any trace of an accent. The court finds that the defendant's claims that he was under the influence, that he was confused, tired and scared, that he didn't understand his right[s] to an attorney or to silence, and that his English was not good in 2017, to be not credible. The court finds Mazzarella's, Gibson's, and Gregorzek's testimony to be credible and adopts their versions of the events surrounding the defendant's advisement . . . the advisement of the defendant's rights, his waiver of rights, and the execution of his statement."

The court further stated: "Although the defendant's confession was recorded, no . . . steps were taken on December 21, [2017], to preserve the interview. Mazzarella testified [that] she was not aware on December

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

21, 2017, that she needed to notify a supervisor of the necessity to preserve the defendant's interview and that the supervisor would thereafter have preserved it. . . . Because no request to preserve the defendant's interview was received within thirty days, according to Mazzarella, in accordance with state police procedures, the defendant's interview was recorded over. Mazzarella further testified that she only discovered in October, 2018, that the confession had not been preserved."

In light of the totality of these subsidiary facts, the trial court found by a preponderance of the evidence that (1) the state's failure to preserve the defendant's statement was not done in bad faith, intentionally, recklessly, or negligently, (2) the defendant voluntarily gave the statement, and (3) the defendant's statement was reliable. As a result, the trial court concluded that the state had satisfied its burden of overcoming the presumption of inadmissibility under § 54-1o.

"[Section] 54-1o provides that, if a person suspected of one of several enumerated classes of felonies gives a statement to law enforcement as a result of a custodial interrogation at a detention facility, the statement will be presumed to be inadmissible unless officers make an audiovisual recording of the interrogation. Under subsection (h) of the statute, the state may overcome the presumption of inadmissibility in any case by proving by a preponderance of the evidence that the statement 'was voluntarily given and is reliable, based on the totality of the circumstances.' General Statutes § 54-1o (h)." *State* v. *Christopher S.*, 338 Conn. 255, 258–59, 257 A.3d 912 (2021). "The voluntariness inquiry addresses a defendant's constitutional right to due process and, potentially, those rights protected by *Miranda*, without regard to whether a confession is true. Reliability, on the other hand, is concerned with whether a statement is true." Id., 284. "[T]he defendant's claim is constitutional with respect to the voluntariness inquiry

and evidentiary with respect to the reliability inquiry." Id., 267. The defendant claims that the trial court erred in finding that the defendant's statement was voluntary and reliable.

A

"The standard of review of a trial court's ruling on voluntariness in the context of the state's motion to admit a defendant's confession under § 54-1o (h) is the same as when a defendant moves to suppress a statement on the ground that it was given involuntarily. [T]he trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . [A]lthough we give deference to the trial court concerning these subsidiary factual determinations, such deference is not proper concerning the ultimate legal determination of voluntariness. . . . Consistent with the well established approach taken by the United States Supreme Court, we review the voluntariness of a confession independently, based on our own scrupulous examination of the record. . . . Accordingly, we conduct a plenary review of the record in order to make an independent determination of voluntariness." (Internal quotation marks omitted.) Id., 274–75.

In *Christopher S.*, we recognized that the term "voluntariness" may encompass two traditional tests: "(1) that the defendant's statement was taken in accordance with the requirements of *Miranda*, and (2) that the police did not overbear the defendant's will in violation of his right to due process." Id., 273–74. We did not decide, however, whether the state must prove both due process voluntariness and compliance with *Miranda* because we held in that case that, even if we assumed that the state did have to prove both, the record supported the trial court's determination that there was

no *Miranda* violation and that the defendant gave his statement voluntarily under the totality of the circumstances. See id., 274. In the present case, we likewise do not decide this issue. Here, too, the record supports the trial court's determination that there was no *Miranda* violation and that the defendant's statement was voluntarily given under the totality of the circumstances.

1

Initially, we note that the parties do not dispute most of the trial court's subsidiary factual findings. The defendant, however, argues that the trial court's findings were clearly erroneous inasmuch as there is no evidence to support the court's finding that, while he was in his cell, he, "unprompted, told Gregorzek that he wanted to give a statement" and, "unprompted, [he] proceeded to give . . . a rundown of the events . . . of that night."[4] The defendant contends that he never offered to give a statement "unprompted" and that, when he agreed to give a statement, he was not in his cell.

The state concedes that there is no evidence that Gregorzek approached the defendant in his holding cell. Rather, Gregorzek testified that he joined Gibson and the defendant in the processing room as Gibson read the defendant his rights. As a result, we do not rely on this subsidiary factual finding in determining whether the defendant's statement was voluntary. The state does not concede, however, that the trial court's finding that the defendant offered to give a statement to Gregorzek

[4] The defendant also argues that the finding that "Gregorzek then assigned . . . Gibson to advise the defendant of his rights" was clearly erroneous. He contends that the evidence shows that Mazzarella asked Gibson to process him and to advise him of his rights. We disagree. Gregorzek testified that he went to the processing room to ensure that Gibson read the defendant his rights. Gibson testified that he was asked to help Mazzarella process the defendant but did not specify who asked him.

"unprompted" was clearly erroneous, arguing that the testimony was ambiguous as to this fact.

During the hearing on the defendant's motion to suppress, Gregorzek testified that he went to the processing room where Gibson and the defendant were located to ensure that Gibson read the defendant his rights. He stated that he was present while Gibson advised the defendant of his rights. The prosecutor then asked Gregorzek if there was any type of coercion of the defendant to sign the forms waiving his rights. Gregorzek responded that "the defendant was more than willing to provide a statement at that time and actually was—was the one that almost approached us to—to provide a statement. We—we asked him if he was willing to provide one, and he was more than willing at that point." To clarify, the prosecutor asked, "based [on] what you're saying, he [the defendant] was the one [who] actually approached—or broached the subject—subject of giving a statement." Gregorzek responded, "[c]orrect." Subsequently, however, Gregorzek testified that he "asked [the defendant] if he would be willing to provide a statement to us, and he was, again, willing, and so I said okay." To again clarify, the trial court asked the following: "Did I understand correctly that you went to the holding cell, and you asked the defendant if he would give a statement, and he said that he was willing to, and then he proceeded to tell you what the events were that had taken place?" Gregorzek responded, "[y]es, Your Honor, aside from it wasn't the holding cell, it was the processing room." Gibson also testified that Gregorzek asked the defendant if he wanted to provide a statement and that the defendant responded that he was willing to do so.

We agree with the state that the record is ambiguous regarding whether the defendant offered to provide a statement "unprompted." There was at least some evidence in the record to support the trial court's subsid-

iary finding that the defendant offered to give a statement unprompted and we, therefore, cannot say that this finding is clearly erroneous. Even if we do not rely on this finding in our determination regarding voluntariness, we conclude that the trial court correctly determined that the defendant's statement was voluntary. In so concluding, we do rely, however, on the trial court's undisputed finding that, when asked if he would provide a statement, the defendant responded affirmatively.

2

Regarding his *Miranda* rights, the defendant argues that his statement was inadmissible because he never gave a "knowing" and "voluntary" waiver of his *Miranda* rights. The waiver of a defendant's *Miranda* rights "must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. . . . Despite this seemingly difficult task, [t]he prosecution . . . does not need to show that a waiver of *Miranda* rights was express. An implicit waiver of the right to remain silent is sufficient to admit a suspect's statement into evidence. . . . [When] the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent. . . . [T]he state must demonstrate . . . (1) that the defendant understood his rights, and (2) that the defendant's course of conduct indicated that he did, in fact, waive those rights . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Christopher S.*, supra, 338 Conn. 278.

The undisputed subsidiary facts show that, when the defendant was asked if he would provide a statement,

he responded affirmatively without any reservations. He then received two *Miranda* warnings before he made his statement to the police. Additionally, after the defendant gave his statement, Mazzarella read it verbatim back to him, including the preprinted notice at the top, which again advised him of his right to remain silent, to consult with an attorney, to have an attorney present, and to terminate questioning at any time. At all times, the defendant stated that he understood his rights, and his demeanor remained calm and cooperative. Additionally, the trial court credited the testimony of Mazzarella, Gibson, and Gregorzek that the defendant spoke and understood English, did not appear tired, and did not appear under the influence of alcohol or narcotics. The subsidiary facts also show that the defendant's statement was not coerced. In fact, the defendant specifically testified that he was not coerced or threatened in any manner. Nor does anything in the record suggest that Mazzarella obtained the defendant's cooperation through physical or psychological coercion, trickery, threats, promises of leniency, or other questionable tactics. On this record, it is clear that the defendant received his *Miranda* warnings, understood these warnings, and voluntarily participated in Mazzarella's interrogation of him. Accordingly, he implicitly gave a knowing, voluntary waiver of his *Miranda* rights.

The defendant nevertheless argues that his statement was not voluntary because he did not have the ability to understand or to act on his constitutional rights. He relies on his own testimony at the suppression hearing that he had been cold, tired, and under the influence of alcohol and narcotics. He also highlights his testimony that his English was not good at the time of the statement and that he did not understand that he could refuse to give a statement. The defendant, however, does not dispute as clearly erroneous the trial court's subsidiary findings that he did not appear to be under

the influence of alcohol or narcotics, that he was cooperative and calm, that he spoke English and understood what was happening, and that he never indicated that he was tired or cold. Rather, the defendant urges this court to credit his testimony, which the trial court specifically discredited, over the testimony of Gregorzek, Gibson, and Mazzarella, which the trial court specifically credited. "[I]t is not the function of this court to [second-guess] the trial court's reasoned credibility determinations . . . ." *State* v. *Jones*, 281 Conn. 613, 655, 916 A.2d 17 (2007).

Additionally, in arguing that his statement was not voluntary, the defendant asks this court to determine whether the state validly explained its failures to record and preserve the confession.[5] He argues that, without this consideration, the statute is essentially toothless, given the low standard required for the state to overcome the statutory presumption.

This court has recognized that it is for the legislature, not this court, to "[weigh] and balanc[e] . . . the benefits and drawbacks of an electronic recording requirement, and to create the parameters of such a rule." (Internal quotation marks omitted.) *State* v. *Christopher S.*, supra, 338 Conn. 299. In doing so, our legislature determined that the statutory presumption of inadmissibility under § 54-1o may be overcome by a preponderance of the evidence. Although this is a low standard, we must assume that the legislature was aware of that when it enacted the statute. Additionally, the legislature did not include any requirement in § 54-1o that the state provide a "valid explanation" for its failures to record and preserve the confession. We therefore decline the

[5] The defendant also argues that the lack of a valid explanation should render the statement's admission per se harmful and automatically reversible. Such a requirement would conflict with the statute's plain language, however, which allows the state to overcome the presumption of inadmissibility by a preponderance of the evidence.

defendant's request that we go beyond the legislature's prescribed requirements and require the state to establish a valid explanation for its failure to comply with § 54-1o for the defendant's statement to be admissible. If the legislature wants to revisit this issue, it is, of course, free to do so. See *State* v. *Christopher S.*, supra, 299–300.

3

Regarding the defendant's due process rights, "any use in a criminal trial of an involuntary confession is a denial of due process of law. . . . The state has the burden of proving the voluntariness of the confession by a fair preponderance of the evidence. . . . [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . . The ultimate test remains . . . [i]s the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The determination, by the trial court, whether a confession is voluntary must be grounded [on] a consideration of the circumstances surrounding it. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . Under the due process clause of the fourteenth amendment, however, in order for a confession to be deemed involuntary and thus inadmissible at trial . . . there must be an essential link

between [the] coercive activity of the [s]tate, on the one hand, and a resulting confession by a defendant, on the other . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 280–81.

The record in the present case simply does not support the defendant's claim that the interrogation violated his due process rights. Instead, the record supports the trial court's determination that the defendant voluntarily gave his statement to Mazzarella. Based on the trial court's subsidiary findings, which the defendant does not dispute as clearly erroneous on appeal, at the time of the interrogation, the defendant spoke and understood English, did not appear to the officers to be under the influence of alcohol or narcotics, and maintained a calm and cooperative demeanor. Even if the defendant did dispute the trial court's subsidiary finding that he understood English, the record fully supports this finding. Although the defendant was born in Mexico City, the trial court simply did not credit the defendant's claim that, at the time of the interrogation, he did not speak or understand English well, undermining the voluntariness of his statement. He spoke without an accent at trial and worked as a manager at a restaurant in Putnam at the time of his arrest. He had lived in San Diego in his youth before moving back to Mexico, and then, around age eighteen to twenty, lived in the United States continuously for the fourteen to sixteen years before his arrest.

Additionally, the defendant agreed to provide a statement, and was advised of his *Miranda* rights twice. The interrogation occurred only a few hours after his arrest and lasted only approximately thirty minutes. There is no evidence of physical or psychological punishment. There also is no evidence that Mazzarella used any potentially coercive methods, such as threats, promises of leniency, or deception. Accordingly, the defendant's

statement was voluntary under both *Miranda* and due process principles.

B

"[T]he reliability inquiry is evidentiary in nature. The standard that we apply in reviewing a trial court's evidentiary ruling depends on the context in which the ruling was made. . . . When a trial court's determination of admissibility is founded on an accurate understanding of the law, it must stand unless there is a showing of an abuse of discretion. . . . When the admissibility of the challenged testimony turns on the interpretation of an evidentiary rule, however, we are presented with a legal question and our review is plenary." (Internal quotation marks omitted.) Id., 284. In determining reliability, courts consider the circumstances under which a statement was given and any evidence that independently corroborates the substantive truth of the defendant's statement. See id., 286–87.

In the present case, the defendant's argument that his statement was not reliable derives only from the fact that it was not recorded and preserved, as the statute requires. It is clear from the trial court's subsidiary findings and the record, however, that the trial court did not abuse its discretion in determining that the defendant's statement was reliable. First, and most important, the defendant testified that the substance of his statement was accurate. Second, there was significant, independent evidence that corroborated the defendant's statement—specifically, the testimony of Bellavance and the testimony of the four victims. Moreover, as discussed, none of the undisputed subsidiary facts shows that the defendant was coerced into giving a false confession.

Accordingly, we conclude that the trial court properly found that the state established by a preponderance of the evidence that the defendant's statement was both

voluntary and reliable and, therefore, admissible under § 54-1o.

II

Next, the defendant claims that the trial court improperly admitted into evidence the entire cooperation agreement between Bellavance and the state. More precisely, he argues that the admission of the provisions regarding Bellavance's obligation to testify truthfully constituted improper vouching, both as a matter of evidentiary law and as a matter of prosecutorial impropriety. We conclude that the trial court did not abuse its discretion in admitting the challenged provisions in the present case. We emphasize, however, that the state must take care in drafting its cooperation agreements, and trial courts must carefully examine their language before admitting them fully into evidence.

In its case-in-chief, the state questioned Bellavance on direct examination regarding the fact that he had entered into a plea agreement and a cooperation agreement with the state. Specifically, Bellavance testified that, in January, 2019, he entered into a plea agreement that included a sentencing range of zero to twenty years of incarceration. According to Bellavance, at the time he entered into this plea deal, the state had not discussed entering into a cooperation agreement with him. Bellavance testified that, after entering into the plea agreement, on the advice of his counsel, he approached the state about entering into a cooperation agreement.

Bellavance ultimately entered into such a cooperation agreement, which provided in relevant part that, "at the time of sentencing the [s]tate's [a]ttorney's [o]ffice will make known to the sentencing court the nature, extent, value, and *truthfulness* of the witness' information and testimony. The defendant retains the right to argue for a lesser sentence than that recommended by the [s]tate, including a sentence that

includes a period of probation and/or special parole. The witness understands that the sentence to be imposed rests entirely with the sentencing court and that he cannot rescind or withdraw his plea of guilty in the event that the court imposes a sentence different from that recommended by the [s]tate's [a]ttorney's [o]ffice." (Emphasis added.) The cooperation agreement further provided: "The witness understands that he must truthfully disclose all information with respect to his criminal activities and the criminal activities of others concerning all matters about which this office and any investigating police agency inquires of him and, furthermore, that he shall truthfully testify at any trial or other court proceeding with respect to any matters about which this office or the investigating police agency may request his testimony. . . . It is further understood and agreed that the witness must at all times give complete, truthful and accurate information and testimony and must not commit any further crimes whatsoever during the pendency of this agreement. Should the witness commit any further crimes or should it be reasonably determined by the [s]tate's [a]ttorney's [o]ffice that he has given false, incomplete or misleading testimony or information, or has otherwise violated any provision of this agreement, he shall thereafter be subject to prosecution for any state criminal offense of which this office has knowledge, including, but not limited to, the offenses described above, perjury, and hindering prosecution."

The prosecutor then sought to enter the entire cooperation agreement into evidence during his direct examination of Bellavance. Defense counsel objected, arguing that it was not relevant and that it constituted vouching because "the prosecutor is going to be making a decision about whether . . . Bellavance is telling the truth or not into whether he gets his bargain . . . ." He argued that "it's a little bit of a backdoor way of

getting in for the state and the prosecutor to be vouching for the credibility of the witness . . . .'' The trial court assumed that, in cross-examining Bellavance, defense counsel planned to attack his credibility and ruled that the cooperation agreement was ''clearly relevant'' to rehabilitate his credibility. The trial court asked defense counsel if he had a problem with any particular portions of the cooperation agreement. In response, defense counsel admitted that he ''intend[ed] on attacking . . . Bellavance's credibility. That's going to be part of my cross-examination.'' Nevertheless, he argued that he did not agree that the cooperation agreement would rehabilitate Bellavance unless there would be evidence that the prosecutor believed he was telling the truth, which would be improper. Defense counsel also requested that the trial court specifically redact the provision stating that, ''at the time of sentencing the [s]tate's [a]ttorney's [o]ffice will make known to the sentencing court the nature, extent, value, and truthfulness of the witness' information and testimony,'' arguing that this showed that the state was going to decide the truthfulness of Bellavance's testimony. The prosecutor responded, stating that the cooperation agreement did not contain any vouching because it merely stated that it was Bellavance's ''obligation to be truthful and that he understands that there are penalties that are related to it as far as perjury and other charges that can be filed against him if he's not being truthful, which is an accurate recitation of the law . . . .'' The prosecutor argued that nothing in the cooperation agreement stated that Bellavance's testimony was in fact truthful. The trial court overruled defense counsel's objection and admitted the agreement in its entirety.

After the trial court admitted the agreement, Bellavance testified that the prosecutor had told him that he ''[j]ust [had] to be honest and . . . tell the truth.'' On cross-examination, defense counsel asked Bellavance

if the prosecutor in the present case, Louis J. Luba, Jr., was "the one [who's] going to let the sentencing court know about how your testimony went?" Bellavance replied in the affirmative. Attacking Bellavance's credibility further, defense counsel asked: "[B]ased [on] this agreement, your testimony could play a part [in] how your sentencing goes?" Again, Bellavance responded in the affirmative. He also answered in the affirmative when defense counsel asked him whether Luba would have "a lot of input" at his sentencing, whether he wanted to have Luba on his side, and whether he agreed that the better he looked to Luba, the more likely that was to happen. Defense counsel then asked Bellavance whether "it [is] safe to say you're also trying to be careful in not making yourself look too bad?" Bellavance responded: "No. I just spoke the truth."

The state's policy of committing all cooperation agreements to writing is relatively recent. In *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 198 A.3d 562 (2019), commenting on the state's "practice of informal, off-the-record leniency understandings with cooperating witnesses"; id., 603; this court encouraged prosecutors "to enter into a written cooperation agreement that memorializes the potential benefits that may ensue as a result of a cooperating [witness'] testimony." (Internal quotation marks omitted.) Id., 606–607. We noted with approval the practice of some trial courts "to make a clear record of the nature of the agreement or understanding, including the anticipated charge(s) and the maximum and minimum penalties for those charges." Id., 607. These cooperation agreements would protect against prosecutors' having "understandings"—often not with a witness, but with his counsel—whereby the state "suggest[s] . . . a favorable recommendation to the sentencing judge . . . in exchange for the witness' testimony inculpating another defendant." Id., 603–604. Both the prosecutor (to the court and to

defense counsel) and the witness (to the jury) could then "den[y] that there is any actual 'agreement' or 'deal' . . . ." Id., 604. "These vague understandings can prevent defense counsel from effectively impeaching the witness for bias, perhaps leaving jurors with the impression . . . that [the witness did not have] any incentive to testify favorably for the state." (Internal quotation marks omitted.) Id. In reality, however, "counsel operating in a courthouse in which he or she is familiar with the practices of prosecutors and presiding judges can comfortably advise the witness of the possible credit that might follow from his testimony. Thus, these 'hypothetical' outcomes serve as a real incentive to motivate a witness to testify for the state." Id.; see also id., 611 (*Palmer*, *J.*, concurring) (because they are really no different from cooperation agreement, "such understandings, although informal and perhaps somewhat undefined, are no less a motivating factor for a cooperating witness than a more formal cooperation agreement").

"Left out of this equation, however, is the jury," we noted, which is "not well versed in the nuanced vagaries of such leniency agreements. Yet, we rely on jurors to assess a witness' credibility—including a witness' motivation to testify—while withholding from them critical information that would help them assess just how motivated that witness might be." Id., 604–605; see also id., 612 (*Palmer*, *J.*, concurring) ("it is well known that . . . cooperating witnesses in this state invariably receive significant consideration"). To combat any misimpressions these "understandings" might leave the jury with, we noted that defense counsel might be motivated to "explore other means to reveal to the jury a cooperating witness' motivation to testify," including retaining and offering testimony from an expert witness, who might educate the jury to these "nuanced vagaries . . . ." Id., 605–606. But "[t]his approach has

its own disadvantages. In addition to increased costs, it leaves the jury to choose between competing experts without a framework from which to properly assess the significance of those experts' opinions." Id., 606; see also id., 613 (*Palmer J.*, concurring) ("if other approaches to identifying the true nature of that understanding are not undertaken by the state or the trial court, defense counsel may find it necessary to seek a jury instruction" explaining benefits cooperating witness can expect to receive).

"To its credit, following our decision in *Marquez*, the Division of Criminal Justice voluntarily adopted a new policy, entitled '515 Cooperating Witnesses,' " which requires cooperation agreements to be reduced to writing. *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 189 n.10, 243 A.3d 1163 (2020). Although the division has adopted a commendable policy, and one that we encouraged, that does not, *a fortiori*, make those agreements admissible in their entirety. Rather, a new concern arises when the state and a cooperating witness enter into an agreement that the state has drafted, virtually in its sole discretion, and the state then seeks to admit into evidence not only the fact of an agreement between the two, but also every word of that (at least arguably) self-serving document. Cf. *State* v. *Tony M.*, 332 Conn. 810, 829–30, 833–35, 213 A.3d 1128 (2019) (letter regarding plea negotiations written by defendant was not admissible, in part, because of concern defendant may use language framed with eye toward its self-serving use at trial).[6] Moreover, at least in the present case, the state sought to enter the agreement into evidence in its case-in-chief to inoculate its own witness against impeachment even before defense counsel challenged his credibility.

[6] Although *Tony M.* involved concerns regarding the defendant's self-serving drafting of plea bargaining documents, this concern applies equally to cooperation agreements drafted solely by the state.

We note initially that the defendant raises this argument as both an evidentiary and a prosecutorial impropriety claim. Both claims are premised on the argument that the truthfulness provisions of the cooperation agreement constitute improper vouching. We will upset a trial court's ruling on the admissibility of evidence only upon a showing of a clear abuse of the court's discretion. See id., 831. Because we hold as a matter of evidentiary law that the trial court did not abuse its discretion by admitting the truthfulness provisions of the cooperation agreement, we likewise hold that no impropriety occurred. Thus, the defendant's claim fails both as an evidentiary and a prosecutorial impropriety matter. See *State* v. *Taft*, 306 Conn. 749, 761–62, 51 A.3d 988 (2012) (claims of prosecutorial impropriety require analysis consisting of two separate and distinct steps: "(1) whether [the impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial" (internal quotation marks omitted)).

Although Connecticut appellate courts have not previously addressed the extent to which cooperation agreements are admissible as a matter of evidentiary law, other appellate courts have. The similarity between how the Federal Rules of Evidence and the Connecticut Code of Evidence treat evidence of truthfulness[7] leads us to look to federal case law for guidance. See, e.g., *State* v. *Favoccia*, 306 Conn. 770, 790–91, 51 A.3d 1002 (2012). The federal courts of appeals are divided on the issue of the admissibility of cooperation agreements and, in particular, provisions of those agreements obliging the witness to testify truthfully. The majority of

[7] Compare Fed. R. Evid. 608 (a) ("evidence of truthful character is admissible only after the [witness'] character for truthfulness has been attacked"), with Conn. Code Evid. § 6-6 (a) ("[e]vidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached").

federal appeals courts have held that provisions in cooperation agreements regarding truthfulness are admissible on direct examination of a witness, even prior to any challenge to the witness' credibility. See *United States* v. *Anderson*, 303 F.3d 847, 856 (7th Cir. 2002); *United States* v. *Tocco*, 200 F.3d 401, 416–17 (6th Cir. 2000); *United States* v. *Santana*, 150 F.3d 860, 863 (8th Cir. 1998); *United States* v. *Spriggs*, 996 F.2d 320, 323–24 (D.C. Cir.), cert. denied, 510 U.S. 938, 114 S. Ct. 359, 126 L. Ed. 2d 323 (1993); *United States* v. *Weston*, 960 F.2d 212, 215–16 (1st Cir. 1992); *United States* v. *Lord*, 907 F.2d 1028, 1031 (10th Cir. 1990); *United States* v. *Binker*, 795 F.2d 1218, 1223 (5th Cir. 1986), cert. denied, 479 U.S. 1085, 107 S. Ct. 1287, 94 L. Ed. 2d 144 (1987); *United States* v. *Oxman*, 740 F.2d 1298, 1302–1303 (3d Cir. 1984), vacated on other grounds sub nom. *United States* v. *Pflaumer*, 473 U.S. 922, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985); *United States* v. *Henderson*, 717 F.2d 135, 137–38 (4th Cir. 1983), cert. denied, 465 U.S. 1009, 104 S. Ct. 1006, 79 L. Ed. 2d 238 (1984). These courts have adopted this approach because, although they recognize that "evidence concerning a plea agreement and its provisions may have both a bolstering and an impeaching effect on the [witness'] credibility";[8] *United States* v. *Lord*, supra, 1030; they also recognize that it is difficult for trial courts to distinguish between impeaching and bolstering provisions of a cooperation agreement. Id., 1030–31. As a result, these courts conclude that "introduction of this evidence enables the jury to more accurately assess the [witness'] credibility

[8] Specifically, "[c]ooperation agreements can undermine a witness' credibility by revealing a motive for the witness to tailor his testimony to satisfy the government to receive the benefits of the agreement while at the same time the witness' credibility can be bolstered by the presence of a cooperation agreement that can give the witness' testimony the appearance of having the government's stamp of approval. *United States* v. *Henderson*, supra, 717 F.2d 137; [see also] *United States* v. *Spriggs*, supra, 996 F.2d 324; *United States* v. *Lord*, supra, 907 F.2d 1030–31." *State* v. *Gentile*, 75 Conn. App. 839, 851–52, 818 A.2d 88, cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003).

. . . regardless of whether the defense intends to use the agreement to impeach the [witness'] testimony . . . ." (Citations omitted.) Id., 1030.

By contrast, the United States Courts of Appeals for the Second and Eleventh Circuits have held that, although cooperation agreements may be admissible if relevant, only "the impeaching aspects of cooperation agreements may be brought out in the government's direct examination of a witness who testifies pursuant to such an agreement." (Internal quotation marks omitted.) *United States* v. *Certified Environmental Services, Inc.*, 753 F.3d 72, 86 (2d Cir. 2014); see also *United States* v. *Knowles*, 66 F.3d 1146, 1161–62 (11th Cir. 1995), cert. denied sub nom. *Wright* v. *United States*, 517 U.S. 1149, 116 S. Ct. 1449, 134 L. Ed. 2d 568 (1996); *United States* v. *Cruz*, 805 F.2d 1464, 1479–80 (11th Cir. 1986), cert. denied, 481 U.S. 1006, 107 S. Ct. 1631, 95 L. Ed. 2d 204 (1987), and cert. denied sub nom. *Thomas* v. *United States*, 482 U.S. 930, 107 S. Ct. 3215, 96 L. Ed. 2d 702 (1987). "[I]mpeaching aspects of cooperation agreements" include "the fact of the agreement and the [witness'] understanding of it, as a motivation for the witness to testify for the [g]overnment . . . ." (Internal quotation marks omitted.) *United States* v. *Certified Environmental Services, Inc.*, supra, 86. The state, however, "may not introduce the bolstering aspects of a cooperation agreement unless and until the [witness'] credibility has been questioned in ways that 'open the door' to the admission of the agreement." Id. "This proposition stems from well established rules of evidence relating to relevance, hearsay, bias, completeness, and otherwise, that taken together, provide that absent an attack on the veracity of a witness, no evidence to bolster [the witness'] credibility is admissible." (Internal quotation marks omitted.) Id. Under this approach, truthfulness provisions are considered "bolstering aspects of a cooperation agreement" and, thus,

are not admissible until the defendant attacks the witness' credibility. Id., 85–86. However, it is not reversible error "if testimony on the [truth telling] provisions of a [witness'] cooperation agreement has been improperly introduced before that [witness'] credibility has been challenged, but the defense challenges the [witness'] credibility later—for example, on cross-examination, or during closing arguments . . . ." *United States* v. *Williams*, 787 Fed. Appx. 8, 10 (2d Cir.), cert. denied, U.S. , 140 S. Ct. 645, 205 L. Ed. 2d 408 (2019); see also *United States* v. *Porges*, 80 Fed. Appx. 130, 132 (2d Cir. 2003). This minority approach is premised on the belief that, although cooperation agreements are " 'a double-edged sword' "; *United States* v. *Certified Environmental Services, Inc.*, supra, 85; overall, "the entire cooperation agreement bolsters more than it impeaches." (Emphasis omitted; internal quotation marks omitted.) Id., 86. The Second Circuit, however, has recognized that this approach creates difficulties, as it is sometimes not easy to draw the line between impeaching provisions and bolstering provisions, especially during trial. For this reason, the Second Circuit has stated that, "[w]ere we writing on a blank slate, we might have followed the other circuits that avoid the distinctions we have required judges and lawyers to make during the heat of trial." *United States* v. *Cosentino*, 844 F.2d 30, 33 n.1 (2d Cir.), cert. denied, 488 U.S. 923, 109 S. Ct. 303, 102 L. Ed. 2d 322 (1988).

Under either approach, however, truthfulness provisions contained in cooperation agreements are admissible, with the divide between circuits focused on when they are admissible—before or after the witness' credibility is attacked. Regardless, all circuits agree that these provisions may constitute improper vouching by the state, with their admissibility hinging on the precise language of the provision. "Improper vouching may occur when the government: (1) refers to facts outside

the record or implies that the veracity of a witness is supported by outside facts that are unavailable to the jury; (2) implies a guarantee of truthfulness; or (3) expresses a personal opinion about the credibility of a witness." *United States* v. *Benitez-Meraz*, 161 F.3d 1163, 1167 (8th Cir. 1998). Under this definition, courts have explained that truthfulness provisions do not constitute impermissible vouching when they merely "reveal that the witnesses had an obligation to testify truthfully and explain the consequences of a breach of that obligation." *United States* v. *Bowie*, 892 F.2d 1494, 1499 (10th Cir. 1990); see also *United States* v. *Winter*, 663 F.2d 1120, 1134 (1st Cir. 1981), cert. denied, 460 U.S. 1011, 103 S. Ct. 1250, 75 L. Ed. 2d 479 (1983), and cert. denied sub nom. *Goldenberg* v. *United States*, 460 U.S. 1011, 103 S. Ct. 1249, 75 L. Ed. 2d 479 (1983), and cert. denied sub nom. *Price* v. *United States*, 460 U.S. 1011, 103 S. Ct. 1250, 75 L. Ed. 2d 479 (1983). These provisions become impermissible vouching only when the prosecutor explicitly or implicitly indicates to the fact finder that he or she has verified the truth of the testimony presented to the fact finder. See *United States* v. *Certified Environmental Services, Inc.*, supra, 753 F.3d 86 ("while the [g]overnment may, after a [witness'] credibility is attacked, rehabilitate the witness using a cooperation agreement, it is well established that prosecutors may not [personally] vouch for their witnesses' truthfulness" (internal quotation marks omitted)); *United States* v. *Suarez-Milian*, Docket Nos. 91-5158 and 91-5159, 1992 WL 252495, *8 (4th Cir. October 5, 1992) (decision without published opinion, 976 F.2d 728) (use of truthfulness portions of cooperation agreements becomes impermissible vouching only when prosecutors explicitly or implicitly indicate they can monitor and accurately verify truthfulness of witness' testimony). For example, a truthfulness provision in a cooperation agreement constitutes improper vouching

if it includes a statement that the government has verified the accuracy of the witness' testimony. See *United States* v. *Certified Environmental Services, Inc.*, supra, 87 ("[T]he prosecutor personally vouched for the truthfulness of these witnesses, stating that 'the immunity agreements are very simple. We wanted to ensure that people taking the stand provided the truth.' "); *United States* v. *Bowie*, supra, 1498 (truthfulness portions of cooperation agreements become impermissible vouching when prosecutors explicitly or implicitly indicate they can monitor and accurately verify truthfulness of witness' statements); *United States* v. *DiLoreto*, 888 F.2d 996, 998 (3d Cir. 1989) (The defendants' convictions were vacated and the case was remanded for a new trial when the prosecutor had attempted to bolster the credibility of the state's cooperating witnesses by stating during closing rebuttal argument, "[w]e don't put liars on the stand. We don't do that." (Emphasis omitted; internal quotation marks omitted.)), overruled in part on other grounds by *United States* v. *Zehrbach*, 47 F.3d 1252 (3d Cir.), cert. denied, 514 U.S. 1067, 115 S. Ct. 1699, 131 L. Ed. 2d 562 (1995), and cert. denied sub nom. *Mervis* v. *United States*, 514 U.S. 1067, 115 S. Ct. 1699, 131 L. Ed. 2d 562 (1995); *United States* v. *Binker*, supra, 795 F.2d 1222–23 n.2, 1227 (portion of plea agreement stating that government had verified accuracy of witness' statement was inadmissible); *United States* v. *Roberts*, 618 F.2d 530, 533–34 (9th Cir. 1980) (statement that detective was in courtroom monitoring truthfulness of witness' testimony was inadmissible). Admitting these truthfulness provisions also constitutes vouching if they refer to facts not in evidence or offer the prosecutor's personal opinion of the truthfulness of the witness' testimony. See, e.g., *United States* v. *Lettig*, 209 Fed. Appx. 832, 840–41 (10th Cir. 2006); *United States* v. *Dadanian*, 818 F.2d 1443, 1445 (9th Cir. 1987), modified, 856 F.2d 1391 (9th Cir. 1988).

We need not decide today whether to follow the majority or the minority of jurisdictions regarding whether the admission of the agreements and their truthfulness provisions must await an attack on the witness' credibility because the trial court did not abuse its discretion under either approach in the present case. Before trial, defense counsel alerted the state and the trial court that he would indeed be attacking Bellavance's credibility and did so on cross-examination, suggesting that Bellavance was motivated to testify dishonestly in the state's favor in the hope that the state would support a reduced sentence for him at his sentencing. Thus, under the majority approach, the timing of the admission of the truthfulness provisions was proper, and, under the minority approach, although these provisions were admitted before the defendant attacked Bellavance's credibility, there was no harm because they would have been admissible later during the state's redirect examination of Bellavance. See, e.g., *United States* v. *Williams*, supra, 787 Fed. Appx. 10.

Nevertheless, the defendant argues that the trial court should not have admitted these particular truthfulness provisions contained in Bellavance's cooperation agreement because they implied that the state was vouching for the Bellavance's credibility. Two of the three truthfulness provisions at issue, however, are similar to the kind of provisions considered permissible in the federal case law discussed and cited previously—specifically, the provisions stating that Bellavance had a duty to "truthfully disclose" and "truthfully testify" and that he may be charged with perjury if he lies. Under applicable case law, these provisions do not constitute impermissible vouching because they do not refer to facts not in evidence, do not explicitly or implicitly indicate that the state has verified the accuracy of the testimony, and do not offer the prosecutor's personal opinion regarding the truthfulness of the testimony. Rather, these provi-

sions merely state that Bellavance had an obligation to testify truthfully—a duty all witnesses are sworn to uphold—and explain the consequences for a breach of that obligation. We do not rule out the possibility that gratuitous references to the threat of perjury may constitute improper vouching under certain circumstances, but this concern does not arise in the present case.

One provision of the parties' agreement in this case requires that we undertake a closer examination, however, and that trial judges do the same in future cases. That provision states: "[A]t the time of sentencing the [s]tate's [a]ttorney's [o]ffice will make known to the sentencing court the nature, extent, value, *and truthfulness* of the witness' information and testimony." (Emphasis added.) The state does not distinguish this provision from any of the other "truthfulness" provisions in the agreement, arguing only that the provisions as a whole "did no more than reveal" that Bellavance had an obligation to testify truthfully and the consequences of breaching that obligation. According to the state, the provision at issue merely "provid[ed] the jury with a full picture of Bellavance's agreement . . . ." "Would that it 'twere so simple." Hail, Caesar! (Universal Pictures 2016).

To the contrary, this provision comes much closer to suggesting, "explicitly or implicitly," that prosecutors "can monitor and accurately verify the truthfulness of the witness' testimony." *United States* v. *Bowie*, supra, 892 F.2d 1498. It comes very close to impermissibly suggesting to the jury that the prosecutor has access to tools or information not available to the jury that the prosecutor will use to ensure that the witness tells the truth. Such an implication is improper, even when made subtly or indirectly. Nonetheless, we recognize that this provision also can be understood to suggest that the prosecutor would be the final arbiter of truth—that is, that the prosecutor would decide the truthful-

ness of Bellavance's testimony and, then, at the time of Bellavance's sentencing, inform the sentencing judge whether he believed that Bellavance had been truthful, despite the fact that the prosecutor has no more information about Bellavance's truthfulness than the jury. Such a reading would weaken Bellavance's credibility by suggesting that Bellavance remains at the mercy of the prosecutor. This provision does not suggest, however, that the prosecutor explicitly or implicitly indicated to the jury that he had verified the truth of the testimony presented to the jury. At the time of the defendant's trial, there remained the possibility that Bellavance might testify in a manner that the prosecutor deemed dishonest and not receive the benefit of the cooperation agreement. Nothing in the cooperation agreement suggested that the prosecutor *already* had verified the truth of Bellavance's testimony. Rather, the cooperation agreement's language left the determination of the truthfulness of Bellavance's testimony to the jury, with the state's role in determining credibility not arising until Bellavance's sentencing hearing. Thus, although it would have been better if this particular reference to truthfulness had been omitted—and although we believe that, in the future, the state should avoid such language—we stop short of concluding that the trial court abused its discretion in admitting that portion of the cooperation agreement.

Nevertheless, we note that, if not carefully drafted by the state and addressed by the trial court, such provisions may lead a jury to infer not only that the prosecutor will monitor and ultimately verify the truthfulness of the cooperating witness' testimony before the sentencing court, but also that, at the time of the testimony, the prosecutor believes the cooperating witness' testimony is truthful. Ethically, of course, the state could not knowingly put on testimony it thought to be untrue; see Rules of Professional Conduct 3.3 (a) (3); and it

certainly would not contract for testimony it knew was false. But the implication that the prosecutor knows, or has the ability to determine, whether the witness is telling the truth must be avoided.

It is not inconsistent, however, to observe that, from the perspective of the now cooperating and testifying witness addressing his testimony to the trier, the "truth" is not the only consideration supporting the agreement. In most instances, of course, a cooperating witness either already has provided a police statement (as Bellavance did in the present case), or he or his counsel has proffered his intended testimony to the state. The state can maintain that it has bargained only for the truth and deny that the essence of the bargain supporting the agreement is that the witness testify consistent with that earlier statement or proffer. But then, as in *Marquez*, the jury is no better informed than when we deny that the state and the witness have an "agreement," but only an "understanding." Jurors are "not well versed in the nuanced vagaries of such leniency agreements. Yet, we rely on jurors to assess a witness' credibility—including a witness' motivation to testify—while withholding from them critical information that would help them assess just how motivated that witness might be." *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 605. The challenge for counsel and the court is to help the jury with these nuanced vagaries.

By introducing such agreements, in whole or in part, that contain provisions that explicitly or implicitly indicate that the prosecutor can monitor and accurately verify the truthfulness of the witness' testimony, the state invites the defendant to conduct a vigorous cross-examination, as in the present case: about the terms of the agreement, who drafted it, who would enforce it, and the witness' motivation for entering into the agreement. It might be that, in most cases, this constitution-

ally protected right will suffice to protect the defendant, while also advancing the truth-seeking function.

As we noted in *Marquez*, however, defense counsel might seek to combat any misimpressions by "explor[-ing] other means to reveal to the jury a cooperating witness' motivation to testify" id., 606; including offering expert testimony to educate the jury about the "nuanced vagaries" of cooperation agreements. Id., 605. This approach increases the costs of litigation and can potentially reduce the case to a swearing contest between competing experts. Id., 606. A defendant also might ask a court to design a jury charge on the issue of how cooperation agreements are struck or ask a court to specifically instruct the jury that the fact that the cooperating witness entered into a cooperation agreement with the state does not ensure the credibility of the testimony. See id., 613 (*Palmer J.*, concurring).

In the end, ensuring that any mention of a cooperation agreement—and more specifically, any mention of "truthfulness" or its equivalent in that agreement—is fairly portrayed to a jury is a task we are confident can be managed by vigilant trial judges, mindful of the circumstances and evidence at issue. We also must trust prosecutors to avoid overreaching by drafting and introducing documents loaded with self-serving terms in a manner that amounts to improper vouching. We caution the state, however, that, both in any cooperation agreement and in any argument before the jury regarding that agreement, the state must not insinuate to the jury that it has verified the testimony placed before the jury or that it is in a position to monitor and accurately verify the witness' testimony. To the extent that a cooperation agreement includes terms or provisions that constitute improper vouching, that needlessly include "[r]epeated references to the [witness'] obligation to tell the truth"; *Commonwealth* v. *Ciampa*, 406 Mass. 257, 262, 547 N.E.2d 314 (1989); or that are otherwise gratuitous or

irrelevant, including gratuitous references to the threat of perjury, trial courts can and should address these concerns by appropriate redactions.

III

Last, the defendant launches a multipronged attack on the jury's findings, claiming that there was insufficient evidence to prove beyond a reasonable doubt that he committed the crimes of (1) attempt to commit robbery in the first degree, (2) home invasion predicated on attempt to commit robbery in the first degree, (3) burglary in the first degree, (4) home invasion predicated on burglary in the first degree, and (5) conspiracy to commit home invasion. We disagree with each of the defendant's sufficiency arguments.

The evidence supporting each of the defendant's challenged convictions can be summarized as follows. In its case-in-chief, the state offered testimony from all four victims and Bellavance, as well as testimony regarding the defendant's written statement to the police. Bellavance testified that the defendant had approached him about stealing money and drugs from the defendant's drug dealer and that he had agreed. The defendant asked him if he could get a gun. Bellavance said no. According to Bellavance, the defendant then asked him if he could get other tools or equipment, specifically, box cutters, zip ties, a machete, gloves and duct tape. Bellavance agreed and obtained these items. Bellavance testified that he and the defendant specifically had discussed what they would do if they encountered residents who would not comply with their demands, agreeing to "tie them up" and "do whatever [was] necessary" to "force them" to comply. According to Bellavance, the defendant stated that he was willing to "do whatever [was] necessary" to obtain the money and drugs, including using force. The defendant also

told Bellavance that he intended to leave for California after they stole the money and drugs.

As to the incident itself, Bellavance testified that, once he had acquired all the tools and had ingested cocaine, he drove the defendant to Daniel's house. As they approached the house, the defendant told Bellavance to park about one mile away. The defendant and Bellavance then walked toward Daniel's house, with Bellavance carrying the machete and both men taking turns carrying a black duffel bag containing the acquired tools. Upon approaching the house, they saw lights on in the front of the residence and a couple of vehicles in the driveway, and the defendant told Bellavance that one of the vehicles belonged to Daniel. Thus, the defendant and Bellavance assumed that Daniel was home. As a result, Bellavance testified, they decided to enter through the back of the house where there was a door leading to the basement. According to Bellavance, the defendant asked him to kick down the door, but he declined, so the defendant kicked it down. The two men then entered the basement with Bellavance holding the machete and duffel bag. Bellavance testified that, just as he entered Daniel's bedroom, he heard footsteps coming down the basement stairs. Three men came down the basement stairs and stopped in their tracks when they saw Bellavance holding the machete. Bellavance testified that one of the men asked them what they were going to do but that he and the defendant did not respond. Bellavance and the defendant then ran out of the residence and hid in the nearby woods until the police apprehended them.

Through Mazzarella, the state offered into evidence the defendant's written statement to the police, which was read into the record.[9] The statement was consis-

[9] "On [December 12, 2017], me and Ben [Bellavance] drove to [Daniel's] house in Woodstock. We went there to get marijuana and money. I had seen that [Daniel (Dan)] had gotten arrested for drugs on [local radio station] WINY, so I knew he was a good score. I also knew Dan before because I

tent[10] with Bellavance's testimony except that the defendant stated that he and Bellavance never intended to hurt anyone.

Raymond Jr. testified that, on the night of the incident, he heard a loud bang and followed his sons down the basement stairs to see what had happened. In the basement, he saw two individuals wearing masks. He stated that one of the intruders, whom he identified as Bellavance, was holding a machete and a backpack. He testified that the other intruder, the defendant, also "appeared to have a weapon in his hand" that was "[s]ome type of knife" or "something else sharp . . . ."

Similarly, Raymond III testified that, after hearing a loud bang and running downstairs to the basement, he

used to buy marijuana off of him. Ben picked me up at my house at almost 7:00 [p.m.] or so in his red Mini Cooper and I told him how to get to Dan's house. I don't think that Ben had met Dan before today. I guess that he just wanted to get some extra money. We parked on a road a ways from Dan's house and walked on the road until we got there. When we arrived at his house I knew that Dan was there because I saw that Dan was there because I saw his car in the driveway. I also noticed that there were two other vehicles in the driveway as well. At [Dan's] house I kicked the door in. We walked into the house and went into [Dan's] room, which was in the basement, which I knew because I had been to his house before. Dan was not in his room. We did not know that it was his parents house, and we made [too] much noise and they came out and started yelling at us and we ran. There was no fighting just yelling. Ben carried the bags of things we had in case we needed them. The machete and everything was [Ben's], he had said that he would grab a bag with whatever he'd need before we left. I only carried a box cutter. We had the items in the bag in case we needed them to tie Dan up. We never had any intention of hurting [Dan] or anyone else we only went there to get money and drugs. Once we started running we ran on the road a little and then went into the woods when we saw a car coming."

[10] In his statement, the defendant admitted that he and Bellavance went to Daniel's house to steal money and drugs, that they parked down the road from Daniel's residence, that the defendant saw Daniel's vehicle in the driveway and knew he was home, that the defendant kicked in the basement door and entered the basement, that the defendant carried a box cutter, that he and Bellavance had items in a bag with which to tie up Daniel, if needed, and that the defendant and Bellavance encountered residents and fled the scene.

saw two men wearing masks. He stated that one of the men was holding a knife and, when he asked what they were going to do, the man holding the knife responded by raising it. Raymond III explained that, when he repeated his question, the men, who remained silent, ran away through the basement door. Daniel's testimony was consistent with the testimony of Raymond III. Additionally, Raymond III testified that he had known the defendant before the incident at issue and recognized him during the incident but could not remember his last name at that time.

The defendant testified in his own defense. He stated that he and Bellavance simply wanted to get drugs and money and had no plan to hurt or tie up anyone. Asked what he intended to do if someone was home, the defendant stated that, "if we would have known there was somebody home, we wouldn't go in there." The defendant testified, contrary to Bellavance's testimony, that he thought no one was home because it was dark outside. He explained that he intended to use the box cutter to cut into drywall because he believed that Daniel hid his money in the power outlets. He also stated that he kept the box cutter in his pocket during the entire incident. He further testified that he did not know what was in the black duffel bag, including the zip ties. On cross-examination, however, he admitted that he previously had conceded that everything in his statement to the police was accurate.

"When reviewing a sufficiency of the evidence claim, we do not attempt to weigh the credibility of the evidence offered at trial, nor do we purport to substitute our judgment for that of the jury. . . . [W]e construe the evidence in the light most favorable to sustaining the verdict . . . [and] determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Haugh-*

wout, 339 Conn. 747, 765, 262 A.3d 791 (2021). We briefly address each of the defendant's insufficiency claims in turn, none of which has merit.

A

The defendant claims that there was insufficient evidence to convict him of attempt to commit robbery in the first degree[11] because (1) there was no evidence that he intended to use or threaten to use force, and (2) there was no evidence that he actually used or threatened the use of a dangerous instrument.[12] We disagree.

Section 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." The attempted crime in the present case is robbery in the first degree under § 53a-134 (a) (3). Specifically, the information charged in relevant part that, in the course of committing a larceny with the intent to deprive another person of property, the defendant used or threatened the use of a dangerous instrument on another person for the purpose of compelling such person to deliver property.[13]

[11] As attempt to commit robbery was the predicate crime to the defendant's home invasion conviction, he also challenges the sufficiency of the evidence to convict him of home invasion. Because we conclude that there was sufficient evidence to convict the defendant of attempt to commit robbery, this claim likewise fails.

[12] To the extent that the defendant also argues that there is no evidence that the box cutter constituted a dangerous instrument. we address this argument in part III B of this opinion because the term "dangerous instrument" under both §§ 53a-134 (a) (3) and 53a-101 (a) (1) is subject to the same definition under § 53a-3 (7).

[13] Robbery in the first degree under § 53a-134 (a) occurs when, "in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, [the defendant] or another participant in the crime . . . (3) uses or threatens the use of a dangerous instrument . . . ."

As to his specific intent, the defendant more specifically argues that the state had to prove beyond a reasonable doubt both that he intended to commit a larceny and that he intended to do so through the use or threatened use of force. The defendant's argument misconstrues the language of the relevant statutes. "[T]he specific intent required to prove an attempted robbery is no different from the specific intent required to commit a robbery . . . ." (Internal quotation marks omitted.) *State* v. *Henderson*, 173 Conn. App. 119, 133, 163 A.3d 74 (2017), aff'd, 330 Conn. 793, 799, 201 A.3d 389 (2019). "To prove that a defendant is guilty of robbery [under § 53a-134 (a) (3)], the state must prove that the defendant had the specific intent to commit a larceny and that the larceny was committed through the use or threatened use of force. . . . [T]he intent element of robbery relates to the commission of the larceny and not to the use or threatened use of physical force." (Internal quotation marks omitted.) Id. Thus, the state was not required to establish beyond a reasonable doubt that the defendant intended to use or threaten the use of force.

As to his actual use or threatened use of a dangerous instrument, the defendant argues that there was evidence only that he had a box cutter in his pocket during the incident at issue, and, thus, he only possessed the box cutter and did not actually use or threaten its use.

General Statutes § 53a-133 provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

A defendant commits larceny under General Statutes § 53a-119 "when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

Although the defendant is correct that, to be convicted of robbery in the first degree under § 53a-134 (a) (3), the state must establish beyond a reasonable doubt that he actually used or threatened to use a dangerous instrument; see *State* v. *Nicholson*, 71 Conn. App. 585, 591–92, 803 A.2d 391, cert. denied, 261 Conn. 941, 808 A.2d 1134 (2002); the defendant was only charged with and convicted of attempt to commit robbery. "Under General Statutes § 53a-49 (a) (2), [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 . . . 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. The act or acts must be something more than mere preparation for committing the intended crime; they must be at least the start of a line of conduct which will lead naturally to the commission of a crime which appears to the actor at least to be possible of commission by the means adopted. . . . Furthermore, the actor's intent can be inferred from his or her verbal or physical conduct and the surrounding circumstances. . . . [T]he attempt is complete and punishable, when an act is done with intent to commit the crime, which is adapted to the perpetration of it, whether the purpose fails by reason of interruption . . . or for other extrinsic cause." (Citations omitted; internal quotation marks omitted.) *State* v. *Anderson*, 211 Conn. 18, 27, 557 A.2d 917 (1989). The defendant was required only to take a substantial step in using or threatening the use of the box cutter to be convicted of attempt to commit robbery. See, e.g., *State* v. *Daniel B.*, 331 Conn. 1, 15, 201 A.3d 989 (2019); *State* v. *Carter*, 317 Conn. 845, 856, 120 A.3d 1229 (2015); *State* v. *Holliday*, 85 Conn. App. 242, 248, 856 A.2d 1041, cert. denied, 271 Conn. 945, 861 A.2d 1178 (2004).

In the present case, there was testimony that the defendant asked Bellavance to bring weapons (first a gun and then the box cutters and machete); that he stated that would tie up and do whatever it took, including using force, to get money and drugs; that he kicked down the victims' backdoor knowing that at least one person was home; and that he possessed a box cutter. Most important, there was testimony from Raymond Jr. that the defendant held a knife or sharp object, which the jury reasonably could have inferred to refer to the box cutter. Even if we assume that this testimony was insufficient to establish that the defendant actually used or threatened the use of the box cutter as a dangerous instrument, it was sufficient to establish that the defendant took a substantial step in using or threatening the use of the box cutter. Accordingly, there was sufficient evidence for the jury to find the defendant guilty of attempt to commit robbery in the first degree.

B

The defendant also claims that there was insufficient evidence to convict him of burglary in the first degree[14] because there was no evidence that the box cutter he possessed constituted a dangerous instrument. Specifically, he argues that there was no evidence that he used or attempted to use the box cutter in circumstances that its use or threatened use was capable of causing death or serious physical injury because the evidence showed that he kept the box cutter in his pocket and that he intended to use it only to cut through drywall.

Section 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when (1)

[14] The defendant also claims that there was insufficient evidence to convict him of home invasion premised on burglary in the first degree. He argues that, because there was insufficient evidence to convict him of first degree burglary, there likewise was insufficient evidence to convict him of home invasion, as burglary was the predicate crime. Because we conclude that there was sufficient evidence to convict the defendant of first degree burglary, this claim likewise fails.

such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument . . . .'' Section 53a-3 (7) defines dangerous instrument as ''any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . .''[15] ''Although it is not necessary under this definition that any physical injury actually have been inflicted . . . it is necessary that under the circumstances in which [the instrument was] used or attempted or threatened to be used, it was capable of causing death or serious physical injury.'' (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Grant*, 177 Conn. 140, 146, 411 A.2d 917 (1979). ''[T]he analysis focuses on the actual circumstances in which the instrument is used in order to consider the instrument's potential to cause harm. . . . The statute neither restricts the inquiry to the exact manner in which the object was actually used, nor requires any resulting serious physical injury. . . . The facts and circumstances [must] show only that the general way in which the object was used could potentially have resulted in serious physical injury. . . . The object's potential for injury, therefore, must be examined only in conjunction with the circumstances in which it is actually used or threatened to be used, and not merely viewed in terms of its dangerous capabilities in the abstract. . . . Ordinary objects that are used in ways that would likely cause death or serious physical injury can constitute dangerous instruments.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Schultz*, 100 Conn. App. 709, 721–22, 921 A.2d 595, cert. denied, 282 Conn. 926, 926 A.2d 668 (2007).

[15] ''Serious physical injury'' is defined as ''physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4).

The defendant concedes that, under § 53a-101 (a) (1), the state had to prove beyond a reasonable doubt only that he was armed with a dangerous instrument, not that he used or displayed a dangerous instrument. See *State* v. *Anderson*, 178 Conn. 287, 294, 422 A.2d 323 (1979) ("Actually, 'armed' is commonly interpreted as simply requiring that a weapon be in one's possession. . . . It is apparent that it is not necessary for a weapon to be exhibited, displayed, utilized or referred to in order for one to be considered 'armed.' " (Citations omitted.)); *State* v. *Owens*, 39 Conn. App. 45, 54, 663 A.2d 1108 ("it was possible to be armed without threatening the use of a weapon"), cert. denied, 235 Conn. 927, 667 A.2d 554 (1995). Nevertheless, he argues that, under § 53a-3 (7), for the box cutter to constitute a dangerous instrument, there must be evidence from which the jury reasonably could infer that he used or attempted to use it in circumstances such that its use or threatened use was capable of causing death or serious physical injury. He contends that there was no such evidence because he did not brandish, show, or use the box cutter. The defendant is correct that, although § 53a-101 (a) (1) does not require the use or threatened use of force per se, the state nonetheless is required to show that the instrument is dangerous under § 53a-3 (7), which may be done through evidence of actual circumstances. This court has explained, however, that for an instrument to constitute a dangerous instrument under § 53a-3 (7), we do not consider the way in which the instrument was "actually used" but only "the actual circumstances"; (emphasis omitted) *State* v. *Jones*, 173 Conn. 91, 97, 376 A.2d 1077 (1977); in which it was "used or attempted or threatened to be used"; (internal quotation marks omitted) id., 95; "to determine its potential as an instrument of death or serious physical injury." Id., 97.

In the present case, the jury reasonably could have found that, under the circumstances, the defendant

used or attempted to use a box cutter, which was capable of causing death or serious physical injury, when he (1) asked Bellavance to procure weapons, including a gun, a machete, and box cutters; (2) stated that he would do whatever it took, including using force and tying up the residents, to obtain the money and drugs; (3) kicked down the backdoor of the residence at night knowing people were home; and (4) was holding the box cutter when he encountered the residence.[16] Additionally, the jury was free to disbelieve the defendant's testimony that he did not intend to harm anyone, that he intended to use the box cutter only to cut into drywall, and that he kept the box cutter in his pocket during the course of the entire incident. See, e.g., *State* v. *Hughes*, 341 Conn. 387, 400, 267 A.3d 81 (2021). Accordingly, there was sufficient evidence that the defendant was armed with a dangerous instrument.

C

The defendant claims that there was insufficient evidence to convict him of conspiracy to commit home invasion premised on attempt to commit robbery in the first degree because the evidence showed that he and Bellavance agreed only to enter the home and to commit larceny, not to enter the home and to use or threaten the use of physical force against another person for the purpose of compelling them to deliver property. Although for attempt to commit robbery in the first degree, the state did not have to prove beyond a reasonable doubt that the defendant had the specific intent to use or threaten the use of force—only the specific intent to commit a larceny—this court has explained that "[c]onspiracy is a specific intent crime, with the

[16] In light of Raymond Jr.'s testimony that he saw the defendant holding a sharp object or knife, we need not determine whether there would have been sufficient evidence for the jury to find that the box cutter constituted a dangerous instrument if it remained in his pocket during the course of the burglary.

intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense [that] is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense."[17] (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 460, 108 A.3d 1083 (2015). As a result, specific intent is required for every element of home invasion,[18] including, in this case, the predicate felony of robbery in the first degree under § 53a-134 (a) (3).

In challenging the sufficiency of the evidence from which the jury reasonably could conclude that he and Bellavance agreed to enter Daniel's home and to commit a larceny through the use or threatened use of physical force, the defendant relies on his own testimony that he did not intend to hurt anyone, that he and Bellavance never discussed or agreed to use force, that he did not know anyone was home, that the box cutter remained in his pocket during the incident, and that he intended to use the box cutter only to cut through drywall. The jury, of course was not required to credit his testimony. See, e.g., *State* v. *Hughes*, supra, 341 Conn. 400.

Rather, the jury was entitled to credit Bellavance's testimony that he and the defendant agreed to enter

[17] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[18] General Statutes § 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

the house to steal money and drugs and that, if any residents resisted, the defendant would tie them up and do whatever was necessary to force them to comply. Bellavance stated that the defendant asked him to gather a machete, several box cutters, zip ties, chisels, and duct tape. Additionally, the defendant himself testified that he traveled to Daniel's house at night, parked approximately one mile away, walked to the house carrying a box cutter and the bag of items obtained by Bellavance, knew that Bellavance had a machete, and kicked in the basement door despite knowing at least one resident was home. The defendant admitted much of the same in his written statement to the police, including that the items in the bag would be used in case they needed to tie up Daniel. Finally, Raymond Jr. testified that the defendant was holding a sharp object or knife, which the jury reasonably could infer to have referred to the box cutter. Accordingly, there was sufficient evidence for the jury to find the defendant guilty of conspiracy to commit home invasion predicated on attempt to commit robbery in the first degree.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and MULLINS, KAHN and KELLER, Js., concurred.

McDONALD, J., with whom ECKER, J., joins, concurring. I agree with part I of the majority opinion, in which the majority determines that the trial court correctly concluded, under the current framework set forth in General Statutes § 54-1o, that the state established by a preponderance of the evidence that the defendant's statement was both voluntary and reliable and, therefore, admissible, despite the remarkable failure of the police to preserve the recording of the defendant's custodial interrogation. I write separately to emphasize that § 54-1o is ostensibly intended to provide meaningful

protections for individuals who are suspected of serious criminal conduct when the police fail to record their custodial interrogation by making statements made during such interrogations presumptively inadmissible at any future trial. In reality, however, § 54-1o provides largely illusory protections insofar as the state is able to overcome the presumption of inadmissibility by a mere preponderance of the evidence and will often rely on the testimony of the very law enforcement officials who failed to record the custodial interrogation to overcome the presumption of inadmissibility. If I correctly understand the legislature's objective in passing the statute, it should address the reality that a "presumption" that can be scuttled by a quantum of evidence no greater than a "preponderance of the evidence" is effectively no presumption at all. General Statutes § 54-1o (h). In my view, if the legislature intended for § 54-1o to provide meaningful protections for individuals being interrogated by law enforcement, while at the same time providing procedural consequences for law enforcement's failure (whether intentional, reckless or negligent) to record these crucial interviews, the legislature should consider amending § 54-1o to provide more meaningful protections to those individuals. The legislature could do so by simply requiring a heightened standard of proof—clear and convincing evidence—to overcome the presumption of inadmissibility, particularly if the evidence of reliability is being offered by the very law enforcement personnel who failed to conform their own conduct to the statutory mandate of recording the interrogation so that the substance of the questions and the manner in which they were being asked, as well as the individual's responses, would be preserved for later review by the state, defense counsel and the fact finder at any trial. Additionally, the legislature may wish to consider requiring ameliorative measures when the state overcomes the presumption of inadmissibility,

including a jury instruction that would alert the jury to the fact that the police did not comply with the recording mandate of the statute or, as in this case, that the police recorded the interrogation and then destroyed that recording by recording over it.

I agree with parts II and III of the majority opinion. Accordingly, I respectfully concur. I begin with this state's recording statute, § 54-1o. Section 54-1o provides that, if a person suspected of having committed one of several enumerated classes of serious felonies gives a statement to law enforcement as a result of a custodial interrogation at a detention facility, the statement will be presumed to be inadmissible unless officers make an audiovisual recording of the interrogation. See General Statutes § 54-1o (b). Under subsection (h) of the statute, the state may overcome the presumption of inadmissibility in any case by proving, by a preponderance of the evidence, that the statement "was voluntarily given and is reliable, based on the totality of the circumstances." General Statutes § 54-1o (h).

The legislative history of § 54-1o reveals that the legislature was concerned with involuntary and untrustworthy confessions, and that it considered the recording requirement in § 54-1o to be an important step toward ensuring the reliability of confessions. See 54 H.R. Proc., Pt. 28, 2011 Sess., p. 9481, remarks of Representative Gary Holder-Winfield ("[M]ost false confessions stemming from an interrogation . . . come from the fact that there may be some intimidation, threats or coercion. This [b]ill seeks to put in place [an audiovisual] recording of the interrogation such that we can capture and see whether . . . those threats, coercions or intimidations happen[ed]."); see also 54 S. Proc., Pt. 16, 2011 Sess., pp. 5111–12, remarks of Senator Eric D. Coleman ("[S]ome of the flaws and shortcomings in our criminal justice system have to do with . . . the voluntariness and the validity of statements and confessions of [an]

accused [which] oftentimes is suspect and has come into question. I believe that the bill before us would be a significant step in [the] direction of . . . contributing to a greater reliance [on] the confessions of individuals who are involved in custodial interrogation. . . . I believe that the recording of custodial interrogations will not only help the accused but, in fact, [when] those confessions and those statements are valid, the recording of them will serve as significant evidence of that fact.").

This court similarly has emphasized the importance of recording custodial interrogations. For example, in his concurrence in *State* v. *Lockhart*, 298 Conn. 537, 4 A.3d 1176 (2010), Justice Palmer explained that we have become increasingly aware that false confessions, despite being counterintuitive, occur with some regularity; see id., 590–91 (*Palmer, J.*, concurring); and that "a recording requirement would dramatically reduce the number of wrongful convictions due to false confessions . . . ." Id., 595 (*Palmer, J.*, concurring). Moreover, this court recently has stated that "[s]uch recordings enable the fact finder to view the circumstances of the interrogation for himself or herself and provide strong evidence to determine both the voluntariness and reliability of a defendant's statement." *State* v. *Christopher S.*, 338 Conn. 255, 282 n.9, 257 A.3d 912 (2021).

To encourage compliance with the recording requirement, § 54-1o (b) creates a presumption of inadmissibility when law enforcement fails to comply with the provisions of the statute. As we have explained, "[t]he pre-sumption of inadmissibility under § 54-1o is designed to encourage the police to record custodial interrogations by creating a consequence for their failure to do so. As we noted in *State* v. *Lockhart*, supra, 298 Conn. 537, one of the benefits of recording is to avoid the 'swearing contests' between law enforcement and defendants regarding what happened in the interrogation room. . . . Id., 566. When officers fail to record,

we return to that paradigm." *State* v. *Christopher S.*, supra, 338 Conn. 290.

Section 54-1o (h), however, makes the failure to record custodial interrogations little more than an inconvenience for the state because the presumption of inadmissibility may be overcome if the state can demonstrate, by a mere preponderance of the evidence, that the statement was voluntary and reliable.[1] Indeed, during a public hearing on the bill, a representative of the Connecticut Criminal Defense Lawyers Association expressed concern that subsection (h) of § 54-1o is "problematic because it seems to be a subsection on which prosecutors could easily rely to gain admittance of a statement that has not been recorded." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 2011 Sess., p. 1964. Similarly, Representative David A. Baram remarked that the statute "indicates that evidence is presumed to be inadmissible unless it is video recorded, and then [subsection (h)] overcomes that presumption by a preponderance of the evidence . . . ." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 2011 Sess., p. 1794. He went on to ask the following question:

[1] This is not the only perceived deficiency that this court has encountered in cases involving § 54-1o. Pursuant to the statute, a custodial interrogation is required to be recorded only when it occurs at a "place of detention . . . ." General Statutes § 54-1o (b). Subsection (a) (4) defines "place of detention" as "a police station or barracks, courthouse, correctional facility, community correctional center or detention facility . . . ." General Statutes § 54-1o (a) (4). Such a cramped understanding of "place of detention" fails to account for situations in which law enforcement engages in custodial interrogations in other coercive environments that may raise the same concerns as custodial interrogations in police stations, courthouses, or correctional facilities. For example, in *State* v. *Tony M.*, 332 Conn. 810, 213 A.3d 1128 (2019), the police interrogated the defendant in his hospital room while he was physically restrained to his hospital bed. See id., 818 and n.4, 826–27. Certainly, this, and other situations, including interrogations in police vehicles or other places where the individual is not free to leave, raise similar concerns regarding the possibility of intimidation, threats or coercion during the interrogation that the recording requirement is meant to guard against. Section 54-1o, however, provides no protections in these situations.

"[W]ould anything really change if a police department for lack of training . . . [or] lack of funds decided to rely on established methods of interrogation *without the video recording* [it] could . . . choose to do [so] and that [the recording requirement] *really isn't the mandate that is being projected on individual police departments*?" (Emphasis added.) Id., 1794–95.

The present case illustrates the problem with the recording statute. Following their arrest, the defendant, Adrian Flores, and Benjamin Bellavance were transported to the police station and placed in individual cells around 11:30 p.m. At approximately 3:20 a.m., the police began to question the defendant, and he went on to make certain inculpatory statements. During the hearing on the defendant's motion to suppress, the defendant testified that "his English was not very good" and that he was under the influence of alcohol, cocaine, and Percocet during the interrogation. Moreover, he "claimed that he was confused, cold, tired, and scared when questioned by the police." The trial court found the defendant not to be credible. In concluding that the defendant's statement was voluntary and reliable, the court did, however, find credible the testimony of the law enforcement officers who interrogated the defendant. Thus, the testimony of the very law enforcement officials who interrogated the defendant, but failed to preserve the recording of that interrogation, was used to overcome the presumed inadmissibility of the defendant's statement.[2]

[2] I do not mean to suggest that I question the trial court's factual findings or legal conclusions that the state proved, by a preponderance of the evidence, that the defendant's statement was voluntarily given and reliable. I merely highlight the fact that, when the police fail to record, or preserve a recording of, a custodial interrogation, in violation of § 54-1o, it is often testimony from the very law enforcement officials who failed to comply with the provisions of § 54-1o that is used to overcome the presumption of inadmissibility. In other words, because there is no recording of the custodial interrogation, we are back to the "swearing contests" between law enforcement and defendants. (Internal quotation marks omitted.) *State* v. *Lockhart*, supra, 298 Conn. 566. It cannot be seriously doubted that law enforcement

One way in which the legislature could provide more meaningful consequences for the failure to record custodial interrogations would be to require a heightened standard of proof from the state to overcome the presumption of inadmissibility. "Increasing the burden of proof is one way to impress the [fact finder] with the importance of the decision . . . ." (Internal quotation marks omitted.) *Santosky* v. *Kramer*, 455 U.S. 745, 764–65, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). As we have explained, "[t]he clear and convincing standard of proof is substantially greater than the usual civil standard of a preponderance of the evidence, but less than the highest legal standard of proof beyond a reasonable doubt." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 794, 700 A.2d 1108 (1997). Implementing the intermediate level, clear and convincing standard to overcome the presumption of inadmissibility would help to ensure that the unrecorded statement is truly voluntarily given and reliable. See id., 795 ("the clear and convincing evidence standard should operate as a weighty caution [on] the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory" (internal quotation marks omitted)).

The United States Supreme Court has required "an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." (Emphasis omitted; internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 70, 939 A.2d 1040 (2008). Connecticut law implements the clear and convincing standard in a variety of contexts, including those that involve only monetary disputes. See, e.g., *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 819,

usually prevails in these contests. As a result, the presumption of inadmissibility under § 54-1o provides little incentive for law enforcement to record custodial interrogations or consequences for not having done so.

955 A.2d 15 (2008) (clear and convincing standard is appropriate standard in common-law fraud cases); *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 226, 890 A.2d 509 (clear and convincing standard is applicable when determining whether attorney violated Rules of Professional Conduct), cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006); *Black* v. *Goodwin*, *Loomis & Britton*, *Inc.*, 239 Conn. 144, 163–64, 681 A.2d 293 (1996) (clear and convincing evidence standard of proof is required to establish collusion); *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 754, 161 A.3d 603 (2017) (clear and convincing standard of proof is required to establish fiduciary fair dealing). It seems apparent that ensuring the reliability and voluntariness of an unrecorded statement, given in a custodial interrogation by an individual suspected of having committed a very serious felony and potentially facing decades in prison, is weightier than any context involving a monetary dispute.

Several states require a showing by clear and convincing evidence, either in the context of an exception to the recording requirement or to prove the voluntariness of an unrecorded confession. See, e.g., Cal. Penal Code § 859.5 (d) (Deering Supp. 2021) ("[a] person's statements that were not electronically recorded pursuant to this section may be admitted into evidence in a criminal proceeding or in a juvenile court proceeding, as applicable, if the court finds that all of the following apply . . . (2) [t]he prosecution has proven by clear and convincing evidence that the statements were made voluntarily"); D.C. Code § 5-116.03 (2019) ("Any statement of a person accused of a criminal offense in the Superior Court of the District of Columbia that is obtained in violation of [the recording statute] shall be subject to the rebuttable presumption that it is involuntary. This presumption may be overcome if the prosecution proves by clear and convincing evidence that the state-

ment was voluntarily given."); N.C. Gen. Stat. § 15A-211 (e) (2019) ("If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement. The State may establish through clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety."); Ind. R. Evid. 617 (a) ("[i]n a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following [exceptions]").

Another way in which the legislature could provide more meaningful consequences for the failure to record custodial interrogations would be to require a jury instruction that would alert the jury to the fact that the police did not comply with the recording mandate of the statute. For example, state recording statutes in Michigan, Nebraska, New York, North Carolina, and Wisconsin provide for a jury instruction requirement when the police fail to record certain custodial interrogations. See Mich. Comp. Laws Serv. § 763.9 (LexisNexis 2016) ("the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement"); Neb. Rev. Stat. § 29-4504 (2016) ("if a law enforcement officer fails to comply

with [the recording statute], a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with such [statute]"); N.Y. Crim. Proc. Law § 60.45 (3) (d) (McKinney 2019) ("upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required . . . may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all"); N.C. Gen. Stat. § 15A-211 (f) (3) (2019) ("[w]hen evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable"); Wis. Stat. Ann. § 972.115 (2) (a) (West 2007) ("upon a request made by the defendant . . . and unless the state asserts and the court finds that [certain conditions apply] or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case").

New Jersey and Massachusetts also require jury instructions when the police fail to follow laws requiring that custodial interrogations be recorded. New Jersey's electronic recordation law provides that "[t]he failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what

weight, if any, to give to the statement." N.J. Court Rules 3:17 (d); see *State* v. *Hubbard*, 222 N.J. 249, 263, 118 A.3d 314 (2015) ("[f]ollowing a comprehensive study of 'whether and how to implement the benefits of recording electronically part, or all, of custodial interrogations,' *State* v. *Cook*, 179 N.J. 533, 561, 847 A.2d 530 (2004), the [c]ourt adopted [r]ule 3:17 in 2005"). Subsection (e) of rule 3:17 provides in relevant part that, "[i]n the absence of an electronic recordation . . . the court shall, upon request of the defendant, provide the jury with a cautionary instruction." N.J. Court Rules 3:17 (e). "[A] report issued by the New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations in 2005 recommended an instruction that the jury has 'not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement.' " *State* v. *Lockhart*, supra, 298 Conn. 564 n.11. Similarly, the Massachusetts Supreme Judicial Court has explained that a defendant is "entitled ([upon] request) to a jury instruction advising that the [s]tate's highest court has expressed a preference that [custodial] interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before [it], [it] should weigh evidence of the defendant's alleged statement with great caution and care." *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 447–48, 813 N.E.2d 516 (2004).

In situations such as that in the present case, in which law enforcement failed to preserve the recording of the custodial interrogation; see General Statutes § 54-1o (c); it may well be appropriate for the trial court to provide an adverse inference instruction similar to the one provided, in the civil context, for spoliation of evidence. See, e.g., *United States* v. *Johnson*, 996 F.3d 200, 216–17 (4th Cir. 2021) ("[w]e observe . . . that if on

remand the [trial] court rejects the defendants' due process claim [premised on the government's failure to preserve evidence] again and conducts a retrial, the court should assess anew whether the defendants are entitled to an adverse inference instruction"); *People* v. *Grovner*, 206 App. Div. 3d 1638, 1641, 168 N.Y.S.3d 606 (2022) (given that exculpatory value of video that law enforcement failed to preserve was speculative, trial court did not abuse its discretion in providing permissive adverse inference instruction); see also, e.g., *Mills* v. *District of Columbia*, 259 A.3d 750, 762 (D.C. 2021) ("[w]hen a trial court determines that the government has . . . fail[ed] to preserve discoverable evidence, the court has discretion to select from [an] extremely broad range of sanctions for corrective action that is just under the circumstances" (internal quotation marks omitted)). Of course, a criminal defendant would also be free to raise a due process challenge based on the state's failure to preserve evidence that may be useful to him. See, e.g., *State* v. *Morales*, 232 Conn. 707, 719–20, 657 A.2d 585 (1995).

If I understand the legislature's objective correctly, I urge it to consider whether to amend § 54-1o to provide more meaningful safeguards in situations in which law enforcement fails to record custodial interrogations. Without more meaningful safeguards, the statute provides little realistic protection. Notwithstanding my concerns with the statutory scheme, as I have articulated them, I am fully in agreement with the majority that, in this case, the trial court correctly concluded, under the current framework set forth in § 54-1o, that the state established, by a preponderance of the evidence, that the defendant's statement was both voluntary and reliable and, therefore, admissible, despite the failure of the police to preserve the recording of the defendant's custodial interrogation.

For the foregoing reasons, I respectfully concur.

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Murder; assault first degree; attempt to commit assault first degree; claim that trial court improperly denied defendant's motion to suppress certain evidence seized by police officers as result of their warrantless entry into his home; whether officers' warrantless entry into defendant's home was justified under emergency exception to warrant requirement of fourth amendment to United States constitution; whether, under totality of circumstances, it was reasonably objective for

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CONNECTICUT APPELLATE REPORTS

Vol. 215

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT v. CHARLES GAMER, JR.
(AC 44179)

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

Syllabus

The defendant, who had been on probation in connection with his conviction of larceny in the first degree, appealed to this court from the judgment of the trial court revoking his probation. As a special condition of his probation, the trial court ordered the defendant to make restitution for verifiable out-of-pocket losses of the complainants in the amount of $227,642. During the defendant's five year probationary period, the defendant paid a total of $2100 in restitution in $100 monthly payments only when he was working. Following a violation of probation hearing, the court found that the state had proved that the defendant violated

the restitution condition of probation by wilfully failing to pay restitution, stating that the defendant intentionally delayed trying to repay the restitution in the hope that his probationary period would expire. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to establish that he wilfully failed to pay restitution: the trial court's finding that the defendant did not make sufficient bona fide efforts to acquire the resources to pay restitution was not clearly erroneous, as there was ample evidence in the record to support such a finding; moreover, the court relied on the defendant's decision to strictly make $100 restitution payments and to do so only in the months that he was working, the defendant's testimony regarding his belief that he should not have to pay the restitution, the defendant's failure to apply to certain positions with potential employers because of his belief that he would not be hired there and testimony from a chief probation officer detailing meetings with the defendant regarding his restitution obligations, including the defendant telling him that he was going to apply for a loan and subsequently failing to provide any documentation showing that he had applied for such loan.
2. The trial court did not abuse its discretion in revoking the defendant's probation and sentencing him to a term of incarceration, this court having concluded that an abuse of discretion was not manifest or injustice did not appear to have been done: the trial court conducted the proper inquiry and found that the defendant wilfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay restitution prior to revoking his probation and sentencing him to imprisonment; moreover, the court's reasoning in revoking the defendant's probation and imposing an additional term of incarceration made it clear that it necessarily believed the defendant's behavior to be inimical to the goals of his probation and that the rehabilitative purpose of probation could no longer be served.

Argued January 6—officially released September 20, 2022

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the matter was tried to the court, *McLaughlin, J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Meaghan C. Kirby*, certified legal intern, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Elizabeth K. Moran*, assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Charles Gamer, Jr., appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32[1] and sentencing him to three years of incarceration. On appeal, the defendant principally claims that (1) there was insufficient evidence to support the court's finding that he wilfully failed to pay restitution[2] and (2) the court abused its discretion by imposing a term of imprisonment in light of his purported inability to pay restitution. We conclude that the court neither erred in finding that the defendant wilfully failed to pay restitution nor

[1] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . .

"(c) Upon . . . an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. . . .

"(d) If such violation is established, the court may . . . (4) revoke the sentence of probation . . . . If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[2] See footnote 6 of this opinion.

abused its discretion in revoking the defendant's probation and sentencing him to a term of imprisonment. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In 2009, the state charged the defendant with larceny in the first degree in violation of General Statutes § 53a-122 based on his unauthorized withdrawal of $227,863.24 from a home equity line of credit taken out by his mother and his sister.[3] On April 19, 2010, on the basis of those facts, the defendant, representing himself, pleaded guilty to one count of larceny in the first degree in violation of § 53a-122. The trial court, *Hudock*, *J.*, canvassed the defendant and found that his waiver of counsel was knowing and voluntary, that there was a factual basis for the guilty plea, and that it was made knowingly, voluntarily, and intelligently, whereupon the court accepted the plea. On July 22, 2010, the court sentenced the defendant to ten years of incarceration, execution suspended after three years, followed by five years of probation. As a special condition of probation, the court ordered the defendant to make restitution for verifiable out-of-pocket losses of the complainants in an amount not to exceed $234,933.24, to be verified by the Office of Adult Probation (OAP).[4] The OAP ultimately determined the amount of restitution to be $227,642.

The defendant's probationary period began on February 19, 2013. During the defendant's five year probationary period, the defendant paid a total of $2100 in restitution, leaving a remaining balance of $225,542. On

[3] The defendant also was charged in a separate file with larceny in the second degree in violation of General Statutes § 53a-123 and issuing a bad check in violation of General Statutes § 53-128 based on his unauthorized taking of $7070 from a childhood friend. See footnote 4 of this opinion.

[4] At sentencing, the state nolled the charges of larceny in the second degree and issuing a bad check, contingent on the $7070 being included in the total restitution amount. See footnote 3 of this opinion.

February 15, 2018, the state charged the defendant with one count of violation of probation for failure to pay restitution pursuant to § 53a-32. The defendant denied the charge. On July 16, 2019, the court, *McLaughlin*, *J.*, held a violation of probation hearing during which the defendant was represented by counsel.

That same day, the court issued its ruling from the bench, initially stating: "When a violation of probation is solely based on the defendant's failure to pay restitution the court must find that the failure was wilful." Guided by that standard, the court found that the state had proved, by a fair preponderance of the evidence, that the defendant violated the restitution condition of his probation by wilfully failing to pay restitution. The court reasoned: "[The defendant's] payment of $100 a month was not a bona fide effort to make restitution. Rather it was a bare attempt to delay this case in hopes of not having to pay the restitution at all." The court expressly relied on (1) the defendant's testimony that he did not need to pay the restitution,[5] (2) the defendant's failure to apply for various positions with employers such as McDonald's or Wendy's because of his belief that he would not be hired, and (3) Chief Probation Officer Kirk Gordon's testimony that he met with the defendant about his restitution obligation, that the defendant told him that he was going to apply for a loan, and that the defendant thereafter failed to provide any documentation to demonstrate that he did so. In sum, the court stated that, based on all of the evidence and the credibility of the witnesses, it found that the defendant intentionally delayed trying to repay the restitution in the hope that his probationary period would expire.

[5] The court also explained that the defendant's uniform payments of $100 per month worked against his argument that he had made bona fide efforts to acquire the resources to pay: "If [the defendant] had paid varying amounts instead of the $100 a month while he was working, perhaps the court would come to a different decision. However, he did not."

On December 19, 2019, the court held a sentencing hearing during which it revoked the defendant's probation and sentenced him to three years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth governing principles of law pertaining to the revocation of probation for failure to pay restitution. In *Bearden* v. *Georgia*, 461 U.S. 660, 672, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the United States Supreme Court held: "[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." The court explained: "If the probationer [wilfully] refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the [s]tate's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the [f]ourteenth [a]mendment." Id., 672–73; see also *State* v. *Martinik*, 1 Conn. App. 70, 71–72, 467 A.2d 1247 (1983) (reversing judgment of revocation of probation for failure to make appropriate wilfulness finding under *Bearden*).

"As our Supreme Court has recognized in a related context, [t]he impact of indigency on a criminal defendant's liability to pay a fine is codified in our rules of

practice. . . . Thus, in Connecticut, it has been acknowledged judicially, both in cases and through our adopted rules of practice, that a finding that a defendant had the ability to pay and wilfully failed to do so is a prerequisite to incarceration for the failure to pay a fine." (Citations omitted; internal quotation marks omitted.) *State* v. *Parker*, 201 Conn. App. 435, 446, 242 A.3d 132 (2020). "[A]n explicit finding of wilfulness is required." Id., 444.

We note that, pursuant to *Bearden* v. *Georgia*, supra, 461 U.S. 672, and *State* v. *Martinik*, supra, 1 Conn. App. 71–72, the trial court (1) considered the reasons for the defendant's failure to pay restitution and (2) concluded that the state proved, by a fair preponderance of the evidence, that the defendant violated his probation by wilfully failing to pay the restitution in the amount of $227,642. Specifically, the court found that the defendant failed to make sufficient bona fide efforts legally to acquire the resources to pay and that the defendant's sporadic payments of $100 per month did not constitute a bona fide effort to make restitution.

I

We first address the defendant's claim that the evidence was insufficient to establish that he wilfully failed to pay restitution.[6] This claim fails.

[6] We pause at this juncture to emphasize that the defendant does not dispute that the trial court made the necessary finding pursuant to *Bearden* v. *Georgia*, supra, 461 U.S. 672, that his failure to pay was wilful. In this way, this case is distinguishable from *State* v. *Parker*, supra, 201 Conn. App. 449–52, in which this court held that, pursuant to *Bearden*, the trial court did not make the necessary finding that the defendant's failure to pay was wilful, which required the reversal of the judgment. As a result, we concluded in *Parker* that "it [was] not necessary to reach the defendant's second claim that the state introduced insufficient evidence to prove that the defendant wilfully refused to pay restitution." *State* v. *Parker*, supra, 452. In the present case, the defendant is making a claim akin to the second claim raised in *Parker*.

Relatedly, because the defendant conceded during oral argument before this court that the trial court made the requisite wilfulness finding pursuant to *Bearden*, we deem abandoned his first claim set forth in his principal

Before we reach the merits of the defendant's claim, we set forth additional, applicable legal principles. "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, [the evidentiary phase and the dispositional phase] each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Preston*, 286 Conn. 367, 375–76, 944 A.2d 276 (2008). "Since there are two distinct components of the revocation hearing, our standard of review differs depending on which part of the hearing we are reviewing." (Internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 26, 31 A.3d 1063 (2011).

Because the present claim involves the evidentiary phase and the trial court's factual finding that the defendant wilfully failed to pay restitution, we set forth the standard of review applicable to that phase. "The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is

appellate brief that the trial court committed a *Bearden* violation. See *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 65 n.1, 223 A.3d 85 (2019) (declining to review claims that counsel expressly abandoned at oral argument), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020).

more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accordingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) Id., 26–27.

Mindful of these principles, we turn to the defendant's claim that the evidence adduced at his violation of probation hearing was insufficient to support the trial court's wilfulness finding. During the evidentiary phase of the hearing, the state called one witness, Kirk Gordon, a chief probation officer. Gordon testified that Shonda Wright, a probation officer, supervised the defendant from approximately February, 2013, to October, 2017, at which point Gordon took over the defendant's case. Gordon further testified that (1) the defendant met with Wright on a monthly basis, (2) Wright specifically advised the defendant of his $227,642 restitution obligation on December 16, 2014, (3) upon establishing a restitution payment plan with probationers, the OAP sends probationers monthly notifications regarding their payment plans, and (4) the defendant received these notifications. Regarding his own interactions with the defendant, Gordon testified that, in addition to several face-to-face meetings, he had six to seven

conversations with the defendant regarding when the restitution was due, the amounts owed, his payment plan, the fact that what the defendant was paying would not be sufficient to pay off the restitution balance, and the consequences of failing to pay the total restitution amount. Gordon also testified that, after speaking to the defendant in November, 2017, he had delayed preparing the arrest warrant for the defendant's violation of probation because the defendant had told him that he planned to pursue a loan in an effort to pay his restitution. The defendant failed to contact Gordon, however, for three to four weeks thereafter and did not provide him with any loan documentation or an updated payment plan.

In the defendant's case-in-chief, the defense called the defendant as a witness.[7] Initially, the defendant testified that he signed his conditions of probation on February 21, 2013, but that the "issue of restitution [was] not represented properly" because a forensic accounting was supposed to be performed to verify the restitution amount. He then stated that he went on around thirty to thirty-five interviews in his first year of probation, with "[e]verybody from Verizon to Home Depot."[8] The defendant explained, however, that these employers would not hire him because of his felony conviction. Therefore, he did not find employment for "[s]everal months,"[9] until he started working as a "[d]ay laborer" with a small landscaping company called Kemry Hills. The defendant then explained that his work schedule as a day laborer was heavily dependent on the weather, and that "if everything went the right way," he would

[7] The defendant confirmed that he had consulted with his attorney and decided to waive his constitutional right not to testify.

[8] The defendant also stated that he did not apply to positions with McDonald's, Burger King, Wendy's, or Starbucks.

[9] The defendant testified that he did not apply for unemployment during these months because he had the "ability to work." He did not, however, speak to anyone regarding his qualifications for unemployment.

make "a couple thousand dollars a month." Nevertheless, the defendant also testified that he did not receive his first paycheck until May, 2016, and thus had no income between February, 2013, and May, 2016.[10] Upon reviewing his tax documents, which had been admitted into the record, the defendant explained that he made (1) between $27,000 and $28,000 in 2016; (2) $28,000 in 2017; and (3) $21,000 in 2018.[11] The defendant also testified that he did not do anything outside of landscaping because "that takes most of your time." When asked: "Do you take accountability with paying this restitution amount? Do you believe that you have to pay it," the defendant responded, "No, I don't think I have to pay it."

On cross-examination, the defendant acknowledged that he pleaded guilty to larceny in the first degree for "stealing money from [his] mother" to pay for his "kids' education." On both direct and cross-examination, however, the defendant testified that, although it was his obligation to pay the restitution amount to which he agreed in his guilty plea, he did not believe that he should have to pay it. On redirect examination, the following exchange occurred between the defendant's counsel and the defendant:

"Q. . . . Do you believe that you should have to pay this money back? And just give the court—I just want your honest answer. We're not here to . . . we just want to be honest and transparent. Do you believe that you should have to pay this money back?

"A. No. . . .

[10] For at least part of this time, the defendant pursued a doctorate in foreign affairs from North Central University, an online program. The defendant explained that he took out a student loan of "like $10,000, $12,000," to pay for this education. He further explained that he made some payment toward this loan in "approximately 2015."

[11] The defendant explained that his income dropped in 2018 because it rained more than usual and he was unable to work as many hours as he had in 2016 and 2017.

"Q. —(inaudible) do you believe that you have to pay this money back?

"A. I'm committed to paying it back. I am committed—I don't believe I owe this money. That's an entirely different situation. . . .

"Q. So you're committed to paying this, as you just testified—

"A. Always have been.

"Q. —because it is your belief that it is your obligation?

"A. Right."

Both the defendant and the state submitted exhibits during the hearing. State's exhibit three shows that the defendant made: (1) no restitution payments in 2013 and 2014; (2) $100 payments in March, April, May, June, July, September, and December, 2015; (3) $100 payments in March, August, September, and November, 2016; and (4) $100 payments in January, February, March, April, May, July, August, September, November, and December, 2017.

After both parties' closing arguments, the court found that the state proved, by a fair preponderance of the evidence, that the defendant violated his probation by failing to pay the restitution in the amount of $227,642. In making this finding, the court expressly relied on "all of the evidence and the credibility of the witnesses . . . ." As to wilfulness, the court found that the defendant's "payment of $100 a month was not a bona fide effort to make restitution. Rather it was a bare attempt to delay this case in hopes of not having to pay the restitution at all." Specifically, the court relied on (1) the defendant's decision to strictly make $100 restitution payments and to do so only in the months that he was working, (2) the defendant's testimony regarding his

belief that he should not have to pay the restitution, (3) the defendant's failure to apply to certain positions with employers such as McDonald's, Wendy's, or Home Depot because of his belief that he would not be hired there,[12] and (4) Gordon's testimony detailing his meetings with the defendant regarding his restitution obligations, including the defendant telling him that he was going to apply for a loan and subsequently failing to provide any documentation showing that he had applied for such loan. We conclude that the court's finding that the defendant did not make sufficient bona fide efforts to acquire the resources to pay restitution; see *Bearden* v. *Georgia*, supra, 461 U.S. 672; *State* v. *Martinik*, supra, 1 Conn. App. 71–72; is not clearly erroneous because there is ample evidence in the record to support it. See *State* v. *Preston*, supra, 286 Conn. 376.

II

We next address the defendant's claim that the court abused its discretion by imposing a term of incarceration based on his purported inability to pay restitution. In support of this claim, the defendant makes five basic contentions: (1) he tried to comply with his restitution obligation; (2) Gordon testified that he had never seen a probationer successfully satisfy a restitution amount of $200,000 or more; (3) "[n]o public safety preservation is achieved by re-incarcerating a man where the victim of the underlying larceny charge, his mother, has already been recuperated for the funds she lost"; (4) re-incarcerating him did not serve any "penological purpose"; and (5) there were several sentence alternatives

[12] The court stated that the defendant did not apply to Home Depot. The defendant testified, however, that he applied to a position with Home Depot but was denied employment because of his felony conviction. Nevertheless, the defendant testified that he did not apply to positions with McDonald's, Burger King, Wendy's, or Starbucks because he believed that he would not be hired by these employers as a result of his felony conviction. See footnote 8 of this opinion. Therefore, the court's point still stands.

available to the court, such as a modification of the sentence, extension of the sentence, and continuation of probation. We reject this claim.

"The standard of review of the trial court's decision at the [dispositional] phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . In the dispositional phase, [t]he ultimate question [in the probation process is] whether the probationer is still a good risk . . . . This determination involves the consideration of the goals of probation, including whether the probationer's behavior is inimical to his own rehabilitation, as well as to the safety of the public." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, supra, 286 Conn. 377. "A defendant who seeks to reverse the exercise of judicial discretion assumes a heavy burden." (Internal quotation marks omitted.) Id., 381 n.8.

On December 19, 2019, the court held a sentencing hearing during which it revoked the defendant's probation and sentenced him to three years of incarceration. In revoking the defendant's probation, the court reasoned that he was "not someone who [was] seeking their best efforts to at least attempt to pay back the restitution" and there was nothing in the record that evinced "true bona fide good efforts to repay the restitution." The court further reasoned that "this was not a case of someone who is not able to pay. This was a case of someone who did not want to pay and was not going to pay that restitution." Additionally, the court opined: "I think [the defendant] did hope that if he

delayed the payment throughout his probation that probation would expire and he could move on with his life."

The defendant's arguments in support of this second claim have not convinced us that an abuse of discretion is manifest or that injustice appears to have been done. See *State* v. *Preston*, supra, 286 Conn. 377. Rather, the defendant is simply repeating many of the same arguments that he made regarding the trial court's wilfulness finding. As explained previously, a court may order the revocation of probation and sentence a defendant to imprisonment based on nonpayment of restitution only when it finds that a probationer has wilfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay. *Bearden* v. *Georgia*, supra, 461 U.S. 672; *State* v. *Martinik*, supra, 1 Conn. App. 71–72. Here, after conducting the proper inquiry and finding that the defendant failed to make sufficient bona fide efforts, the court revoked the defendant's probation and sentenced him to imprisonment. Pursuant to *Bearden*, "a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the [s]tate is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense." *Bearden* v. *Georgia*, supra, 668. "[T]he element of punishment in probation revocation of [the] defendant is attributable to the crime for which he [or she] was originally convicted and sentenced. Thus, any sentence [the] defendant had to serve as the result of the [probation] violation . . . was punishment for the crime of which he [or she] had originally been convicted. Revocation is a continuing consequence of the original conviction from which probation was granted." (Internal quotation marks omitted.) *State* v. *Santos T.*,

146 Conn. App. 532, 536–37, 77 A.3d 931, cert. denied, 310 Conn. 965, 83 A.3d 345 (2013).

Furthermore, the court's reasoning in revoking the defendant's probation and imposing an additional term of incarceration makes clear that it necessarily believed (1) the defendant's behavior to be inimical to the goals of his probation; see *State* v. *Preston*, supra, 286 Conn. 377; and (2) that the rehabilitative purpose of probation could no longer be served. We will not substitute our judgment for that of the trial court. *State* v. *Roman*, 13 Conn. App. 638, 641, 538 A.2d 1076 (1988). In light of the foregoing, we conclude that the court did not abuse its discretion in revoking the defendant's probation and sentencing him to three years of incarceration.

The judgment is affirmed.

In this opinion the other judges concurred.

DISCIPLINARY COUNSEL *v.* CHARLES B. SPADONI (AC 44826)

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

Syllabus

The defendant appealed to this court from the trial court's judgment denying his application for reinstatement to the bar. The defendant had been suspended from the practice of law, upon presentment by the plaintiff, Disciplinary Counsel, following his conviction in federal court of obstruction of justice in connection with a public corruption scheme. The defendant also was convicted of other felony offenses, including racketeering, bribery and wire fraud, but those convictions were reversed on appeal. The defendant subsequently filed an application for reinstatement to the bar, and the trial court referred the application to the Standing Committee on Recommendations for Admission to the Bar for New Haven County pursuant to the applicable rule of practice (§ 2-53). The committee held an evidentiary hearing on the application, during which the defendant refused to answer direct questions regarding his conduct during and surrounding the events that resulted in the convictions that were reversed. The defendant also testified that he was innocent of any wrongdoing and that he had not committed the crime of

obstruction of justice, focusing his testimony on multiple exhibits that he argued demonstrated his innocence. Following the hearing, the committee issued a report in which it recommended that the defendant's application for reinstatement be denied on the ground that he lacked the requisite good moral character to practice law. In reaching its decision, the committee found, inter alia, that the defendant's refusal to answer questions regarding the reversed convictions demonstrated a lack of honesty and candor, that his reinstatement could be detrimental to the integrity and standing of the bar and the administration of justice because he refused to accept responsibility for the obstruction of justice conviction, which strikes at the heart of the public trust in the legal profession, and that his failure to accept responsibility for his wrongdoing made rehabilitation impossible. A three judge panel of the Superior Court thereafter accepted the committee's recommendation and rendered judgment denying the defendant's application for reinstatement, concluding that the committee, in making its recommendation, did not abuse its discretion or act arbitrarily, unreasonably, or without a fair investigation of the facts. *Held*:

1. The trial court correctly determined that the committee had the authority to question the defendant about his presuspension misconduct; pursuant to Practice Book § 2-53, the committee had the authority and duty to investigate conduct that could inform its assessment of the defendant's moral fitness, including not only the underlying facts of the defendant's obstruction of justice conviction but also all of the facts that the committee believed could be relevant to the determination of the defendant's present fitness to practice law and moral character, and the defendant's argument that the committee had the authority to investigate only conduct of which he was convicted conflated the attorney reinstatement process with the attorney grievance process.
2. The defendant could not prevail on his claim that the committee improperly found that he failed to accept his obstruction of justice conviction with sincerity and honesty because he plausibly reconciled his claim of innocence with that conviction before the committee; contrary to the defendant's contention, his claim of innocence did not render the other criteria set forth in *Statewide Grievance Committee* v. *Ganim* (311 Conn. 430), for evaluating an application for reinstatement inapplicable but, rather, was simply another piece of evidence for the committee to consider in conjunction with all of the other factors utilized in determining whether the defendant met his burden to show rehabilitation, good moral character and a present fitness to be reinstated to the legal profession.

Argued March 9—officially released September 20, 2022

Procedural History

Presentment by the plaintiff for disciplinary proceedings following the defendant's felony conviction,

brought to the Superior Court in the judicial district of Hartford, where the court, *Bryant*, *J.*, issued an order suspending the defendant from the practice of law on an interim basis; thereafter, the court, *Sheridan*, *J.*, rendered judgment suspending the defendant from the practice of law; subsequently, the defendant filed an application for reinstatement to the bar; thereafter, the defendant's application for reinstatement was referred to the Standing Committee on Recommendations for Admission to the Bar for New Haven County, which filed a report recommending denial of the application for reinstatement; subsequently, a three judge panel, *Sheridan*, *Budzik* and *Lynch*, *Js.*, accepted the standing committee's report and rendered judgment denying the defendant's application for reinstatement to the bar, from which the defendant appealed to this court. *Affirmed.*

Charles B. Spadoni, self-represented, the appellant (defendant).

Paul C. Jensen, *Jr.*, assistant bar counsel, with whom, on the brief, were *Brian B. Staines*, chief disciplinary counsel, and *Elizabeth M. Rowe*, assistant bar counsel, for the appellee (plaintiff).

Opinion

NORCOTT, J. The defendant, Charles B. Spadoni, an attorney suspended from the practice of law, appeals from the judgment of the Superior Court denying his application for reinstatement to the bar of this state. On appeal, the defendant claims that the three judge panel of the Superior Court considering the defendant's application for reinstatement to the bar improperly accepted the report and recommendation of the Standing Committee on Recommendations for Admission to the Bar for New Haven County (committee) because (1) the committee exceeded the scope of its investigative

authority by inquiring as to the defendant's presuspension misconduct, and (2) the committee improperly found that the defendant failed to accept his federal conviction for obstruction of justice with sincerity and honesty. We disagree with the defendant and, therefore, affirm the judgment of the court.

The following facts and procedural history, as set forth in the court's memorandum of decision, are relevant to this appeal.[1] "The [defendant] was admitted to the Connecticut bar on May 3, 1977. . . . In 1997, the [defendant] was hired as the general counsel for a Boston based private equity firm, Triumph Capital Group [Inc.] (Triumph). *United States* v. *Triumph Capital Group, Inc.*, 544 F.3d 149, 152 (2d Cir. 2008). Triumph managed some of the investments of the state pension funds. Id., 152–53. Certain investments made by the state pension funds with Triumph, contributions made by Triumph to the state Republican party and contracts Triumph had with Republican candidate Paul Silvester's campaign staffers came under federal scrutiny. Id., 153. In connection with that scrutiny, on January 9, 2001, the [defendant] was indicted by a federal grand jury for committing various crimes under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. § 1961 et seq.]. Id., 156.

"On July 16, 2003, a jury found the [defendant] guilty of [racketeering, racketeering conspiracy] obstructing justice, bribery and [wire] fraud. Id., 156. The [defendant] was sentenced principally to concurrent [thirty-six] month terms of imprisonment on all counts and a $50,000 fine. Id., 158. Thereafter, the [defendant] appealed. On appeal, the [United States Court of Appeals for the] Second Circuit found there was sufficient evidence to support the jury's verdict, which found

[1] On appeal, the defendant does not challenge any of the facts found by the committee and adopted by the court.

the [defendant] guilty of [racketeering, racketeering conspiracy] bribery, wire fraud and obstruction of justice. Id., 160, 169. The Second Circuit ordered a new trial on the racketeering, racketeering conspiracy, bribery and wire fraud charges on the ground that the government unconstitutionally suppressed material exculpatory and impeaching evidence. Id., 165. The Second Circuit did not order a new trial on the obstruction of justice charges, stating that, [e]ven if the suppressed notes had an impeaching effect so strong as to call into question Silvester's testimony on other matters, the government's evidence of [the defendant's] obstruction of justice was overwhelming. In light of the forensic examiner's detailed testimony regarding the suspicious timing of the deletion of relevant files from [the defendant's] laptop using Destroy-It! software, and its corroboration with [Robert] Trevisani's testimony about [the defendant's] mention of Destroy-It! as software to be used in order to hide something . . . we do not think that the suppression of [Special] Agent [Charles E.] Urso's notes raises a reasonable probability that the verdict on the obstruction of justice count would have been different. . . . Id., 165 n.13.

"On November 10, 2008, the [defendant] and the government both filed motions for rehearing, and, on November 21, 2008, the Second Circuit denied both motions. The mandate issued on January 12, 2009. On November 16, 2009, the [defendant] served a copy of a motion to recall the mandate on the government, which was summarily denied by the Second Circuit on December 18, 2009. On September 15, 2011, the United States District Court for the District of Connecticut resentenced the [defendant] to two years of incarceration, a $50,000 fine and three years of supervised release. On July 9, 2012, the Second Circuit affirmed the judgment of conviction for obstruction of justice. *United States* v. *Spadoni*, 479 Fed. Appx. 392, 393 (2d Cir.), cert.

denied, 568 U.S. 1019, 133 S. Ct. 625, 184 L. Ed. 2d 411 (2012). The [defendant's] license to practice law in Connecticut was suspended from January 31, 2007, through September 9, 2016." (Internal quotation marks omitted.)

On April 19, 2017, the defendant filed in the Superior Court an application for reinstatement to the bar pursuant to Practice Book § 2-53. On May 9, 2017, pursuant to Practice Book § 2-53 (f), the defendant's application was referred to the committee. On February 20, 2019, the committee held an evidentiary hearing on the defendant's application, at which the defendant was present and permitted to testify. At the reinstatement hearing, the defendant refused to answer direct questions regarding his conduct during or surrounding the events that resulted in his racketeering, racketeering conspiracy, bribery, and wire fraud convictions, which were reversed on appeal. Specifically, the defendant "took the position that any conduct which did not result in his conviction of a crime was off limits for [the committee] in assessing his character and fitness to practice law."[2] Further, when asked by committee member Howard K. Levine whether "the inquiry into [the defendant's]

[2] At the reinstatement hearing, during the assistant bar counsel's cross-examination of the defendant, when asked about a certain conversation with Silvester, the defendant stated: "Well, what is—I'm now going to object because we're really going into areas beyond the scope of my—my direct and—and I was charged with campaign bribery, which I was acquitted of. So all these questions now are irrelevant, and I object to continuing this line of inquiry."

The following colloquy then took place between committee member Howard K. Levine and the defendant:

"Q. I have just one question, and I appreciate you engaging in this with me. One of the [*Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 87 A.3d 1078 (2014)] factors is the applicant's character, maturity and experience at the time of discipline and at present. Again, is it your position that that limits the inquiry solely to those matters that comprised of your conviction and does not allow either counsel or the committee to inquire into matters upon which you were acquitted or matters which were not the subject of a grievance?

present moral fitness [allowed] . . . the committee to look into matters that are not the subject of grievances or criminal convictions," the defendant responded: "On a going forward basis, you have full rein, plenary power to do—whatever my moral fitness is. But . . . in terms of moral fitness, it's really limited to the presuspension. It's the conviction and it's not—you cannot then use a conviction and then go back and try to resurrect or investigate . . . conduct that . . . didn't result in a conviction." The committee asked if the defendant would reconsider his refusal to answer its questions, but the defendant refused and stood on his objection.[3]

Before the committee, the defendant also stated affirmatively that he believed that he was innocent of any wrongdoing and that he had not committed the crime of obstruction of justice, even though his conviction on that charge had been affirmed on appeal. In support of his belief, the defendant testified that the Second Circuit "articulated no factual predicate that exists in the trial evidence for its holding that the jury had sufficient evidence to find [the defendant] guilty of obstructing justice." The defendant focused his direct testimony on multiple exhibits, including contracts, transcripts from the criminal trial, and affidavits that he argued demonstrated his innocence. Additionally, on cross-examination, the defendant stated that there was "insufficient evidence to find [him] guilty because

"A. Yes, unless the—I don't prevail in demonstrating that I was innocent, then that fact would rise. But if I'm demonstrating that I'm innocent then it doesn't get—you don't get to go back and start, make the entry."

[3] The following colloquy took place at the reinstatement hearing between Levine and the defendant:

"Q. Okay. Mr. Spadoni, if we gave you the opportunity, fully understanding your legal position, if we gave you [the] opportunity now for [the assistant bar counsel] to ask you those questions again, would you still stand on your legal position or would you answer the questions?

"A. I would stand on my legal position because it's—and I don't think you have the authority—this is not the forum. That—that train left. You know, when I was—when I was—they could have filed a grievance which can be independent."

. . . the finding of sufficiency was based on . . . [nonexistent] evidence, and the allegation that . . . [he] failed to turn over a disk that had been called for . . . by a subpoena is not based on fact."

Ultimately, on February 5, 2021, the committee issued its written report in which it recommended that the defendant's application for reinstatement be denied because the defendant failed to meet the standards for good moral character to practice law as set forth in Practice Book § 2-5A. Specifically, the committee recommended that the defendant should not be reinstated because he "blatantly refused to accept his wrongdoing." The committee noted that, although the Second Circuit reversed the defendant's convictions of racketeering, racketeering conspiracy, bribery, and wire fraud, the court rejected the defendant's argument that there was insufficient evidence to support his conviction on those charges. Consequently, the committee concluded that inquiry regarding the defendant's conduct surrounding these charges was relevant because "these offenses [are] antithetical to the qualities necessary for an attorney to maintain the trust of the public. Engaging in such conduct evinces a lack of moral character, honesty and respect for the public, law enforcement and the judiciary which should be inherent to all members of the bar." The committee was not persuaded that the Second Circuit's reversal of the defendant's convictions on these charges "negates the nature and seriousness of the original jury findings to the point where the committee should not consider and place considerable weight on them." The committee, therefore, concluded that the defendant's failure to answer questions about those charges demonstrated that he lacked "honesty and candor" and "deprived the committee [of] the opportunity even to assess whether whatever conduct he may have engaged in leading up to his suspension did or did not uphold the requirement that

the [defendant] be of good moral character. . . . [I]t is the [defendant's] lack of candor and honesty in refusing to answer that leads the committee to find that the [defendant] has not met his burden of proving he is of good moral character." (Footnotes omitted.)

Additionally, the committee found that "[t]he [defendant's] conviction for obstruction of justice strikes at the heart of public trust in the legal profession. Recognizing that the [defendant] continues to profess his innocence, the conviction stands and details his participation in a public corruption scheme. Obstruction of justice implicates all of the traits that the public expects members of the bar to possess, including honesty, respect for law enforcement and the judiciary. That the [defendant] continues to deny any responsibility for or even acknowledgment of the crime of which he was convicted serves only to amplify the committee's concerns that public confidence in the profession would be undermined by his [reinstatement]." The committee further noted that the defendant's refusal to accept responsibility for his obstruction of justice "makes rehabilitation an impossibility. There has been no acceptance of responsibility for his wrongdoing and, therefore, [the defendant] cannot possibly be rehabilitated." For these reasons, the committee recommended that the defendant's application for reinstatement be denied.

On June 1, 2021, an evidentiary hearing was held before a three judge panel of the Superior Court to determine whether to accept or reject the committee's recommendation that the defendant's application for reinstatement be denied. The Office of the Chief Disciplinary Counsel, the Statewide Grievance Committee, and the defendant all appeared and participated in the hearing. In its memorandum of decision, the court stated that, before both it and the committee, "the [defendant] offered only his own testimony with regard to his acceptance of responsibility and his recognition

of the harm his violation of federal criminal law has caused to the legal profession and the public."

On June 30, 2021, the court, by way of a memorandum of decision, unanimously accepted the committee's recommendation and denied the defendant's application for reinstatement. In doing so, the court reiterated the committee's concerns regarding the defendant's return to practice and evaluated the record along with the defendant's candor and demeanor as he responded to questions from the court. Having done so, the court reasoned that it could not "conclude that the committee acted arbitrarily or unreasonably or in abuse of its discretion or without a fair investigation of the facts in recommending that the [defendant] not be readmitted to the practice of law in Connecticut." This appeal followed.

Because both of the defendant's claims pertain to the attorney reinstatement process, we first discuss that procedure and the applicable standards of review. "Fixing the qualifications for, as well as admitting [or readmitting] persons to, the practice of law in this state has ever been an exercise of judicial power. . . . This power has been exercised with the assistance of committees of the bar appointed and acting under rules of court. . . . Although these committees have a broad power of discretion, they act under the court's supervision. . . . Accordingly, [i]t is the court, and not the bar, or a committee, which takes the final and decisive action.

"In deciding whether to accept or reject a standing committee recommendation on reinstatement to the bar, the trial court does not take evidence or hear the matter de novo. . . . Rather, it reviews the standing committee's decision on [the] record to determine whether [the standing committee] has conducted a fair and impartial investigation, and whether it acted fairly

and reasonably or from prejudice and ill will in its consideration of the application. . . . Ultimately, the court must decide whether the standing committee, by approving or withholding its approval of an application, acted arbitrarily or unreasonably or in abuse of its discretion or without a fair investigation of the facts. . . . In either admission or readmission proceedings, the burden is on an applicant to prove his or her present fitness to practice law. . . .

"As to any subordinate facts found by a standing committee, the trial court reviews them only for clear error. A factual determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The standing committee, as fact finder, determines with finality the credibility of witnesses and the weight to be accorded their testimony. . . . At the same time, [t]he ultimate facts [found by a standing committee] are reviewable by the court to determine whether they are reasonable and proper in view of the subordinate facts found and the applicable principles of law." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 450–52, 87 A.3d 1078 (2014).

Ultimately, "[b]ecause the trial court exercises no discretion, but rather is confined to a review of the record before the [standing committee], we are not limited to the deferential standard of manifest abuse or injustice when reviewing [the trial court's] legal conclusions about the adequacy of the evidence before the [standing committee] . . . ." (Internal quotation marks omitted.) Id., 452. Instead, our "review of the trial court's decision, to either accept or reject the standing committee's recommendation, is plenary." Id.

We now turn to the language of Practice Book § 2-53, which governs the application process for a suspended attorney to be reinstated to the bar. Particularly, § 2-53 (a)[4] provides that an attorney who has been suspended is permitted to file an application for reinstatement. "The application shall be referred by the clerk of the Superior Court where it is filed to the chief justice or designee, who shall refer the matter to a standing committee on recommendations for admission to the bar . . . ." Practice Book § 2-53 (f). Then, the committee to which an application for reinstatement has been referred, "shall investigate the application, hold hearings pertaining thereto and render a report with its recommendations to the court." Practice Book § 2-53 (i).

I

The defendant first claims that the court improperly accepted the report by the committee because the committee exceeded the scope of its investigative authority by inquiring as to the defendant's presuspension misconduct. Specifically, the defendant argues that the committee's inquiry into his actions that served as the basis for his racketeering, racketeering conspiracy, wire fraud, and bribery convictions, and the conclusions it drew from his refusal to answer questions about those actions, were improper because those convictions were reversed by the Second Circuit and the scope of the committee's investigation does not include alleged but unajudicated misconduct.[5] We disagree.

[4] Practice Book § 2-53 (a) provides in relevant part: "An attorney who has been suspended from the practice of law in this state for a period of one year or more or has remained under suspension pursuant to an order of interim suspension for a period of one year or more shall be required to apply for reinstatement in accordance with this section, unless the court that imposed the discipline expressly provided in its order that such application is not required. . . ."

[5] The defendant, without any direct citation to legal authority, frames his first claim as challenging the committee's "subject matter jurisdiction" to investigate certain allegations against him. We disagree with the defendant's

We begin with the general principles and standards of review that govern our resolution of the defendant's first claim. We interpret the defendant's claim to be challenging the scope of the committee's investigation pursuant to Practice Book § 2-53, not the court's acceptance of the committee's recommendation. Consequently, to the extent that we are interpreting the relevant sections of the rules of practice, our review is plenary. See, e.g., *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

We next outline the duties and limits of a committee's investigation and adjudication of an application for reinstatement. Throughout the reinstatement process, Practice Book § 2-53 (j) instructs that "[i]t is the applicant's burden to demonstrate by clear and convincing evidence that he or she possesses good moral character and fitness to practice law as defined by Section 2-5A." Practice Book § 2-5A provides: "(a) Good moral character shall be construed to include, but not be limited to, the following: (1) The qualities of honesty, fairness, candor and trustworthiness; (2) Observance of fiduciary responsibility; (3) Respect for and obedience to the law; and (4) Respect for the legal rights of others and the judicial process, as evidenced by conduct other than merely initiating or pursuing litigation. (b) Fitness to practice law shall be construed to include the following: (1) The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation,

characterization. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 463, 239 A.3d 272 (2020). Here, there is no dispute that the committee had the authority to adjudicate the defendant's application for reinstatement; rather, the defendant's claim challenges whether the committee's inquiry into his presuspension misconduct was proper.

organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and solving ethical dilemmas; (2) The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and (3) The capability to perform legal tasks in a timely manner."

As stated by our Supreme Court, "[o]ur rules of practice do not enumerate specific criteria to be used in evaluating an application for reinstatement to the bar. Connecticut courts and those of other jurisdictions, however, have relied on several considerations, however, among them the following: (1) the [applicant's] present moral fitness; (2) the [applicant's] acceptance of wrongdoing with sincerity and honesty; (3) the extent of the [applicant's] rehabilitation; (4) the nature and seriousness of the original misconduct; (5) the [applicant's] conduct following the discipline; (6) the time elapsed since the original discipline; (7) the [applicant's] character, maturity, and experience at the time of discipline and at present; (8) the [applicant's] current competency and qualifications to practice law; (9) [the applicant's payment of] restitution; and (10) the proof that the [applicant's] return to the practice of law will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive of the public interest." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 454–55.

"[W]hen courts consider the evidence introduced in reinstatement proceedings of an applicant's current fitness, they must evaluate it against the backdrop of the applicant's prior misconduct, and [inquire] whether the former is of sufficient weight to overcome the latter." (Internal quotation marks omitted.) Id., 456. As such, "[a]n attorney's commission of misconduct that results in criminal convictions, particularly for crimes that

involve elements of dishonesty, casts a dark shadow over his or her fitness to practice law, and typically results in a lengthy period of suspension or disbarment." (Footnote omitted.) Id., 457.

In the reinstatement process, "[t]he court's fundamental inquiry in addressing a petition for reinstatement to the practice of law is whether the attorney has rehabilitated himself or herself in conduct and character since the suspension was imposed. . . . The applicant must show that he is presently fit to again exercise the privileges and functions of an attorney as an officer of the court and confidential manager of the affairs and business of others entrusted to his care . . . keeping . . . in view . . . his previous misconduct, his discipline therefor, and any reformation of character wrought thereby or otherwise as shown by his more recent life and conduct." (Citation omitted; internal quotation marks omitted.) Id., 453. Specifically, "[t]he appropriate inquiry when deciding whether to grant admission to the bar is whether the applicant has *present* fitness to practice law. . . . Fitness to practice law does not remain fixed in time." (Citations omitted; emphasis in original.) *Scott* v. *State Bar Examining Committee*, 220 Conn. 812, 829, 601 A.2d 1021 (1992).[6]

Accordingly, it is clear that a committee's consideration of an applicant's present good moral character is an expansive inquiry. The committee may consider the applicant's conduct prior to or after his or her suspension, regardless of whether that conduct served as the basis for his or her suspension. The committee may also consider all conduct in determining the applicant's

[6] Although *Scott* involved admission to the bar and not reinstatement following suspension, cases involving a committee's investigation of an individual's application for admission are applicable here because, as stated by our Supreme Court, "[i]n either admission or readmission proceedings, the burden is on an applicant to prove his or her present fitness to practice law." *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 451.

present fitness. For example, in *Scott* v. *State Bar Examining Committee*, supra, 220 Conn. 815, the applicant for admission sat for the state bar examination in July, 1987, which he passed. Nevertheless, the Bar Examining Committee voted unanimously to deny him admission to the bar on the basis of both its and the local standing committee's investigation into the applicant's past criminal record. Id. The standing committee conducted a hearing in which it questioned the applicant about both his criminal record, as well as his prior drug use. Id. The standing committee, and later the executive committee of the Bar Examining Committee, conducted hearings that involved the applicant's history dating back to marijuana use between 1977 and 1985. Id., 814. More specifically, the hearings investigated the following events: "In 1981, the [applicant] was arrested and charged with possession of controlled drugs and possession of [marijuana]. The possession of controlled drugs charge was nolled and the [applicant] paid an $85 fine for possession of [marijuana]. He was convicted of possession of [marijuana] for a second time in 1983 and paid a $385 fine. The [applicant's] last drug related conviction occurred in 1984, when he was arrested and charged with interfering with a police officer and possession of a controlled substance. The interference charge was nolled, and he paid a $250 fine for possession of a controlled substance. The [applicant] has also been cited for failing to register a change of address with the [Department of Motor Vehicles], failure to carry his registration, illegal dumping, failure to carry an insurance card, making an improper left turn and failure to have insurance. Furthermore, at the age of seventeen, he was adjudicated as a youthful offender on a charge of criminal attempt to commit burglary." Id., 814 n.2. All of this conduct, regardless of the timing or final adjudication was investigated in relation to the applicant's admission to the bar. Id., 815. On the basis of

the information learned during its investigation, the Bar Examining Committee members denied the applicant admission to the bar because he had three convictions involving illegal substances, his explanation of his criminal prosecutions was not credible, and he "displayed a lack of candor and did not appreciate the importance of his testimony at the hearing." (Internal quotation marks omitted.) Id., 816. The applicant appealed to the Superior Court, which reversed the decision of the Bar Examining Committee and ordered the applicant admitted to the bar. Id., 813–14. The Bar Examining Committee appealed to this court, and the appeal was transferred to our Supreme Court, which reversed the judgment of the Superior Court. Id., 814. Specifically, our Supreme Court noted that the rules of practice delegated to the Bar Examining Committee, "the duty, power and authority to . . . determine whether such candidates are qualified . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 825–26. Therefore, the court held that the Bar Examining Committee was within its authority to question the applicant about all prior arrests, even those that were nolled or did not result in a conviction, in order to consider the applicant's candor and credibility when assessing his moral fitness. Id., 825. It further concluded that "[i]t was improper for the trial court . . . to substitute its own assessment of the [applicant's] credibility and candor for that of the [Bar Examining Committee]." Id.

In the present case, the defendant challenges the committee's authority to delve into and adjudicate "alleged but unadjudicated, presuspension misconduct . . . ." Particularly, the defendant challenges the committee's attempted questioning regarding conduct related to his convictions that were reversed on appeal. As in *Scott*, the committee had the authority to investigate conduct that could play a role in its assessment of the defendant's moral fitness. See *Scott* v. *State Bar*

Examining Committee, supra, 220 Conn. 825–26. In the present case, this included not only the underlying facts of the defendant's obstruction of justice conviction, but also all of the facts that the committee believed could be relevant to the determination of the defendant's present fitness to practice law, as well as his good moral character. Not only did the committee have the authority to do so, but the rules of practice charge it with investigating such conduct. See Practice Book § 2-53 (i). Ultimately, the committee had a duty to undertake a fair investigation of the facts by exploring the defendant's moral character. See *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 463–64.

Although the defendant argues[7] that the committee only had the authority to investigate conduct of which he was convicted, specifically his obstruction of justice conviction, this argument appears to conflate the reinstatement process pursuant to Practice Book § 2-53 with the grievance process pursuant to Practice Book § 2-32. As discussed previously, the committee's inquiry to determine whether to reinstate a suspended applicant is unbound in time. See *Scott* v. *State Bar Examining Committee*, supra, 220 Conn. 829. Conversely, Practice Book § 2-32 (a) (2) (E) permits the dismissal of a grievance complaint that is founded on allegations that occurred more than six years prior to the filing of such a

[7] The defendant also argues that, because the committee did not have authority to adjudicate or investigate the facts underlying the racketeering, racketeering conspiracy, wire fraud, and bribery allegations, the committee's findings of fact that are based on his refusal to answer questions concerning those allegations are void as a matter of law. In support of this argument, the defendant fails to cite any legal authority, and, therefore, we decline to review it because it is inadequately briefed. See *Marvin* v. *Board of Education*, 191 Conn. App. 169, 178 n.8, 213 A.3d 1155 (2019) ("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 . . . ." (Internal quotation marks omitted.)).

complaint. This court previously has held that "attorney grievance proceedings and bar admission proceedings are quite different; we therefore do not accept the petitioner's invitation to draw an analogy between the two. . . . The burden in grievance proceedings is on the statewide grievance committee to establish the occurrence of an ethics violation by clear and convincing proof. . . . The ultimate burden of proving good moral character required for admission to the bar, however, is on the applicant." (Citations omitted; internal quotation marks omitted.) *Friedman* v. *Connecticut Bar Examining Committee*, 77 Conn. App. 526, 541, 824 A.2d 866 (2003), appeal dismissed, 270 Conn. 457, 853 A.2d 496 (2004). Therefore, with the foregoing principles in mind, we conclude that the court correctly determined that the committee had the authority to question the defendant about his presuspension misconduct.

II

The defendant's second claim is that the committee improperly found that he failed to accept his obstruction of justice conviction with sincerity and honesty. The defendant argues that he was not required to do so because he proved to the committee that he plausibly reconciled his claim of innocence and, additionally, that the remaining criteria set forth in *Ganim* for the court to utilize in the evaluation of an application for reinstatement are not applicable. We disagree.

We begin with the general principles and standards of review that govern our resolution of the defendant's second claim. "[W]hen reviewing the legal conclusions of the trial court concerning the adequacy of evidence before the [committee], we need only determine whether the [committee's] finding, that the [applicant] lacked good moral character, is supported in the record of the application proceedings." (Internal quotation marks omitted.) Id., 529. "Ultimately, the court must

decide whether the . . . committee, by approving or withholding its approval of an application, acted arbitrarily or unreasonably or in abuse of its discretion or without a fair investigation of the facts." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 451.

Along with the considerations for reinstatement set forth by our Supreme Court in *Ganim*, we reiterate that, "[i]n either admission or readmission proceedings, the burden is on an applicant to prove his or her present fitness to practice law." Id. In *Ganim*, our Supreme Court stated that "the defendant's failure to either explain, or acknowledge any responsibility for, his extensive criminal wrongdoing, or to express remorse for that wrongdoing, was a highly relevant consideration . . . ." Id., 463. The court noted that, although this type of acknowledgement in the reinstatement process is not required, it is one of the many factors that must be examined. See id., 464 n.32.

The defendant contends that *Ganim* stands for the proposition that, in a reinstatement proceeding in which the applicant maintains his innocence, even after his conviction is upheld on appeal, the applicant is not required to accept his established conviction if his claim of innocence plausibly can be reconciled with his conviction. The defendant argues that he appropriately reconciled his claim of innocence with his obstruction of justice conviction before the committee, and, therefore, the committee improperly relied on his failure to accept responsibility for that conviction and to admit his wrongdoing in recommending that he not be reinstated to the bar.

In support of this claim, the only law to which the defendant cites are two footnotes from *Ganim*. See id., 464 n.32; id., 466 n.33. The first footnote provides: "The defendant contends that the trial court improperly held,

as a matter of law, that he necessarily had to be found remorseful, or acknowledge his criminal wrongdoing, before he could be found presently fit to practice law. According to the defendant, the court considered remorse and acknowledgment of wrongdoing to be a bright line requirement for readmission, and such a requirement is not prescribed by statute or court rule . . . . We recognize that the trial court did devote a significant portion of its analysis to the issue of the defendant's lack of remorse, and it ended that section of its memorandum of decision by concluding that the standing committee improperly found that [the defendant] was remorseful or acknowledged that he engaged in the criminal misconduct, which are necessary components of rehabilitation and a finding of present fitness. . . . At the same time, however . . . it is clear that lack of remorse was not the sole basis for the court's ultimate determination that the defendant had not met his burden of proving present fitness.

"To the extent the trial court's decision can be read as stating a hard and fast rule requiring remorse, in all cases, as an absolute condition for reinstatement, we disavow it as legally incorrect. Nevertheless . . . the defendant's lack of remorse, particularly as it was not accompanied by an explicit profession of innocence and plausible explanation for his sixteen criminal convictions, certainly was a proper consideration in this case, even if it was not a dispositive one. Additionally, even putting aside the issue of the defendant's remorse, or lack thereof, we still would conclude that the other probative and credited evidence in the record was not sufficient to support the standing committee's finding of present fitness. Accordingly, any error by the trial court in this regard was of no consequence." (Emphasis omitted; internal quotation marks omitted.) Id., 464 n.32.

Additionally, the second footnote on which the defendant relies provides: "In a reinstatement proceeding, an applicant's previous criminal convictions, upheld on appeal, are treated as conclusive evidence that the applicant in fact engaged in conduct that was seriously wrong. . . . Unless this premise somehow is shown to be faulty, an applicant's subjective belief that he did not in fact engage in wrongful conduct suggests two other possibilities. The first possibility is that the [applicant] is, for whatever reason, in such a state of denial as to be unable to appreciate the difference between reality and imagination with respect to what he did and did not do. If this is the case, a necessary premise for rehabilitation (and for the ability to practice law)—the ability to appreciate the reality of what one is doing and has done—is missing from the [applicant].

"The second possibility is that the [applicant's] ability to form reasonably acceptable moral and legal conclusions about his conduct—and his ability to appreciate and apply the commonly-agreed upon meaning of the law and the ethical requirements of the legal profession—are so far from adequate that he similarly has no business practicing law. . . . These were possibilities that the standing committee should have explored in the present case." (Citations omitted; internal quotation marks omitted.) Id., 466 n.33.

These two footnotes simply do not stand for the proposition that an individual need not exhibit good moral character under the criteria set forth in *Ganim*, even if an individual plausibly reconciles his or her claim of innocence with the evidence that formed the basis of his or her conviction. Instead, as the court in *Ganim* stated, an applicant's "denial of responsibility, like the convictions themselves, is simply another piece of evidence to consider, and to be given such weight as it deserves in light of the circumstances." (Internal quotation marks omitted.) Id., 465.

"The law requires a reformation of character as demonstrated by an applicant's more recent life and conduct. The more egregious the misconduct resulting in disbarment, the greater the proof of moral character and trustworthiness required for reinstatement." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rapoport*, 119 Conn. App. 269, 282, 987 A.2d 1075, cert. denied, 297 Conn. 907, 995 A.2d 639 (2010). "Thus, when courts consider the evidence introduced in reinstatement proceedings of an applicant's current fitness, they must evaluate it against the backdrop of the applicant's prior misconduct, and [inquire] whether the former is of sufficient weight to overcome the latter." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 456.

In the present case, the defendant argues that he did not need to accept his established conviction with sincerity and honesty because he proved his claim of innocence to the committee. This argument only further exhibits the defendant's confusion with the reinstatement process, particularly, his belief that his claim of innocence presupposes that all other criteria from *Ganim* are met, which is simply not what the committee found. The committee was not investigating or recommending guilt or innocence; instead, the committee was charged with determining whether the defendant had been rehabilitated, as well as whether he possessed good moral character and the requisite fitness to practice law, which must all be "viewed against the backdrop of the defendant's misconduct and the disrepute it brought" to both the defendant and the legal profession. Id., 462.

Although this failure to acknowledge or express remorse for misconduct is not the sole factor determinative of the defendant's application for reinstatement, it

was appropriate for the committee to consider, particularly in light of its concerns about the defendant's candor and demeanor before the committee. See id., 464–65. Additionally, it plays a role in whether the defendant has exhibited to the committee that he has been rehabilitated since his conviction. Particularly, the committee expressed significant concerns that more than ten years had passed since the defendant's suspension, but he continues to insist that he did not commit any wrongdoing. This led the committee to state that rehabilitation would be impossible so long as the defendant fails to acknowledge that he committed a crime. Thus, although failing to acknowledge or exhibit remorse for his misconduct does not alone bar the defendant's application for reinstatement, it may be considered in conjunction with all of the other factors utilized to determine if the defendant has met his burden to show rehabilitation, good moral character, and a present fitness to be reinstated to the legal profession.[8] See id., 467.

Accordingly, we conclude that the court did not err in finding that the committee did not act arbitrarily or unreasonably, or in abuse of its discretion when issuing

[8] It must be restated that "[a]ttorney discipline exists for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them. . . . An attorney as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, by misconduct in any capacity, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. . . . Therefore, [i]f a court disciplines an attorney, it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Ganim*, supra, 311 Conn. 452–53.

its recommendation that the defendant's application for reinstatement to the bar be denied.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KEEMO WHITE (AC 44242)

Bright, C. J., and Cradle and Seeley, Js.

Syllabus

Convicted of the crime of assault in the first degree with a firearm as an accessory, the defendant appealed to this court. He claimed, inter alia, that the trial court's jury instructions improperly omitted an essential element of that offense, namely, the accessory's intent that the principal would use a firearm during the commission of the offense. The defendant had been dating A's sister, M. A suspected that the defendant had been beating M and drove with S to M's apartment building to check on her. The victim, G, drove to the apartment building separately and joined A and S inside the building. When the defendant arrived shortly thereafter, a physical altercation ensued between A and the defendant during which a gun fell out of the defendant's pocket. G, S and A then fled the building and entered G's car while the defendant ran to a parking lot across the street and conferred with another man. The defendant and the other man, who was armed with a gun, then ran to G's car, which G was unable to start, and, together, pulled on the handle of the driver's side door in an attempt to open the door and pull G out of the driver's seat. G attempted to flee when they were able to open the door but was shot by the defendant's acquaintance. At trial, the defendant contended that the court should instruct the jury on accessorial liability in accordance with the requirements for conspiratorial liability set forth in *State* v. *Pond* (315 Conn. 451), which held that a defendant must intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement. The trial court rejected the defendant's reliance on *Pond* and instead instructed the jury in accordance with *State* v. *Gonzalez* (300 Conn. 490) and *State* v. *Artis* (136 Conn. App. 568) that an accomplice may be held criminally liable for the principal's use of a weapon even when the accessory did not intend or even know that a weapon would be used to commit the crime. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction, which was based on his assertion that his actions did not show that he intended to physically harm G or

intended that his accomplice would use a firearm: the jury reasonably could have inferred that the defendant intended to cause physical injury, as he enlisted his acquaintance's aid to pursue G, A and S after the initial altercation with A ended, the defendant knew that his acquaintance had a gun while the two men forcibly tried to open the car door as G pleaded with them not to shoot, and the jury reasonably could have credited the testimony of G and A that, while inside G's car, they saw the defendant's acquaintance with a gun in his hand and the defendant pulling on the car door's handle, which was corroborated by video from a nearby surveillance camera, in an attempt to engage in a physical altercation with G; moreover, the state was not required to prove, as the defendant claimed, that he intended that his acquaintance use a firearm or that he knew his acquaintance had a firearm, as neither of those factors were elements of the offense with which the defendant was charged; furthermore, despite the defendant's contentions that it was speculative for the jury to conclude that he intended to harm G and that the jury reasonably could have drawn alternative inferences from the evidence, the fact that the jury might have reached one of the different conclusions the defendant proffered did not undermine the reasonableness of the conclusion that it did reach.

2. The defendant's claim that the trial court improperly declined to instruct the jury that he had to intend, or to know, that his acquaintance would discharge a firearm, was unavailing, as those criteria were not elements of accessorial liability under § 53a-59 (a) (5):

a. Contrary to the defendant's assertion, a plain reading of § 53a-59 (a) (5) makes clear that it includes neither a specific intent nor a general intent requirement as to the discharge of a firearm, which is merely the means by which the injury must occur, and the defendant's claim that an accomplice should at least have knowledge of the firearm, as required under federal law, was unavailing, as this state's Supreme Court, having addressed a similar issue in *Gonzalez*, is the ultimate authority on the interpretation of Connecticut statutory law; moreover, there was no merit to the defendant's contention that, because he was unable to avail himself of the statutory (§ 53a-16b) affirmative defense regarding his knowledge that his accomplice had a firearm, § 53a-59 (a) (5) must include an intent or knowledge element with regard to the use of a firearm, as the legislature's exclusion of that crime from the list of crimes in § 53a-16b evinced its intent that lack of intent or knowledge of a firearm was not a valid defense; furthermore, there was no merit to the defendant's claim that the court should have instructed the jury in accordance with the allegation in the state's information that he intended that a firearm be used, as an information alters neither the statutory elements of the charged offense nor what the court must include in its jury instructions.

b. This court rejected the defendant's request that it overrule binding precedent holding that an accomplice need not have knowledge of or

intent regarding an aggravating factor that requires that the principal have only general intent, as this court, being an intermediate appellate body, was bound to follow the precedent from our Supreme Court and other panels of this court.

Argued May 10—officially released September 20, 2022

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gold*, *J.*; verdict of guilty of assault in the first degree as an accessory; thereafter, the court denied the defendant's motions for a new trial, to set aside the verdict and for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Anthony Bochicchio*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Keemo White, appeals from the judgment of conviction, rendered following a jury trial, of being an accessory to assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (5). On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction of assault in the first degree as an accessory, and (2) the trial court improperly instructed the jury by omitting an essential element of the offense, namely, the defendant's intent or knowledge that the principal

would discharge a firearm during the offense.[1] We affirm the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, and procedural history inform our review of the defendant's claims. On the evening of July 24, 2017, Anna Kistoo (Anna), Lisa Sattaur, and Michael Gordon drove to Sigourney Street in Hartford to locate Anna's sister, Melissa Kistoo (Melissa), who was dating the defendant. Anna suspected that Melissa "was getting [beaten] up by [the defendant]" and wanted to check on her. They took two separate cars, with Anna and Sattaur in one car and Gordon in the other. Upon arriving, Gordon parked in front of 196 Sigourney Street. Anna and Sattaur parked on a cross street. Anna and Sattaur then searched the mailboxes of several apartment buildings and eventually found Melissa's name on a mailbox for one of the apartments. Anna and Sattaur approached what they believed to be Melissa's apartment while Gordon, who had joined the two women in the building, remained on the staircase leading up to the floor where the apartment was located.

The defendant arrived shortly thereafter and walked past where Gordon was standing on the staircase, at which point the two nodded at each other. Upon seeing the defendant, Anna approached him and asked where her sister was. About ten to fifteen seconds later, the interaction devolved into a physical altercation. During the "tussle," a gun fell from the defendant's pocket onto the floor. Gordon, who was still standing on the steps, saw the gun on the floor and yelled to Anna and Sattaur "to run to the car [because] there was a gun in the hallway." The defendant then exited the building via

[1] Although the defendant addresses his instructional claim first in his appellate briefs, we begin with his sufficiency of the evidence claim because, if he prevails on this claim, he is entitled to a judgment of acquittal rather than to a new trial. See, e.g., *State* v. *Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007).

the back door and ran to the parking lot across the street, where he conferred with a male acquaintance.

After the altercation, Gordon, Sattaur, and Anna also ran out of the back door of the building and returned to Gordon's car, as it was the closest. Thereafter, the defendant and his acquaintance, who was holding a firearm, ran from the parking lot across the street toward Gordon's car. Gordon observed the defendant and his acquaintance running toward his car and attempted to start the car, but it would not start. While Gordon, Sattaur, and Anna were inside Gordon's car, the defendant and his acquaintance together attempted to open the driver's side door and pull Gordon from the car. While this was happening, Gordon and Anna observed that the acquaintance had a gun in his hand. Gordon then raised his hands and yelled that he "didn't do nothing" and did not "have anything, don't shoot, don't shoot." The defendant and the acquaintance eventually were able to open Gordon's door, at which point Gordon exited the car and attempted to flee but was shot in the hip by the defendant's acquaintance.[2] Shortly after Gordon was shot, Sattaur was able to start Gordon's car. Sattaur and Anna then drove to where Gordon was lying on the ground, picked him up, and drove him to Saint Francis Hospital and Medical Center in Hartford.

After Gordon was admitted to the hospital, Anna and Sattaur were accompanied by responding officers to the police station to give statements. On July 25, 2017,

[2] At trial, the state introduced into evidence two surveillance videos from an apartment building at 195 Sigourney Street, which captured the events of the evening. The video shows the defendant running into a gated parking lot at 195 Sigourney Street before running back across the street toward Gordon's vehicle with his acquaintance close behind him. The video also shows the defendant and his acquaintance attempting to open Gordon's car door. When the door opens, Gordon exits and begins to run down the street prior to being shot.

Gordon, Sattaur, and Anna each separately identified the defendant from a photographic array, but the individual who shot Gordon was never identified or apprehended. The state charged the defendant as an accessory to assault in the first degree in violation of §§ 53a-8 (a) and 53a-59 (a) (5), and with conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-59 (a) (5). The case was tried to a jury over the course of three days, beginning on September 16, 2019.

Following the trial, the jury found the defendant guilty of assault in the first degree by means of a firearm as an accessory and not guilty of the conspiracy charge. The defendant filed a motion for a new trial, a motion to set aside the verdict, and a motion for a judgment of acquittal. The court denied the motions and sentenced the defendant to fifteen years of incarceration, execution suspended after seven and one-half years, followed by three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that there was insufficient evidence to support his conviction of being an accessory to assault in the first degree. He argues that "[his] actions that day did not show that he intended to physically injure Gordon. Nor did they show that [he] intended the principal use a firearm." We are not persuaded.

The standard of review for a sufficiency of the evidence claim is well settled. "[A] defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and

no more than, the evidence introduced at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"[O]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether

there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 424–26, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

The defendant in the present case was charged with assault in the first degree by means of a firearm as an accessory in violation of §§ 53a-8 and 53a-59 (a) (5). "[F]or the purposes of determining criminal liability, it is of no consequence whether one is labeled an accessory or a principal." *State* v. *Hines*, 89 Conn. App. 440, 447, 873 A.2d 1042, cert. denied, 275 Conn. 904, 882 A.2d 678 (2005). Thus, "to establish a person's culpability as an accessory to a particular offense, the state must prove that the accessory, like the principal, had committed each and every element of the offense." *State* v. *Patterson*, 276 Conn. 452, 483, 886 A.2d 777 (2005).

Section 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm." Thus, "to prove a person guilty as a principal of assault in the first degree [under § 53a-59 (a) (5)], the state must prove beyond a reasonable doubt that (1) the person caused physical injury to another person; (2) that he did so while acting with the intent to cause physical injury to the other person or a third person; and (3) that he caused such physical injury to the other person by means of the discharge of a firearm." *State* v. *Raynor*, supra, 175 Conn. App. 427.

"[A] conviction under § 53a-8 requires [the state to prove the defendant's] dual intent . . . [first] that the accessory have the intent to aid the principal and [second] that in so aiding he intend to commit the offense with which he is charged. . . . Additionally, one must

knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Citation omitted; internal quotation marks omitted.) *State* v. *Heinemann*, 282 Conn. 281, 313, 920 A.2d 278 (2007).

Accordingly, "establishing a defendant's guilt as an accessory to that offense under §§ 53a-59 (a) (5) and 53a-8 requires proof of the following essential elements: (1) that the principal offender violated § 53a-59 (a) (5) by causing physical injury to another person by means of the discharge of a firearm while acting with the intent to cause physical injury; (2) that the defendant solicited, requested, importuned or intentionally aided the principal offender to engage in the conduct by which he violated § 53a-59 (a) (5); and (3) that when the defendant intentionally aided the principal offender to engage in such conduct, the defendant was acting with the intent to cause physical injury to another person." *State* v. *Raynor*, supra, 175 Conn. App. 427–28.

"To act intentionally, the defendant must have had the conscious objective to cause the [desired result] . . . . Intent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . [T]he defendant's state of mind at the time of the shooting may be proven by his conduct before, during and after the shooting. Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude toward the victim by the defendant that is probative of the defendant's mental state." (Internal quotation marks omitted.) Id., 431–32; see also *State* v. *Vasquez*, 68 Conn. App. 194, 207, 792 A.2d 856 (2002) ("[i]t is axiomatic that a factfinder may infer an intent to cause . . . physical injury from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading up to and immediately following the incident" (internal quotation

marks omitted)). As noted previously, the defendant claims on appeal that the evidence at trial was insufficient to prove beyond a reasonable doubt that (1) he intended to cause physical injury to Gordon or (2) that he intended that the principal would inflict that injury by means of the discharge of a firearm. We conclude that the evidence was sufficient to prove the defendant's intent to cause physical injury and that the state was not required to prove that the defendant intended that the principal inflict the injury by means of the discharge of a firearm.

A

At the outset, we note that the parties agree that Gordon was physically injured by means of the discharge of a firearm by a principal offender other than the defendant. The defendant argues, however, that there was insufficient evidence to sustain his conviction of assault in the first degree as an accessory because his "actions that day did not show that he intended to physically injure Gordon." Specifically, the defendant claims that "the evidence does not show what [his] intention was when he ran to Gordon's car and was trying to open the door. It does not show that he intended to aid the principal in his endeavor, nor does it show that he intended to physically injure someone."[3]

[3] The defendant's appellate briefs make only passing reference to whether the evidence before the jury proved that the defendant intended to aid the principal in the assault. The defendant simply attempts to analogize the facts of the present case to those of *State* v. *Bennett*, 307 Conn. 758, 768, 59 A.3d 221 (2013), in which "the evidence reveal[ed] little about" the defendant's actions prior to arriving at the scene of the murder and during the brief period between his arrival and the shooting at issue. In that case, our Supreme Court found the evidence insufficient for the trial court to find the defendant guilty beyond a reasonable doubt of being an accessory to murder. See id., 774. In the present case, the defendant asserts that, as "in *Bennett*, there is no proof of what [he] initially said to the principal. In fact, this incident was not planned nearly as carefully as *Bennett*. . . . Also, although [the defendant] and the principal acted together to open the car doors, he did not do anything to aid, encourage or facilitate the shooting."

In support of his argument, the defendant further asserts that the "evidence . . . was incredibly sparse" and that, as such, the inference that he intended to harm Gordon was speculative. The defendant points to several alternative inferences that could have been drawn, including that, "from his perspective [Sattaur, Anna, and Gordon] planned on continuing to assault him," and, in that context, he "ran to get a friend." The defendant maintains that there was "no evidence as to what [the defendant and his acquaintance] said to each other" or "evidence that [the defendant] knew the [other man] had a gun." Further, the defendant contends that, because he ran ahead of his acquaintance when running toward Gordon's car, it is "more likely that [the defendant] saw the gun when they got to Gordon's car and tried to open the door. But by then, whatever the principal intended to do was out of [the defendant's] control." The defendant thus argues, based on the evidence adduced at trial, that "it is difficult to envision that [he] had time to form any intent at all," given that the "entire incident occurred in a matter of seconds." We are not persuaded.

There is ample evidence from which the jury reasonably could have found that the defendant intended to cause physical injury to Gordon. The evidence showed that, after disengaging from his altercation with Anna and Sattaur, the defendant ran to a parking lot where

In making this argument, the defendant overlooks that, in *Bennett*, the court noted that an accessory may be found to have intended to aid the principal where he "actively participated in [the crime] through acts beneficial to the principal such as identifying the victim, taking the principal to the victim, distracting the victim, acting as a lookout to prevent interruption to the murder or facilitating the principal's escape." *State* v. *Bennett*, supra, 307 Conn. 769. Given that the evidence admitted in the present case showed that the principal ran to Gordon's car only after talking with the defendant and that the defendant worked in tandem with the principal to open Gordon's car door, which immediately preceded the assault on Gordon, the jury reasonably could have concluded that the defendant intended to aid the principal in the assault.

he met the principal, who had a gun, and then ran to confront the trio in Gordon's car. The evidence further showed that, although Anna, Sattaur, and Gordon exited the building the same way the defendant did, they were not pursuing him. To the contrary, they ran away from the defendant to Gordon's car. The defendant and the principal then ran to the car after Gordon, Sattaur, and Anna had entered it. On the basis of this evidence, the jury reasonably could have inferred that the defendant solicited the principal's aid in confronting the trio.

In addition, the jury reasonably could have credited the testimony of Gordon and Anna that the defendant and the principal were both pulling on the door handle of Gordon's driver's side door. Their testimony was corroborated by a video recorded from a surveillance camera at a nearby building. See footnote 2 of this opinion. From this evidence, the jury reasonably could have inferred that the defendant and the principal were attempting to open the car door to engage in a physical altercation with Gordon. Gordon and Anna testified that they saw the principal with a gun in his hand while the two men were trying to open Gordon's car door. Gordon further testified that he then raised his hands and yelled that he "didn't do nothing" and did not "have anything, don't shoot, don't shoot." The evidence also showed that, despite Gordon's pleas, the defendant and the principal continued to pull on the door handle until the door opened, Gordon fled, and the principal shot him.

From this evidence, the jury reasonably could have found beyond a reasonable doubt that the defendant intended to cause physical injury because he enlisted assistance from another to pursue Gordon, Anna, and Sattaur after the initial confrontation ended, forcibly opened Gordon's car door to get to Gordon, knew that the principal had a gun, and continued to force the car door open after Gordon's pleas of "don't shoot, don't shoot." The fact that the jury might have reached one

of the conclusions suggested by the defendant does not undermine the reasonableness of the conclusion it did reach. See, e.g., *State* v. *Raynor*, supra, 175 Conn. App. 425 ("the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence" (internal quotation marks omitted)). Thus, because the evidence viewed in the light most favorable to sustaining the verdict was sufficient to prove that the defendant possessed the requisite intent to cause physical injury, his sufficiency of the evidence claim fails.

B

The defendant next claims that, if "an essential element of accessory to assault first with a firearm is that the defendant intend the principal fire the gun or know the principal has a gun," then "the evidence is insufficient to prove that element." For the reasons discussed in part II of this opinion, the state was not required to prove that the defendant intended that the principal use a firearm or that the defendant knew that the principal had a firearm, as neither is an element of the charged offense. Accordingly, we reject the defendant's sufficiency argument on this point.

II

We next turn to the defendant's claim that the trial court's jury instructions improperly omitted an essential element of the offense of assault in the first degree with a firearm as an accessory. Specifically, the defendant argues that "[a]n accessory to assault first with a firearm must have the specific intent that the physical injury happen from the discharge of the firearm, or the general intent that the principal discharge a firearm, or the knowledge that the principal is going to use a firearm to inflict the injury." In the alternative, the defendant argues that "the case law that holds that an accomplice does not need to have knowledge or intent of an

aggravating factor that requires the principal have only general intent should be overruled." The state responds that the court "properly rejected the defendant's request to add an element to accessorial liability for the crime of assault in the first degree that is not contained in the statutes." We agree with the state.

We begin with our standard of review. "[W]e review jury instructions to determine whether, read in their entirety, they omitted an essential element of the crime charged, thus creating a reasonable possibility that the jury was misled in reaching its verdict." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 300 Conn. 490, 499, 15 A.3d 1049 (2011). The defendant's claim, which requires us to determine whether a particular mental state is an essential element of being an accessory to assault in the first degree with a firearm, raises a question of statutory interpretation, over which we exercise plenary review. See, e.g., *State* v. *Brown*, 192 Conn. App. 147, 152, 217 A.3d 690 (2019).

The record reveals the following additional relevant facts and procedural history. On September 17, 2019, the court held an on-the-record charge conference with the parties. At the charge conference, defense counsel requested that the court instruct the jury, with regard to the charge of assault in the first degree as an accessory, that the state had to prove beyond a reasonable doubt "that the defendant intended [the] physical injury [be caused] . . . specifically by means of a firearm." In so requesting, the defendant argued that *State* v. *Pond*, 315 Conn. 451, 108 A.3d 1083 (2015), established a similar intent requirement for conspiratorial liability and should be extended to accessorial liability. In *Pond*, our Supreme Court held that, "to be convicted of conspiracy, a defendant must specifically intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement." Id., 453. In the present case, the defendant

argued that this extension is logical, as the policy behind the specific intent requirement of conspiracy—that conspirators should not be punished for "conspiring to commit crimes that they never agreed or intended to commit"—applies with equal force to accessorial liability. The court indicated that it would review *State* v. *Pond*, supra, 451, before ruling on the issue, surmising that the defendant wanted the *Pond* conspiracy standard to be applied to the accessory charge.[4]

Although the defendant conceded that our Supreme Court in *Pond* specifically addressed the issue of accessorial liability and distinguished it from conspiratorial

[4] In *State* v. *Pond*, supra, 315 Conn. 454, the defendant was convicted of conspiracy to commit robbery in the second degree in violation of General Statutes (Rev. to 2007) §§ 53a-48 (a) and 53a-135 (a) (2). In that case, the defendant claimed that the trial court had improperly failed to instruct the jury that, to find him guilty of the conspiracy charge, he must have specifically intended that his coconspirator would display or threaten the use of what the coconspirator would represent to be a deadly weapon or dangerous instrument. Id., 454–55. In so arguing, the defendant pointed to the language of § 53a-48 (a), which requires the state to prove that the defendant acted "with intent that conduct constituting a crime be performed," and argued that the statute should be read as requiring that an "accused specifically intend that each part of each element of . . . the crime that forms the object of the conspiracy, be performed." *State* v. *Pond*, supra, 468. The defendant further argued that "any ambiguities in the text of § 53a-48 (a) may be resolved by comparing the statutory language with that of . . . § 53a-8 (a), which governs accomplice liability, and § 53a-49 (a), which governs criminal attempt." Id., 469. Our Supreme Court agreed, stating: "[I]f the legislature had intended to impose the same kind of strict liability for conspiracy as it did for accomplice liability and criminal attempt, it would have used the same statutory language to characterize the respective mens rea requirements. It did not. . . .

"[T]he legislature, in defining the requisite intent for conspiracy in § 53a-48 (a), declined to use the language from §§ 53a-8 (a) and 53a-49 (a) providing that the intent necessary to violate those statutes is identical to the mental state required for commission of the underlying offense. We presume that this choice of statutory language was purposeful and, therefore, that the legislature did not intend that the mens rea requirement for conspiracy would mirror that of the object offense. Accordingly, we agree with the defendant that the decidedly most reasonable interpretation of § 53a-48 (a) is that, to conspire to commit robbery in the second degree in violation of §§ 53a-135 (a) (2) and 53a-48, a defendant must specifically intend that the

liability, he asked the trial court "to reconsider [*Pond*'s] holding" and use the same intent language for both the conspiracy and accessory instructions. The state argued that *Pond* "directly address[ed] this issue of the difference between conspiracy and accessory," and requested that the court "apply *Pond* as it is and not expand what it currently requires the court to do."

The trial court agreed with the state and denied the defendant's request to charge based on the court's reading of *State* v. *Pond*, supra, 315 Conn. 451, *State* v. *Gonzalez*, supra, 300 Conn. 490,[5] and *State* v. *Artis*, 136 Conn. App. 568, 47 A.3d 419 (2012), rev'd on other grounds, 314 Conn. 131, 101 A.3d 915 (2014). In so ruling, the court observed that *Pond* distinguished accessorial liability from conspiratorial liability and that *Gonzalez* and *Artis* held that an accomplice may be held criminally liable for the principal's use of a weapon, even when the accessory did not intend or even know that a weapon would be used to commit the crime. See *State* v. *Pond*, supra, 469–70; *State* v. *Gonzalez*, supra, 503–505; *State* v. *Artis*, supra, 584. Further, the court noted that giving the requested instruction would involve changing "the first element of assault in the first degree to a different mental state than the statute provides."

Discussing this court's decision in *Artis*, the trial court noted: "Importantly, *Artis*, which, like *Pond*, also

planned robbery will involve the display or threatened use of a purported weapon." (Citations omitted; internal quotation marks omitted.) Id., 469–71.

[5] The issue in *Gonzalez* concerned a jury instruction regarding an element of the offense of manslaughter in the first degree with a firearm, specifically, "the defendant's intention that the principal would use, carry or threaten the use of a firearm during the commission of the offense." *State* v. *Gonzalez*, supra, 300 Conn. 492. As we will discuss subsequently in this opinion, our Supreme Court held that no such intent requirement existed and that "Connecticut case law [permits] the imposition of accessorial liability pursuant to § 53a-8, without requiring that the defendant intend to satisfy a criminal statute's aggravating circumstance in cases [in which] that aggravating circumstance does not [require] a specific mental state . . . ." Id., 506.

cites [*Gonzalez* and] deals with precisely the charge that we have here: assault in the first degree [as an accessory], albeit under subsection (a) (1) rather than the subsection (a) (5) case that we have.

"*Artis* holds that, in an assault one case, where the defendant is charged under a theory of accessorial liability, the state is not required to prove that the defendant intended to cause serious physical injury, specifically, by means of a dangerous instrument, or even to prove that the defendant was even aware that another participant in the crime possessed a dangerous instrument.

"As *Artis* points out, in the crime of assault in the first degree, the use of a dangerous instrument and, by analogy, [the] use of a firearm in our case, simply represents the means by which the defendant is alleged to have participated in causing the serious physical injury. But, to be culpable, the defendant only needs to have the intent to cause serious physical injury, not the intent to do so with a dangerous instrument.

"So, in light of those cases, I will not be instructing that, [for] the defendant to be convicted [as] an accessory, he must have intended to cause physical injury, specifically, by use of a firearm."

A

Because the defendant's claim centers on the elements of the crime of which he was convicted, we begin with the language of the relevant statutes. "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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Winakor* v. *Savalle*, 343 Conn. 773, 781, 276 A.3d 407 (2022).

The statutory provision governing accessorial liability is § 53a-8 (a), which provides that "[a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

It is well established that there is no legal distinction between principal and accessorial liability. See, e.g., *State* v. *Flemke*, 315 Conn. 500, 508, 108 A.3d 1073 (2015). "Instead, [t]he modern approach is to abandon completely the old common law terminology and simply provide that a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime. . . . The legislature adopted this view and expressed it in . . . § 53a-8 (a). Accordingly, accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Internal quotation marks omitted.) Id.

Because an accessory is legally accountable for the conduct of another who commits a crime, for purposes

of imposing criminal liability, the state need not establish that the defendant "[knew] of or endorse[d] every act of his coparticipant in the crime." *State* v. *McCalpine*, 190 Conn. 822, 832, 463 A.2d 545 (1983); id., 832–33 ("[c]ontrary to the defendant's allegations, [our case law] impose[s] no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon"); see also *State* v. *Avila*, 223 Conn. 595, 609, 613 A.2d 731 (1992) (affirming *State* v. *McCalpine*, supra, 832–33).

Rather, "a conviction under § 53a-8 requires [the state to prove the defendant's] dual intent . . . [first] that the accessory have the intent to aid the principal and [second] that in so aiding he intend to commit the offense with which he is charged. . . . Additionally, one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 499–500. That being said, "Connecticut case law remains consistent . . . in permitting the imposition of accessorial liability pursuant to § 53a-8, without requiring that the defendant intend to satisfy a criminal statute's aggravating circumstances in cases [in which] that aggravating circumstance does not [require] a specific mental state and requires only that the *principal* act with the general intent to perform the proscribed act." (Emphasis added.) Id., 506.

We find particularly instructive our Supreme Court's decision in *Gonzalez*. In that case, the defendant similarly claimed that the trial court's jury instructions improperly omitted an essential element of the offense of manslaughter in the first degree with a firearm as an accessory. "Specifically, the defendant claim[ed] that accessorial liability under § 53a-8 encompasses both the specific intent to cause a result, in this case, to cause the victim serious physical injury, as well as the

general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm." (Internal quotation marks omitted.) Id., 495. The court rejected this claim.

After reiterating the dual intent standard of § 53a-8, the court reviewed the elements of the underlying substantive crime, manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a.[6] "Lacking a specifically enumerated mental state, the statutory language of § 53a-55a clearly indicates . . . that the firearm element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to use a firearm in the commission of the offense." Id., 502. The court then discussed the additional elements of accessorial liability under § 53a-8 for violations of § 53a-59a and the seminal case in this area, *State* v. *McCalpine*, supra, 190 Conn. 831.

Finding that "*McCalpine* remains good law with respect to the proposition that the accessory statute's requirement that the defendant act with the mental state required for commission of an offense drops out of the calculation when the aggravating circumstance does not require proof of any particular mental state"; (internal quotation marks omitted) *State* v. *Gonzalez*, supra, 300 Conn. 505; the court held that, "[w]hen a defendant is charged with a violation of § 53a-55a as an accessory, the state need not prove that the defendant intended the use, carrying or threatened use of the firearm. . . . Proof of the intent element is satisfied if the principal

[6] General Statutes § 53a-55a (a) provides in relevant part: "A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ."

in fact used the firearm." (Citation omitted; internal quotation marks omitted.) Id., 510.

Relying on the reasoning in *Gonzalez*, this court in *Artis* held that, in the case of accessory to assault in the first degree by means of a dangerous instrument in violation of §§ 53a-8 and 53a-59 (a) (1), "the state was not required to prove that the defendant intended to cause serious physical injury *by means of a dangerous instrument*, or to prove that the defendant was even aware that another participant had a dangerous instrument or knife. . . . The use of a dangerous instrument simply represents the means by which the defendant is alleged to have participated in causing the serious physical injury, but to be culpable, the defendant only needs to have the intent to cause serious physical injury to another person, not the intent to do so with a dangerous instrument." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Artis*, supra, 136 Conn. App. 584–85; see also *State* v. *Miller*, 95 Conn. App. 362, 371–77, 896 A.2d 844 (holding that crime of first degree manslaughter with firearm did not require proof that defendant, as accomplice, intended to use firearm), cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006); *State* v. *Tucker*, 9 Conn. App. 161, 167–68, 517 A.2d 640 (1986) (holding that crime of accessory to assault in second degree does not require intent that injury be caused by means of dangerous instrument or deadly weapon but, rather, requires only intent to cause physical injury to another person).

We conclude that *Gonzalez* and *Artis* are directly applicable to the defendant's claim in this case. The requirement in § 53a-59 (a) (5) that the physical injury be inflicted "by means of the discharge of a firearm" is similar to the requirement in § 53a-55a (a) that a person is guilty of manslaughter in the first degree with a firearm if he "uses, or is armed with and threatens the use of or displays or represents by his words or

conduct that he possesses a . . . firearm" when committing the crime of manslaughter. If the state was not required to prove in *Gonzalez* that the defendant, as an accessory, intended or knew that the principal would use a firearm when committing manslaughter, the state in the present case was not required to prove that the defendant intended or knew that the principal would assault Gordon by means of discharging a firearm. Similarly, the "by means of a dangerous instrument" language at issue in *Artis* is virtually identical in structure and application to the "by means of the discharge of a firearm" language at issue in the present case. "The statutory language as to the aggravating circumstances in [§§ 53a-55a and 53a-59 (a) (1)] lacks the requirement of specific intent." *State* v. *Artis*, supra, 136 Conn. App. 584. Consequently, we see no basis for reaching a different result in this case.

Nevertheless, the defendant attempts to distinguish this case law in a variety of ways. We address his specific arguments in turn.

The defendant first argues that the "by means of the discharge of a firearm" language of § 53a-59 (a) (5) is not merely an aggravating factor but is an essential element of the crime that required the state to prove that he specifically intended the principal to discharge the firearm during the assault. According to the defendant: "For a principal to be charged with [a violation of] § 53a-59 (a) (5), he must inflict the injury in a very specific way—through the discharge of a firearm. No other method will satisfy the elements of the statute. The level of specificity the statute requires implies that the principal must have some premeditation or at least a plan to shoot the gun, even if it is formed moments before the shot is fired. This is very different from other aggravating factors involving weapons where the use of the weapon can encompass a wide range of actions, from simply carrying the weapon to using it to inflict

the injury in whatever way seems efficacious at the moment."

The defendant's assertion, however, finds no support in the relevant statutory language. Section 53a-59 (a) (5) does not require "premeditation" or "a plan to shoot the gun" in order to violate the statute. A plain reading of the statute makes clear that there is no particular mental state attached to the element requiring that a defendant cause injury "by means of the discharge of a firearm." See, e.g., *State* v. *Rosado*, 107 Conn. App. 517, 537, 945 A.2d 1028 (holding that intent to use firearm was not element of § 53a-59 (a) (5) but that offender must intend only to cause physical injury), cert. denied, 287 Conn. 919, 951 A.2d 571 (2008); *State* v. *Washington*, 15 Conn. App. 704, 710–11, 546 A.2d 911 (1988) (holding that state need not establish intent that injury be caused by means of deadly weapon or dangerous instrument to convict defendant of assault in first degree).

The only mental state required under § 53a-59 (a) (5) is the specific intent "to cause physical injury." See, e.g., *State* v. *Rosado*, supra, 107 Conn. App. 537. Had the legislature intended there to be a mental state requirement as to the means of inflicting the injury, it could have easily set forth such a requirement in the statute by stating that the discharge had to be intentional or knowing. Because the legislature declined to impose such a requirement, there is no basis for us to do so. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 218, 942 A.2d 1000 (2008) ("absence of any [mental state] requirement demonstrates that the legislature did not intend to make it an element of the crime" (internal quotation marks omitted)).

Accordingly, the defendant's interpretation of subsection (a) (5) of § 53a-59 as requiring the principal to "have some premeditation or at least a plan to shoot the

gun" finds no support in either the statutory language or the case law interpreting that language.

The defendant's assertion that, because "the charge [of assault in the first degree with a firearm] must be accomplished only by the discharge of a firearm . . . it follows that the accomplice must specifically intend that the principal fire a gun to [cause] the injury" is also unpersuasive. That the offense at issue here can only be committed via the discharge of a firearm does not itself require that any particular mental state accompany the discharge. It is merely the means by which the injury must occur. See, e.g., *State* v. *Artis*, supra, 136 Conn. App. 584. As previously stated, § 53a-59 (a) (5) requires no mental state with regard to the discharge of a firearm. Because the statute does not require a specific mental state with regard to the firearm element of the offense, to be culpable, the defendant need have only the intent to cause physical injury to another person, not the intent to do so with a firearm. See id., 584–85; see also *State* v. *Rosado*, supra, 107 Conn. App. 537.

The defendant argues, alternatively, that an accomplice must have, if not the specific intent that the principal use a firearm, at least the general intent that the principal act volitionally in some way in discharging the firearm. Specifically, the defendant argues that the language, "causes such injury to such person or to a third person by means of the discharge of a firearm" within § 53a-59 (a) (5) is, at least, a general intent element. Therefore, according to the defendant, it follows that, because an accessory must act "with the mental state required for commission of [the] offense," the accessory should likewise have the general intent that the principal cause injury "by means of the discharge of a firearm." (Emphasis omitted.)

In support of his argument, the defendant relies on the concurring opinion of Justice Shea in *State* v. *McCal-*

pine, supra, 190 Conn. 833. In *McCalpine*, the defendant was convicted of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), which requires that the defendant commit the robbery while "armed with a deadly weapon . . . ." On appeal, the defendant in *McCalpine* argued that the intent element of § 53a-8 required that the accessory possess the intent to aid in the commission of the robbery as well as the intent that the principal do so while armed with a deadly weapon. Id., 831. The majority in *McCalpine* disagreed, stating that, "[t]o establish the guilt of an accused as an accessory . . . the state must prove criminality of intent and community of unlawful purpose. . . . The mental state of an [accessory] incorporated in § 53a-8 does not require that the accused know of or endorse every act of his coparticipant in crime." (Citation omitted.) Id., 832.

"In his concurrence, Justice Shea departed from that conclusion. Reasoning that 'the mental state required of an accomplice who is charged with a crime [cannot be] less than that which must be proved against a principal' . . . Justice Shea stated that '[t]his requirement must extend to those acts which enhance the degree of the crime as well as to those which constitute the basic crime itself. Otherwise an accomplice might be convicted of an offense although he did not entertain the same mental state required by statute for conviction of the principal.' " (Citation omitted.) *State* v. *Miller*, supra, 95 Conn. App. 373 (summarizing concurring opinion in *State* v. *McCalpine*, supra, 190 Conn. 833–34).

Although subsequent decisions have limited *McCalpine* to cases in which the charged offense required proof of a particular mental state; see, e.g., *State* v. *Crosswell*, 223 Conn. 243, 258 and n. 11, 612 A.2d 1174 (1992); "*McCalpine* remains good law with respect to the proposition that the accessory statute's requirement that the defendant act with the mental state required

for the commission of an offense drops out of the calculation when the aggravating circumstance does not require proof of any particular mental state." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 505.

As § 53a-59 (a) (5) does not require proof of any particular mental state on the part of the principal with regard to "the discharge of a firearm," the statute also does not require that the accomplice act with any particular mental state in order to be guilty of committing the offense. Thus, the state need not establish that a defendant generally intended that the principal use the firearm in some way during the assault to establish a violation of § 53a-59 (a) (5). See, e.g., *State* v. *Rosado*, supra, 107 Conn. App. 537 (intent to use firearm is not required under § 53a-59 (a) (5), which requires only "intent to cause physical injury . . . by means of the discharge of a firearm" (internal quotation marks omitted)). Put simply, the statute includes neither a specific nor a general intent requirement as to the discharge of a firearm.

The defendant next argues that, "[i]f this court does not believe the statute demands that the accomplice must specifically or generally intend that the principal fire a gun, the court should nonetheless hold that the accomplice should have knowledge of the gun." In support of this argument, the defendant urges this court to adopt the reasoning of *Rosemond* v. *United States*, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014). The state argues that the analysis in *Rosemond* is inapplicable because it involved an interpretation of "different statutory language in a different statute by a different legislative body." We agree with the state and conclude that *Rosemond* does not control the issue presented here.

In *Rosemond*, the United States Supreme Court interpreted the federal aiding and abetting statute, 18 U.S.C.

§ 2 (a), as it applied to a violation of 18 U.S.C. § 924 (c), which prohibits the use or carrying of a firearm "during and in relation to any crime of violence or drug trafficking crime." (Internal quotation marks omitted.) *Rosemond* v. *United States*, supra, 572 U.S. 67. "As at common law, a person is liable under [18 U.S.C.] § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." Id., 71. The court in *Rosemond* observed that, in the case of 18 U.S.C. § 924, the "intent must go to the specific and entire crime charged"; id., 76; specifically, in the case of *Rosemond*, to the "predicate crime plus gun use . . . ." Id. The Supreme Court then explained that it "previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." Id., 77. Therefore, an accomplice must "[know] that one of his confederates will carry a gun." Id.

The problem with the defendant's argument is that our Supreme Court never has interpreted § 53a-8 in the manner that the court in *Rosemond* interpreted 18 U.S.C. § 2. To the contrary, our Supreme Court consistently has held that the accessory is punished for the ultimate harm caused by the principal because the accessory helped the principal to bring about the actual harm even if he was unaware of how the principal was going to cause the harm. For example, in *State* v. *Pond*, supra, 315 Conn. 480, the court held: "[I]f one participant decides to brandish a gun in what had been planned as an unarmed robbery, his accomplices may be convicted of robbery in the first degree for their role in the crime, regardless of their knowledge or intention with regard to the weapon." See also *State* v. *Artis*, supra, 136 Conn. App. 583 (holding that §§ 53a-8 and 53a-59 (a) (1) "[do] not require that [the defendant] knew of

the presence of a knife, if indeed, that is the instrument that caused [the victim's] injuries"). Ultimately, in the absence of a potential conflict with the United States constitution or other federal law, our Supreme Court, and not the United States Supreme Court, is the ultimate authority on the interpretation and construction of Connecticut's statutes. See, e.g., *State* v. *Jenkins*, 298 Conn. 209, 263, 3 A.3d 806 (2010); see also *Johnson* v. *Manson*, 196 Conn. 309, 319, 493 A.2d 846 (1985) ("Connecticut is the final arbiter of its own laws"), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986).

As other state appellate courts have noted, *Rosemond* "plows no new constitutional ground and applies only to 18 U.S.C. § 924 (c) and the federal aiding-and-abetting statute [and] has no impact on state law." *Whitaker* v. *State*, 199 A.3d 1021, 1029 (R.I. 2019); see also *State* v. *Ward*, 473 S.W.3d 686, 693 (Mo. App. 2015) ("Nothing in *Rosemond* . . . suggests that its holding rests on any constitutional requirement or has any application to state criminal laws on accomplice liability; rather, the [c]ourt's analysis was merely a question of federal interpretation of the federal aiding and abetting statute. As such, it does not control here even where the federal statute and state aiding and abetting statutes are similar.").

The defendant's assertion, relying on the reasoning in *Rosemond*, that "it is incredibly unfair to dilute the elements of the crime when someone is charged as an accessory" misses the point. The elements of the offense of which the defendant was convicted are determined by the legislature, not the courts. The language adopted by our legislature establishes that an accessory, who intentionally aids the principal, merely is being held "liable for his role in an actual crime, whatever that role might be . . . ." *State* v. *Pond*, supra, 315 Conn. 487. Here, the assault would not have occurred were it not for the defendant's actions. The

defendant recruited the principal's presence to confront Gordon and aided the principal in ushering Gordon out of the car. The jury reasonably concluded that the defendant possessed the same specific intent required for the offense of assault in the first degree—the intent to inflict physical injury—and intentionally aided the principal who engaged in the conduct that aggravated the crime, i.e., caused physical injury by means of the discharge of a firearm. Whether the defendant knew that his cohort had a firearm is immaterial under the relevant statutes.

The defendant further argues that, because he may not rely on an affirmative defense under General Statutes § 53a-16b, the court "must find that the accomplice intend[ed] the shooting or [knew] of the gun . . . ." Conversely, the state argues "that the legislature has not authorized a defendant to reduce his culpability where he acts as an accessory to a first degree assault does not mean that a court is authorized to alter the elements of the crime enacted by the legislature." We agree with the state.

Section 53a-16b authorizes a defendant who was "not the only participant" in specific offenses[7] to raise an affirmative defense that he "(1) [w]as not armed with a . . . firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon." Section 53a-59 (a) (5) is not one of the enumerated crimes to which this affirmative defense applies. The defendant asserts that "one of the reasons the court [in *Gonzalez*] determined that the state did not need to prove [that] the accomplice intended the use of a firearm for manslaughter first with a firearm [in violation of § 53a-55a] was because the accomplice was able to avail himself of [the] affirmative defense

[7] These offenses include General Statutes §§ 53a-55a, 53a-56a, 53a-60a, 53a-92a, 53a-94a, 53a-102a and 53a-103a.

[in § 53a-16b]." The defendant argues, therefore, that, because, unlike in *Gonzalez*, § 53a-16b is not available to him, § 53a-59 (a) (5) must include an intent or knowledge element with regard to the use of a firearm. We are not persuaded.

That the legislature permitted § 53a-16b to be raised as an affirmative defense to violations of § 53a-55a has no bearing on this case. Had the legislature intended the result the defendant suggests it had two direct avenues available to it. First, as previously noted in this opinion, it expressly could have included an intent or knowledge requirement in § 53a-59 (a) (5). It did not. It is axiomatic that this court may not change the elements of a statute to alter its plain meaning. See, e.g., *Mayer* v. *Historic District Commission*, 325 Conn. 765, 776, 160 A.3d 333 (2017) ("it is well settled that [w]e are not permitted to supply statutory language that the legislature may have chosen to omit" (internal quotation marks omitted)). As the state correctly notes in its brief, "legislatures and not courts are responsible for defining criminal activity." *State* v. *Skakel*, 276 Conn. 633, 675, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). Second, the legislature could have included § 53a-59 (a) (5) in the list of offenses to which § 53a-16b applies. Again, it did not. See footnote 7 of this opinion. In fact, that § 53a-16b does not include assault in the first degree with a firearm indicates that the legislature did not want lack of intent or knowledge of a firearm to be a valid defense to an accessory's liability for the crime. See, e.g., *Mayer* v. *Historic District Commission*, supra, 775 ("we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded" (internal quotation marks omitted)).

Finally, the defendant argues that, "because the information charged [him] with intending that a firearm be used," the jury instruction should have included that

element. Specifically, the defendant argues that, because the information alleged that he "did solicit, request, command, importune or intentionally aid another person to intentionally cause physical injury, by means of a firearm," the state was required to prove that he intended that his cohort discharge the gun.[8] The defendant's argument is without merit.

What is set forth in an information alters neither the statutory elements of the charged offense that the state is required to prove beyond a reasonable doubt at trial, nor what the court must include in the jury instructions. "[B]oth this court and our Supreme Court have made clear that [t]he inclusion in the state's pleading of additional details concerning the offense does not make such allegations essential elements of the crime, upon which the jury must be instructed. . . . Our case law makes clear that the requirement that the state be limited to proving an offense in substantially the manner described in the information is meant to assure that the defendant is provided with sufficient notice of the crimes against which he must defend. As long as this notice requirement is satisfied, however, *the inclusion of additional details in the charge does not place on the state the obligation to prove more than the essential elements of the crime*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Vere C.*, 152 Conn. App. 486, 527, 98 A.3d 884, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014).

Here, the information put the defendant on notice that he was being charged as an accessory to first degree assault under §§ 53a-8 and 53a-59 (a) (5). Thus, the

[8] The state argues that the defendant improperly omitted a comma in the information, thus modifying the first clause. The defendant, however, correctly transcribed what was set forth in the information—the first sentence containing "by means of a firearm" had a comma within the information, and the second sentence did not. Regardless, the defendant's argument is incorrect.

defendant had sufficient notice of the crime against which he was required to defend. "As long as an information provides the statutory name of the offense . . . identifie[s] the place of the offense, the names of the victims, and the general nature of the acts . . . the allegations . . . [are] sufficient." (Internal quotation marks omitted.) *State* v. *Solek*, 242 Conn. 409, 424, 699 A.2d 931 (1997).

Given that neither intent that a principal discharge a firearm nor knowledge that the principal intends to do so is an element of accessorial liability for the crime of assault in the first degree in violation of § 53a-59 (a) (5), the state was not required to prove those elements. We conclude, therefore, that the court properly declined to instruct the jury that, to find the defendant guilty of assault in the first degree with a firearm as an accessory in violation of §§ 53a-8 and 53a-59 (a) (5), the defendant was required to intend or to know that the principal would discharge a firearm during the incident to inflict the injury.

B

Finally, the defendant argues, in the alternative, that "*McCalpine*, *Miller*, *Gonzalez* and all the case law that holds that an accomplice does not need to have knowledge or intent of an aggravating factor that requires the principal have only general intent should be overruled." This, however, we cannot do.

"[A]s an intermediate appellate body, we are not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court." (Internal quotation marks omitted.) *State* v. *Salazar*, 151 Conn. App. 463, 476, 93 A.3d 1192 (2014), cert. denied, 323 Conn. 914, 149 A.3d 496 (2016). Nor can one panel of this court overrule another panel of this court. E.g., *Connelly* v. *Commissioner of Correction*, 149 Conn. App. 808, 815, 89 A.3d 468 (2014) ("it is axiomatic that

one panel of this court cannot overrule the precedent established by a previous panel's holding"). Because this court is bound to follow the precedent from both our Supreme Court and other panels of this court, the defendant's claim that this court should overrule binding precedent must be rejected.

The judgment is affirmed.

In this opinion the other judges concurred.

DANIELLE LEHANE *v.* JAMES MURRAY
(AC 44541)

Bright, C. J., and Cradle and Seeley, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court, challenging certain postjudgment orders of the trial court. Under the parties' separation agreement, which had been incorporated into the dissolution judgment, the parties shared joint legal custody of their minor child, who resided primarily with the plaintiff, and exercised a two week, rotating parenting plan. The separation agreement also provided the plaintiff with a nonmodifiable right to claim the child as a dependent for income tax purposes. Within months of the marital dissolution, the parties embarked on three years of extensive litigation pertaining to custody of and visitation with the child, during which each party filed motions seeking sole custody of the child. After a fifteen day hearing, the trial court found, inter alia, that the plaintiff had a defiant and manipulative disposition, and had misrepresented facts and violated and made up court orders to support her long-standing desire to undermine the defendant's relationship with the child. The court further found that, although the defendant willingly encouraged the mother-child relationship, the plaintiff wilfully denied the defendant access to the child and repeatedly made insulting references about the defendant, which the child understood, as well as unsubstantiated complaints to the police and to the Department of Children and Families. The court denied the plaintiff's motion and granted the defendant's motion, awarding him, inter alia, sole physical custody of the child. The court's order also set a visitation schedule for the plaintiff, and permitted the defendant to alter, change or modify that schedule and the location, dates and times the parties would exchange the child. The court further ordered the plaintiff to undergo a psychological evaluation and to provide a copy of the evaluation to the defendant. *Held*:

1. The trial court properly exercised its decision-making authority, pursuant to statute (§ 46b-56), in affording the defendant a limited amount of discretion to adjust the plaintiff's visitation schedule with the minor child: the court carefully considered the evidence, the unique circumstances at issue, and the extensive, undisputed findings regarding the history of conflict between the parties in the parenting of the child, and made the requisite findings regarding the child's best interest in implementing a practical mechanism for the parties, short of returning to court, to deal with the conflicts in the parenting of their child that have resulted from the plaintiff's obstructionist conduct and consistent tendency to instigate that conflict; moreover, contrary to the plaintiff's contention that the court gave the defendant unbridled authority to suspend or terminate her parenting access to the child and unilateral authority to decide the nature and scope of their relationship, the court established a specific schedule of parenting access, which governed the defendant's exercise of discretion and permitted him to modify her visitation schedule but not to reduce, suspend or terminate her access to the child.
2. The trial court abused its discretion in ordering the plaintiff to undergo a psychological evaluation; the court's authority to order such an evaluation is restricted by statute (§ 46b-6) to pending matters to assist the court in the disposition of the issues presented therein and, because there were no further matters pending before the court, there was no statutorily valid reason to order a psychological evaluation.
3. The trial court erred in modifying the dissolution judgment to permit the defendant to claim the child as a dependent for income tax purposes; the separation agreement included a clear and unambiguous provision giving the plaintiff the nonmodifiable right to claim the child as a dependent.

Argued May 10—officially released September 20, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Diana*, *J.*, denied the plaintiff's motion to modify custody and visitation and granted the defendant's motion to modify custody and visitation, and the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Dana M. Hrelic, with whom were *Johanna S. Katz* and, on the brief, *Stacie L. Provencher*, for the appellant (plaintiff).

Mary Piscatelli Brigham, for the appellee (defendant).

Opinion

CRADLE, J. In this postdissolution matter, the plaintiff, Danielle Lehane, appeals from the judgment of the trial court modifying the parties' custody of and visitation with their minor child. The court awarded sole legal and physical custody to the defendant, James Murray, and awarded the plaintiff certain visitation rights. On appeal, the plaintiff claims that the court (1) improperly delegated its judicial authority to a nonjudicial party by giving the defendant the authority to "alter, change or modify" her visitation schedule, (2) exceeded its authority by ordering her to submit to a psychological evaluation and to provide the results to the defendant, and (3) improperly awarded the defendant the right to claim the child as a dependent for income tax purposes where the dissolution judgment included a clear and unambiguous provision awarding the plaintiff the nonmodifiable right to do so. We disagree with the plaintiff's claim that the court improperly delegated its judicial authority to the defendant, but we agree with her other two claims. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following procedural history is relevant to this appeal. The marriage of the parties was dissolved on March 23, 2017, and their separation agreement was incorporated into the judgment of dissolution. Pursuant to that judgment, the parties shared joint legal custody of their four year old son, who resided primarily with the plaintiff, and the parties exercised a two week rotating parenting plan. Since June, 2017, the parties have been engaged in extensive litigation involving custody of and

visitation with their son. Commencing November 24, 2020, and concluding December 21, 2020, the trial court, *Diana*, *J.*, held a fifteen day hearing on twenty-four postjudgment motions the parties had filed, including motions in which they each sought sole custody of their son. On February 3, 2021, the court issued a memorandum of decision in which, inter alia, it granted the defendant's motion to modify and awarded him sole legal and physical custody of the parties' son.[1] The court further ordered, inter alia, that "the plaintiff shall have parental access to the minor child" every other weekend and every Wednesday overnight, and that "the defendant may alter, change or modify [that] schedule, along with the location, date and time of the exchanges." The court also ordered: "No holiday or vacation orders shall be entered on behalf of the plaintiff unless consented to by the defendant in writing, except that the plaintiff shall have eight (8) hours of access to the minor child over the Thanksgiving weekend and over the Christmas holiday as is decided by the defendant."

The court ordered the plaintiff to immediately undergo a psychological evaluation and to provide a copy of that evaluation to the defendant. The court

[1] The court denied the plaintiff's motion for sole custody of the minor child. The court also denied five motions for contempt the plaintiff had filed in which she "argue[d] that the defendant [had] violated terms of their separation agreement alleging incidents of sexual abuse . . . deliberate obstruction to the child's mental health treatment . . . pestering participants during video calls . . . and not following the rotation of the parties in taking the minor child to therapy . . . ." (Citations omitted.)

The defendant also filed several motions for contempt. The court found the plaintiff in contempt for her "systematic and continuous efforts to interfere with the minor child's natural love and affection for the defendant"; her wilful violation of the defendant's right to visitation with the child on Halloween; her wilful denial of the child's access to his paternal grandmother and failure to "encourage affection and to show mutual respect"; and her wilful conduct by which she "coaches the minor child into fits of emotional instability, which deprives the defendant of exercising his parenting time." None of these rulings has been challenged on appeal.

ordered that the plaintiff "shall follow all recommendations regarding any and all treatment consultations set forth by the evaluator and therapist."

The court also modified child support, ordering the plaintiff to pay child support in the amount of $122 per week to the defendant in accordance with the Child Support and Arrearage Guidelines set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies. The court further ordered that the defendant shall be entitled to claim the child as a dependent for income tax purposes. This appeal followed.

I

The plaintiff first claims that the trial court improperly delegated its judicial authority to a nonjudicial party by giving the defendant the authority to "alter, change or modify" her visitation schedule. We are not persuaded.[2]

The court's authority to enter orders pertaining to the care and custody of minor children, and the factors that must be considered in doing so, are prescribed by statute. General Statutes (Rev. to 2019) § 46b-56 (a) authorizes the Superior Court in any action involving the custody or care of minor children to "make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable." Subsection (b) of General Statutes (Rev. to 2019) § 46b-56 provides in relevant part: "In

[2] The plaintiff also contends that the court's order regarding vacation time with the parties' son also constitutes an improper delegation of the court's authority because it restricts any future court involvement with that schedule without the consent of the defendant. We decline to so interpret the court's order. Rather than presuming that the court impermissibly sought to restrain any future court from exercising its statutory authority, we construe the court's order requiring the consent of the defendant to pertain to the plaintiff, not the authority of the court.

making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . .'' Subsection (b) of General Statutes (Rev. to 2019) § 46b-56 also contains a nonexhaustive list of possible orders including a catchall provision permitting ''any other custody arrangements as the court may determine to be in the best interests of the child.'' General Statutes (Rev. to 2019) § 46b-56 (c) provides in relevant part that, ''[i]n making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of [sixteen enumerated][3] factors . . . . The court is not

[3] Specifically, the court may consider: ''(1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser,

required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision." (Footnote added.)

Although we typically review a trial court's custody and visitation orders for an abuse of discretion, the question of "whether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review." *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018). "It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Internal quotation marks omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 674, 220 A.3d 194 (2019).

In this case, following a fifteen day evidentiary hearing during which the parties introduced more than 100 exhibits, the trial court set forth extensive factual findings and conclusions, which are supported by the record and have not been challenged on appeal, upon which it based its orders pertaining to the parenting of

if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b." General Statutes (Rev. to 2019) § 46b-56 (c).

the parties' son. The court began by examining various conflicts that had arisen between the parties since the date of dissolution. The court recounted that the conflict included, but was not limited to, two claims by the plaintiff to the Department of Children and Families (DCF), alleging safety concerns and lack of supervision of the child when he is in the defendant's care, and a similar complaint to the Torrington Police Department (police department). Both DCF and the police department found the plaintiff's claims to be unsubstantiated. Despite knowing that no safety concerns were found, the plaintiff wilfully denied the defendant access to the child for three weeks during the period surrounding those unsubstantiated allegations.

On the basis of the significant and consistent conflicts between the parties, the court found: "The plaintiff's behavior consistently ignores and distorts court orders. She has undermined the defendant's relationship with their son by coaching him, not honoring or encouraging access, and by crying when he visits with his father. . . . [T]he plaintiff describe[s] her[self] . . . [as] the gatekeeper in deciding if the [defendant's] visits [with their son] take place. . . . She admitted that she refused to allow the defendant access to their son for a period of time due to safety concerns, despite a finding by DCF to the contrary. The other reason provided [by the plaintiff] is that the minor child refused to go with the defendant." On the basis of the plaintiff's actions, including but not limited to those recited previously, the court concluded that "the plaintiff failed to act in good faith in encouraging the minor child to visit [the defendant] . . . . Her comments and repeated insulting references to the defendant send a clear message that this perceptive child understands, [and] has mirrored and parroted." (Citation omitted.)

In support of its findings, the court referred to communications between the parties on Our Family Wizard

(OFW)[4] for the three years since the date of dissolution, which were introduced as exhibits at the hearing. The court found: "A review of the OFW exchanges between the parties clearly reveals, in the parties' own words, how they interact with each other. The defendant is neutral, calm, pleasant, informative and appropriate in his language and tone. The plaintiff is at times appropriate; other times she does not reply to specific questions and often takes on a hostile, combative, accusatory and insulting attitude in her exchange." The court further noted that, while the defendant had demonstrated "his willingness and ability to encourage the mother-child relationship," the plaintiff had "shown no such capacity, willingness or ability to understand and meet the needs of the minor child."

The court further found: "The parties' fun loving child, who wants to please everyone, has struggled since the divorce, as he finds himself stuck in the middle of this high conflict matter. . . . The plaintiff's unsubstantiated incident[s] [were] weaponized to manipulate and influence the minor child to achieve absolute control and restrict the defendant's legal role and personal relationship with their son . . . . As a result of the plaintiff's intentional interference and coaching, the minor child has struggled with the truth. . . . The situation demands a reset to correct and heal the distress and confusion that has been escalating for over three years." (Citations omitted.)

The court additionally noted "the progressively deteriorating relationship between the parties" and concluded: "These parties are incapable of and have been unable to present a unified approach in raising their

[4] 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 September 12, 2022). See *Dufresne* v. *Dufresne*, 191 Conn. App. 532, 535 n.5, 215 A.3d 1259 (2019).

son, in disciplining him and helping him overcome challenges. The plaintiff has undermined the defendant at every opportunity and has no concern about how her conduct impacts the minor child and his relationship with the defendant. And to continue with the custody order of the separation agreement would manifestly work to the detriment of the minor child."

On the basis of the foregoing, the court concluded: "The evidence in this case is abundantly overwhelming and uncontroverted, as the parties have preserved a written and audiovisual record. The court finds the defendant to be credible and the plaintiff without any credibility. The plaintiff's disposition is defiant, manipulative and misguided; she is unwilling to accept and support DCF's findings and the minor child's having a relationship with [the] defendant. She brazenly misrepresents facts, [and] violates and makes up court orders at will to support her long-standing desire to undermine the defendant's relationship with their son. She is found to be emotionally uninsightful regarding the defendant and the minor child's relationship. She actively coaches the minor child by telling him what to say and, therefore, she is incapable of meeting his needs. As such, the court finds that there has been a material change in circumstances since the date of judgment regarding custody between the parties' minor child and the plaintiff. The court further finds that it is in the best interest of the minor child to modify the plaintiff's access/visitation schedule."

The court further reasoned: "The plaintiff has made systematic and continuous efforts to interfere with the minor child's natural love and affection for the defendant . . . [and] [s]aid efforts have created a harmful mental health situation for the minor child . . . . The plaintiff has engaged in behavior which had, as a foreseeable consequence, a negative influence on the relationship between the minor child and the defendant

. . . . The best interests of the minor child would be served by the plaintiff's being evaluated by a psychiatrist or clinical psychologist for the purpose of developing a therapy plan designed to minimize or eliminate such negative behavior . . . . The best interests of the minor child support a modification of the current custodial orders in an effort to minimize the plaintiff's ability to negatively influence the minor child . . . . The best interests of the minor child support continued work with the mental health professional to assist in adjusting to the custodial changes and assist in dealing with the negative information which has influenced him in the past."

On the basis of the foregoing, the court awarded sole legal and physical custody of the parties' son to the defendant and established a specific schedule of parenting access for the plaintiff. We disagree with the plaintiff's contention that the court improperly delegated its judicial authority when it ordered that the defendant may "alter, change or modify" her visitation schedule. In so ordering, the court did not, as the plaintiff contends, give the defendant "unbridled" authority to modify her right to visit their son; nor did the court give the defendant unilateral authority to suspend or terminate her parenting access to their son. The court's order permits the defendant to modify the plaintiff's visitation *schedule*, not to modify her *right* to visitation. The court established specific parameters regarding the plaintiff's visitation with the parties' son, and the defendant is governed by those parameters in exercising the limited discretion afforded to him by the court. In other words, although the court's order allows the defendant to "alter, change or modify" the plaintiff's visitation *schedule*, it does not permit him to reduce, suspend or terminate her access to their son.[5]

[5] The plaintiff lists many ways by which the defendant could terminate or suspend her access to their son under the guise of his authority to "alter, change or modify" the visitation schedule, but those extreme hypothetical

In support of her claim, the plaintiff argues that the court's order allows the defendant to unilaterally "decide the nature and scope" of the plaintiff's contact with their son, which was held by this court, in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 373, 190 A.3d 68 (2018), to be an improper delegation of judicial authority. We disagree. In *Kyle S.*, the trial court expressly stated that it would "rely" on the minor child's therapist, with respect to issues involving the child, to "dictate" the scope of the father's contact with the child in a therapeutic setting. Id., 361. The court further ordered that the father's contact with the child was subject to expansion or contraction depending on the child's needs and that the therapist would be "in charge." (Emphasis omitted.) Id. This court held that the trial court impermissibly delegated its judicial authority to the minor child's therapist because it "improperly removed itself from the decision-making process by permitting [the therapist] to decide the nature and scope of [the father's] contact with [the child]." Id., 373. This case is distinguishable from *Kyle S.* because, here, the court's order allowing the defendant to "alter, modify or change" the plaintiff's visitation schedule does not give him the authority to "decide the nature and scope" of her relationship with their son.[6] Rather, after fully

steps, if taken by the defendant, would run afoul of the court's orders regarding the plaintiff's rights to "parenting access." On the basis of the defendant's history of acknowledging the importance of the son's relationship with both parents, the court trusted that he would continue to act in the son's best interest. If he fails to do so, the plaintiff has the right to file a motion for contempt. Counsel for the defendant acknowledged at oral argument before this court that the limited discretion afforded to the defendant by the trial court does not permit him to suspend or terminate the plaintiff's access to their son.

[6] This case is also distinguishable from other cases in which this court or our Supreme Court has reversed a family court's order on the ground that the court had improperly delegated its core decision-making function to another party, such as, for instance, *Nashid* v. *Andrawis*, 83 Conn. App. 115, 120–22, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004), in which the court removed itself entirely from the decision-making process by permitting legal issues to be resolved through binding arbitration that

and carefully considering the evidence presented by the parties, as well as making the requisite findings regarding the best interest of the minor child, the court exercised its judicial decision-making authority in determining the nature and scope of the plaintiff's parenting access and affording the defendant only a limited amount of discretion to modify the visitation schedule.[7]

Our Supreme Court has recognized that "conflicts frequently develop over relatively minor decisions relating to the day-to-day upbringing and support of minor children, conflicts which in reality reflect little more than a difference of opinion or preference between sometimes hostile parties. . . . Frequent litigation of these minor disagreements leads to frustrating court delays . . . and, because of the adversarial nature of traditional court proceedings, can work to heighten tensions and engender further conflict." (Citations omitted.) *Masters* v. *Masters*, 201 Conn. 50, 66, 513 A.2d 104 (1986). Here, it was the court's judicial determination that it was in the best interest of the parties' son that the defendant have sole legal and physical custody, as

was subject to limited judicial review, or *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980), in which the court delegated its authority to render a binding decision to a family relations officer.

[7] We also note that, in this case, the court did not give decision-making authority to a third-party therapist or a mediator but, rather, afforded the father of the child, as the sole legal and physical custodian, the latitude to adjust the mother's visitation schedule in accordance with the child's needs. The court's order is consistent with the well established principle that the care of children resides first with their parents in order to fulfill a function the state can neither supply nor impede. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Indeed, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." *Troxel* v. *Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Roth* v. *Weston*, 259 Conn. 202, 216, 789 A.2d 431 (2002) (same). In affording the defendant the limited discretion to adjust the plaintiff's visitation schedule, the court recognized the need for the parties to prioritize their roles as mother and father, rather than plaintiff and defendant.

well as the limited discretion to deal with minor day-to-day conflicts that may necessitate an alteration of the plaintiff's visitation schedule but do not necessarily require court involvement. In other words, by affording the defendant the discretion to adjust the plaintiff's visitation schedule, the court implemented a mechanism for the parties, short of returning to court, to deal with the everyday conflicts that arise in high conflict cases and, in fact, have arisen in this case as a result of the plaintiff's obstructionist conduct.[8] Under the unique circumstances presented in this case, specifically, by way of the court's extensive, undisputed findings regarding the history of conflict between the parties in the parenting of their son and the plaintiff's consistent tendency to instigate that conflict, the court's order affords the defendant, as the sole legal and physical custodian, a practical mechanism to react, in real time, to the potentially disruptive conduct of the plaintiff and the needs of the parties' son.

The trial court's orders in the present case, similar to the trial court's order vesting certain authority in the minor child's guardian ad litem in *Thunelius*, "[reflect] . . . the court's confidence in the commitment . . . of the [defendant], and the court's desire to minimize the effect of the parties' toxic parenting relationship on their child and to discourage [the plaintiff] from heedless and incessant litigation over matters that should not require judicial intervention." *Thunelius* v. *Posacki*, supra, 193 Conn. App. 676. We conclude that the court properly exercised its decision-making authority in issuing those orders.

[8] For instance, the trial court found that the plaintiff has demonstrated a pattern of emotionally manipulating the child against the defendant, particularly when the child leaves her to visit the defendant. Recognizing that this is not in the best interest of the child, the court's order allows the defendant to respond to such behavior immediately to alleviate the turmoil suffered by the child.

II

The plaintiff next claims that the court exceeded its authority by ordering her to submit to a psychological evaluation. We agree.[9]

General Statutes § 46b-6 provides in relevant part: "In any *pending* family relations matter the court or any judge may cause an investigation to be made with respect to any circumstance of the matter which may be helpful or material or relevant to a proper disposition of the case. . . ." (Emphasis added.) General Statutes § 46b-3 provides that the court in any family relations matter may employ the use of a psychologist, psychiatrist or family counselor in carrying out such an evaluation.

Thus, this court has held that "the [trial] court may require the parties and the child to undergo a psychiatric or psychological evaluation for the purpose of properly disposing of a family matter, in a modification of custody case, [or] to assist in determining the best interest of the child." *Foster* v. *Foster*, 84 Conn. App. 311, 323, 853 A.2d 588 (2004). In accordance with the plain language of § 46b-6, however, it is well settled that the court's authority to order such an evaluation is restricted to *pending* matters to assist in the disposition of the issues presented therein. See, e.g., *Janik* v. *Janik*, 61 Conn. App. 175, 180, 763 A.2d 65 (2000), cert. denied, 255 Conn. 940, 768 A.2d 949 (2001); *Savage* v. *Savage*, 25 Conn. App. 693, 700–701, 596 A.2d 23 (1991); cf. *Martowska* v. *White*, 149 Conn. App. 314, 323, 87 A.3d 1201 (2014) (court properly ordered psychological evaluation for purposes of determining visitation schedule).

[9] In light of our resolution of this claim, we need not address the plaintiff's related claims that the court improperly ordered her to provide the defendant with a copy of the psychological evaluation or that the court improperly delegated its authority to the therapist in ordering the plaintiff to adhere to all of the therapist's recommendations.

In this case, the court did not order the plaintiff to undergo a psychological evaluation to determine whether a modification of custody was appropriate or to aid in the disposition of the case. Rather, the court ordered the psychological evaluation after it made the determination to modify custody and established the plaintiff's visitation schedule. Because there were no further matters pending before the court, there was no statutorily valid reason for the court to order a psychological evaluation. We therefore conclude that the court abused its discretion in doing so.[10] See, e.g., *Janik* v. *Janik*, supra, 61 Conn. App. 180 (postjudgment order for psychological evaluation constitutes an abuse of discretion).

III

The plaintiff finally claims that the court improperly modified the dissolution judgment to permit the defendant to claim the child as a dependent for income tax purposes where, pursuant to the parties' separation agreement, the dissolution judgment included a clear and unambiguous provision giving the plaintiff the nonmodifiable right to do so. We agree.

"The [separation] agreement of the parties executed at the time of the dissolution was incorporated into the judgment and is a contract of the parties. . . . The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . [T]he construction of a written

[10] The plaintiff argues that the reversal of this order requires reversal of the court's "entire custodial decision" because "[t]he orders regarding the psychological evaluation are . . . inextricably tied to the order giving the defendant the unbridled authority to modify the plaintiff's access to the child . . . ." Because we agree that the order requiring the plaintiff to undergo a psychological evaluation was improper in that it is untethered to any pending proceeding, we reject the plaintiff's argument that the order is inextricably tied to the court's other orders.

contract is a question of law for the court. . . . The scope of review in such cases is plenary." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 56 Conn. App. 459, 470, 743 A.2d 1135, cert. granted, 253 Conn. 910, 754 A.2d 160 (2000) (appeal withdrawn September 27, 2000).

"Once the provisions of a separation agreement . . . are incorporated into the dissolution judgment, they can be modified by court order only if the agreement so incorporated does not preclude modification." (Internal quotation marks omitted.) Id. "When a provision in a divorce decree that precludes or restricts a later court's power to modify financial orders is clear and unambiguous . . . that provision will be upheld." (Internal quotation marks omitted.) Id., 471.

Here, paragraph 7 (e) of the parties' separation agreement provides in relevant part: "The parties agree that for purposes of [Internal Revenue Code] § 152 (e), the [plaintiff] shall be entitled to the dependency exemptions for the minor child for as long as the child is eligible to be claimed as an exemption. . . . The [defendant] shall not claim the child on his own federal tax return in any such year. This right to claim [the minor child] as a dependent for tax purposes is nonmodifiable."

Because the separation agreement clearly and unambiguously restricted modification of the child tax exemption, the court erred in modifying that provision and transferring that right to the defendant.[11]

The judgment is reversed only as to the court's orders that the plaintiff undergo a psychological evaluation and that the defendant may claim the minor child as a

[11] We further note that an order affording a party the right to claim a child as a tax exemption is not a form of child support but, rather, constitutes a division of property, which may not be modified after the marriage is dissolved. See General Statutes § 46b-81.

dependent for income tax purposes and the case is remanded with direction to vacate those orders; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JOSE AYUSO *v.* COMMISSIONER OF CORRECTION (AC 43985)

Moll, Alexander and Suarez, Js.

Syllabus

Convicted of several crimes after a shooting incident in which he wounded two police officers, J and O, the petitioner sought a writ of habeas corpus. He claimed, inter alia, that his trial, appellate and habeas counsel provided ineffective assistance and that the prosecutor at his criminal trial knowingly presented false testimony. The petitioner had approached an unmarked police vehicle in a parking lot and fired gunshots at three undercover officers in the vehicle. As J got out of the driver's side of the vehicle, one of two gunshots the petitioner fired toward him struck the bulletproof vest J was wearing under his clothes. The petitioner claimed, inter alia, that the prosecutor knowingly presented and failed to correct false testimony from the third officer, P, that one of the bullets the petitioner fired had lodged in or damaged J's bulletproof vest and that P had witnessed damage to the vest shortly after the shooting. The habeas court rejected the petitioner's claim, concluding that P had not intended to deceive the jury. In a subsequent articulation, the court affirmed its decision, relying on the fact that the petitioner's counsel had had an opportunity to examine the vest prior to trial. The court denied the habeas petition and thereafter denied the petition for certification to appeal to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petitioner certification to appeal from the judgment denying his petition for a writ of habeas corpus; the petitioner failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve those issues in a different manner or that the questions they raised were adequate to deserve encouragement to proceed further.
2. The petitioner's claim that he was deprived of his right to due process when the prosecutor failed to correct P's testimony concerning the bulletproof vest was unavailing, as P's testimony was neither false nor substantially misleading: P's reference to the impact on J's bulletproof vest of one of the bullets the petitioner fired was incidental to P's description of the injuries he observed when he examined J in the immediate aftermath of the shooting, and P's description of those injuries

did not convey to the jury that he had inspected or witnessed damage to the vest; moreover, even if P's testimony was false or substantially misleading, the petitioner was unable to demonstrate that the prosecutor's failure to correct the testimony was fundamentally unfair, as there was no reasonable likelihood that the testimony could have affected the judgment of the jury, the condition of J's vest was not relevant to any of the crimes of which the petitioner was convicted or to any material issue in the case, there was no evidence that something other than a bullet could have caused J's injury, and, in the context of the petitioner's defense of self-defense, it was inconsequential for the jury to determine what the petitioner struck when he used deadly physical force by discharging his handgun; furthermore, the petitioner's assertion that P's testimony about the vest was relevant to assessing J's credibility was unavailing, as the existence of damage to the vest would not have tended to undermine J's trial testimony, the jury reasonably could have found that one of the bullets that the petitioner fired caused J's injury, regardless of the existence of damage to the vest, and, although the court, in its initial decision and in its articulation, incorrectly failed to focus its analysis on the substance of the relevant evidence to determine if it was false or substantially misleading, this court concluded that the same result was required by law.

3. The petitioner's claim that he was deprived of the effective assistance of counsel at his criminal trial was unavailing:

a. Trial counsel's decision not to challenge the state's evidence that a bullet caused J's injury did not prejudice the petitioner, as counsel believed that the pursuit of such a strategy would detract from the petitioner's self-defense claim, that it would not have been beneficial with respect to the attempted murder or assault charges against the petitioner concerning J and that the presence of physical damage to the vest was not significant; moreover, the habeas court's focus on whether the petitioner was prejudiced by counsel's performance was proper in light of testimony from the physician who treated J that a gunshot was the only way to explain J's injuries, and, as it was undisputed that the petitioner used a firearm during the shooting, whether J was struck by a bullet or whether the petitioner had assaulted O or attempted to assault P was unrelated to the petitioner's claim of self-defense; furthermore, even if the jury had found that the petitioner did not cause J's injury, the state would have been entitled to an instruction on the lesser included offense of attempt to commit assault, which carried the same penalty as a conviction of assault.

b. There was no reasonable probability that the outcome of the petitioner's criminal trial would have been different, as he contended, if his counsel had investigated and presented certain evidence in support of his self-defense claim: although the petitioner claimed that testimony from a mental health professional would have been critical to the jury's understanding of his behavior, the petitioner's reliance on the opinions

of a psychologist who testified at the habeas trial about his state of mind at the time of the shooting incident was undermined by the fact that the psychologist's evaluations of him occurred more than fifteen years after the shooting incident, and the petitioner's assertion that certain other testimony about a lethal threat that purportedly had been made to him on the day of the shooting would have corroborated his claimed belief that the police had come to carry out the threat would not have shed light on whether he subjectively believed at the time of the shooting that the threat was credible or that he actually feared for his life; moreover, the petitioner's attempt to demonstrate that he was prejudiced by his counsel's failure to present that evidence was hampered by the fact that, even if the petitioner had been able to demonstrate that he subjectively feared for his life at the time of the shooting, the evidence at trial did not support a conclusion that his use of deadly physical force was objectively reasonable; furthermore, even though the habeas court incorrectly determined that trial counsel's failure to investigate and present the testimony of those witnesses in support of the petitioner's self-defense claim was not prejudicial because such evidence was to some extent cumulative of the petitioner's trial testimony, the court nevertheless reached the correct result, as such evidence was unlikely to have swayed the jury to find that the petitioner's use of force was objectively reasonable.

c. The petitioner's defense at trial was not prejudiced as a result of his counsel's failure to object pursuant to *State* v. *Morales* (232 Conn. 707) to the state's failure to preserve and make available to counsel the vehicle that the officers occupied at the time of the shooting incident: the petitioner failed to satisfy the requirement under *Morales* that the vehicle was material to his defense and that the result of his trial would have been different had it been available to him, as the evidence supported the habeas court's determination that the petitioner failed to show what benefit further testing beyond that presented to the jury could have provided or that anything material was lost by virtue of the manner in which the police stored the vehicle; moreover, it was undisputed that the petitioner's trial counsel had observed the vehicle in a junkyard prior to trial and did not pursue testing of it at that time or make any further request of the court with respect to the vehicle, and, although the petitioner's forensic criminologist testified at the habeas trial that certain forensic testing could have been performed had the vehicle been stored in a different manner, the criminologist lacked any reliable data from which to draw conclusions and essentially speculated about what such testing might have entailed; furthermore, defense counsel's arguments at trial and cross-examination of the state's witnesses reflected counsel's belief that the forensic analysis of the crime scene and the vehicle that had been performed by the state provided the defense with ample fodder to undermine the state's theory of the shooting.

4. The petitioner could not prevail on his claim that he was deprived of the effective assistance of his appellate counsel:

a. Despite his contention that his appellate counsel should have challenged the trial court's failure to instruct the jury regarding a witness who purportedly had threatened him on the day of the shooting and should have raised claims concerning the court's refusal to allow him to call the witness so that any invocation of the witness' fifth amendment privilege would occur on a question-by-question basis before the jury, the petitioner did not demonstrate that counsel's representation was deficient, as he failed to present any authority to support his assertions that the trial court had acted improperly, his claim amounted to little more than speculation that a reviewing court would have found error, and he merely asserted in conclusory fashion that raising those claims would have resulted in a reasonable probability that he would have prevailed in his direct appeal from his conviction.

b. The petitioner's claim that his appellate counsel rendered deficient performance by failing to raise a *Morales* claim concerning the state's failure to preserve the police officers' vehicle was unavailing; contrary to the petitioner's contention, even if counsel had performed deficiently by not raising a *Morales* claim in the petitioner's direct appeal from his conviction, her performance did not prejudice the petitioner, as more than a reasonable probability existed that a reviewing court would have rejected a *Morales* claim under the first condition of *State* v. *Golding* (213 Conn. 233), the record having been devoid of an adequate factual record as to whether a *Morales* violation occurred.

c. The petitioner failed to demonstrate that his appellate counsel performed deficiently by failing to raise an unpreserved claim that the prosecutor improperly vouched for J's credibility during closing argument to the jury: the prosecutor did not improperly express a personal belief in J's credibility but, rather, invited the jury to infer that any inconsistencies in J's recollection of the shooting were the result of the emotional state he was in at that time; moreover, the petitioner's trial counsel did not object to the prosecutor's argument, and the petitioner failed to cite any authority to support a conclusion that his appellate counsel rendered deficient performance by failing to raise the claim or that a reasonable probability existed that, had the claim been raised, it would have changed the outcome of the petitioner's direct appeal.

5. The petitioner could not prevail on his claim that the habeas court improperly precluded the petitioner's counsel from questioning the trial prosecutor about whether he should have known at the time of trial that certain of P's testimony about J's bulletproof vest was false: counsel's inquiry into what additional investigation the prosecutor could have undertaken regarding whether the vest had been struck by a bullet that the petitioner fired was not relevant to the allegation in the habeas petition that the prosecutor knew at the time of trial that P had provided false testimony; because the petitioner alleged in the habeas petition

only that the prosecutor had knowingly presented false testimony but did not allege alternatively that the prosecutor should have known that P's testimony was false, what the prosecutor should have known about the vest and, thus, the veracity of P's testimony, was not material to the issue framed in the habeas petition.

Argued November 9, 2021—officially released September 20, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Newson, J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Michael W. Brown, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Tamara A. Grosso*, former assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Jose Ayuso, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying 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 because (1) the prosecutor's presentation of false or misleading testimony at his criminal trial violated his due process right to a fair trial, (2) his trial counsel's performance was deficient and deprived him of his right to the effective assistance of trial counsel, (3) his appellate counsel's performance was deficient and deprived him of his right to the effective assistance of appellate counsel, and (4) the habeas court committed an evidentiary error that

entitles him to a new habeas trial. We dismiss the appeal.

The following facts and procedural history are relevant to the claims raised on appeal. Following a jury trial in 2004, the petitioner was convicted of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), one count of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (5), one count of carrying a pistol without a permit in violation of General Statutes § 29-35, and one count of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] This court previously has summarized the facts the jury reasonably could have found: "On June 5, 2003, at approximately 1 a.m., Officers Tishay Johnson and Victor Otero and Sergeant Gerry Pleasant of the Hartford [P]olice [D]epartment were working undercover to target street crimes in Hartford and were patrolling the city in an unmarked, two door Toyota Tercel. At that time, the undercover officers received a radio dispatch, directing them to investigate the 500 block of Zion Street for loitering and narcotics sales. Johnson then drove northbound on Zion Street, turning right onto Park Street. Johnson entered a driveway located between 835 and 853 Park Street and parked the vehicle in the rear parking lot. After Johnson parked the vehicle, the [petitioner], who had been standing underneath a nearby tree, approached the driver's side of the vehicle. Pleasant immediately recognized the [petitioner] from previous encounters. Johnson rolled down the window, and the [petitioner] asked Johnson what he needed. In response, Johnson asked the [petitioner] what he had.

[1] The jury found the petitioner not guilty of three counts of attempt to commit murder in violation of General Statutes §§ 53-49 (a) (2) and 53a-54a and three counts of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (2).

"The [petitioner] then looked inside the vehicle at Otero, who was sitting in the backseat, and at Pleasant, who was sitting in the front passenger seat, and then stepped away from the vehicle. Pleasant and Johnson, who still were seated in the front seat, heard the [petitioner] load his gun, which was a .40 caliber Glock semiautomatic handgun. Johnson also observed the [petitioner] point the gun at him. As Johnson was exiting the vehicle, the [petitioner] fired two gunshots in Johnson's direction, one of which struck the bulletproof vest that Johnson was wearing underneath his clothes. The [petitioner] continued to shoot as he moved away from the vehicle, and the officers also fired their .45 caliber semiautomatic handguns. During this time, the [petitioner] shot Otero several times. Johnson briefly chased the [petitioner] down Park Street; however, Johnson returned to the parking lot after exhausting his supply of ammunition. Pleasant then notified the police dispatcher of the situation, providing a description of the [petitioner], and requested an ambulance. Johnson, who was experiencing pain in his ribs, and Otero, who was bleeding from his abdomen, lay on the ground and waited to be taken to a hospital.

"Although the [petitioner] had sought refuge in a nearby apartment building on Mortson Street, responding officers, having been informed of the [petitioner's] whereabouts by a resident of the apartment building, eventually located and arrested him. The police also located the [petitioner's] .40 caliber Glock handgun in an apartment on Mortson Street. The [petitioner] later was brought to the hospital so that the officers could identify him. Johnson made a positive identification of the [petitioner]." *State* v. *Ayuso*, 105 Conn. App. 305, 307–308, 937 A.2d 1211, cert. denied, 286 Conn. 911, 944 A.2d 983 (2008). During his criminal trial, the petitioner was represented by Attorneys Jeffrey Kestenband and William Paetzold. In 2005, the trial

court, *Mullarkey, J.*, imposed a total effective sentence of forty-one years of imprisonment, with a two year mandatory minimum to serve.

Following his conviction, the petitioner brought a direct appeal to this court, which affirmed the judgment of conviction. See id., 305. Later, our Supreme Court denied the petitioner's petition for certification to appeal. See *State* v. *Ayuso*, 286 Conn. 911, 944 A.2d 983 (2008). The petitioner's appellate counsel was Stephanie L. Evans.

The petitioner had brought a prior action for a writ of habeas corpus, which was dismissed for failure to prosecute. This court dismissed the petitioner's subsequent appeal from the judgment rendered by the habeas court in the prior habeas action. See *Ayuso* v. *Commissioner of Correction*, 146 Conn. App. 906, 77 A.3d 216, cert. denied, 310 Conn. 961, 82 A.3d 628 (2013).

On July 8, 2014, the petitioner commenced the underlying action for a writ of habeas corpus. By way of his amended petition dated November 14, 2018, the petitioner, represented by counsel, alleged in count one that the prosecutor at his criminal trial violated his due process right to a fair trial by knowingly presenting and failing to correct false testimony that affected the outcome of the trial. Specifically, the petitioner alleged that Pleasant "falsely testified that Johnson was shot by the petitioner on June 5, 2003, with a bullet that was lodged in or otherwise damaged Johnson's bulletproof vest and that Pleasant witnessed damage to the vest shortly after the shooting." In count two, the petitioner alleged that the prosecutor violated his due process right to a fair trial by failing to disclose favorable evidence to the defense, namely, "that [Johnson's] gun holster, which he was wearing on his right side at the time of the shooting, was damaged by a bullet." The

petitioner alleged that, if this evidence had been disclosed to the defense in time for it to have been relied on at the time of trial, "the result of the petitioner's criminal trial would have been different and more favorable to the petitioner." In count three, the petitioner alleged that he did not receive the effective assistance of counsel in connection with his criminal trial and that, but for counsel's deficient performance, the outcome of the trial would have been different and more favorable to him. In count four, the petitioner alleged that he did not receive the effective assistance of counsel in connection with his direct appeal and that, but for appellate counsel's deficient performance, the outcome of the appeal would have been different and more favorable to him. In count five, the petitioner alleged that he was deprived of the effective assistance of counsel in connection with his prior habeas action and that, but for habeas counsel's deficient performance, the outcome of the action would have been different and more favorable to him.

The respondent, the Commissioner of Correction, filed a return in which he denied the substantive allegations in each count of the petition. With respect to the first and second counts of the petition, the respondent alleged the special defense of procedural default. With respect to counts three and four, the respondent alleged that the allegations therein "fail to state claims upon which relief can be granted, present the same grounds as a previously denied/dismissed petition and fail to state facts or to proffer new evidence not available at the time of the prior petition, are successive in nature, and must be dismissed pursuant to Practice Book §§ 23-29 [and] 23-30." The petitioner filed a reply in which he denied each and every special defense on which the respondent relied.

On April 24 and 29, and June 11, 2019, the court, *Newson*, *J.*, conducted an evidentiary hearing on the

petition for a writ of habeas corpus. Prior to trial, the petitioner withdrew the fifth count of his petition, in which he alleged a deprivation of his right to the effective assistance of habeas counsel in his prior habeas action.

In a thorough memorandum of decision dated January 10, 2020, the habeas court addressed the merits of the claims raised and denied the petition for a writ of habeas corpus. We will discuss the details of the court's decision as necessary in the context of the claims raised on appeal.[2] The habeas court subsequently denied the petitioner's petition for certification to appeal to this court. This appeal followed.

I

We first address the petitioner's claim that the habeas court erred in denying his petition for certification to appeal.[3] We conclude that the court's ruling did not constitute an abuse of its discretion.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be

[2] The court later granted in part and denied in part the petitioner's motion for articulation of its decision.

[3] Mindful that a petitioner is unable to demonstrate that a court abused its discretion in denying a petition for certification to appeal with respect to a ground that was not raised before the habeas court in support of the petition; see, e.g., *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216–17, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013); we observe that the grounds set forth in the petition for certification to appeal encompass the claims raised in this appeal.

reviewed by the court having jurisdiction and the judge so certifies."

"'Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits.' . . . *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 811, 975 A.2d 42 (2009); see also *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994) (adopting factors identified by United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as appropriate standard for determining whether habeas court abused its discretion in denying certification to appeal).

" '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.' . . . *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 573, 211 A.3d 72, cert. denied, 333 Conn. 902, 215

A.3d 160 (2019)." *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 78–79, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021).

For the reasons set forth in the remainder of this opinion, we conclude, on the basis of our review of the record and applicable legal principles, that the petitioner has not demonstrated that the claims of error related to the court's denial of his petition for a writ of habeas corpus are 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. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, therefore, dismiss the appeal.

II

The petitioner claims that the prosecutor's presentation of false or misleading testimony at his criminal trial violated his due process right to a fair trial. We are not persuaded.

This claim arises from the habeas court's rejection of the claim set forth in count one of the petition for a writ of habeas corpus, in which the petitioner alleged that "Pleasant falsely testified [at the criminal trial] that Johnson was shot by the petitioner on June 5, 2003, with a bullet that was lodged in or otherwise damaged Johnson's bulletproof vest and that Pleasant witnessed damage to the vest shortly after the shooting." The petitioner alleged that the prosecutor knew that this testimony was false and failed to correct the testimony. The petitioner alleged that "[t]here is a reasonable likelihood that—but for the false testimony of Pleasant about Johnson being shot by the petitioner in the area of the bulletproof vest—the result of the petitioner's criminal trial would have been different and more favorable to the petitioner."

Transcripts of the criminal trial proceedings were in evidence at the habeas trial. These reveal that, prior to the criminal trial, defense counsel filed a motion to test Johnson's bulletproof vest "to determine the bullet that struck [Johnson] [and] which firearm that came from, if possible." The prosecutor represented to the court that the state was in possession of the bulletproof vest worn by Johnson at the time of the shooting. The prosecutor also represented that, after Johnson had inspected his vest, Johnson did not believe that the vest had been penetrated by a bullet. The prosecutor stated that, although Johnson's vest had "a mark" on it, "I don't have any evidence to show that there was any bullet associated with [Johnson's] vest." Later that day, after defense counsel had an opportunity to inspect Johnson's vest, defense counsel informed the court that "the vest that [Johnson] was wearing did not appear to contain any type of marking or bullet hole." Thereafter, defense counsel stated, "[w]e are all set on that."

During the criminal trial, Johnson testified that, at the time of the shooting, he was wearing a bulletproof vest underneath his street clothing, specifically, a football jersey. He testified that the first gunshot fired by the petitioner shattered the window of the unmarked police vehicle in which he and his fellow officers were seated. He also testified that the first or second gunshot fired by the petitioner struck him. Johnson testified that, after the shooting, he experienced pain. He testified, "I laid down on the ground because I didn't know what type of injuries I sustained in being shot." After being examined at Hartford Hospital, he learned that he had sustained a bruised liver and a cracked rib. Ronald Gross, Johnson's treating physician at Hartford Hospital, testified at the criminal trial that Johnson had "what appeared to be a superficial abrasion wound" across his right hip and abrasions on his right arm that were

consistent with "what [he] thought [was] a bullet wound."

Pleasant testified at the criminal trial about what he observed during the shooting. Pleasant testified that he was in the front passenger seat of the unmarked police automobile, Otero was in the backseat, and Johnson was in the driver's seat. Pleasant testified that the petitioner and Johnson began speaking with one another, and the petitioner, who was standing near Johnson, made a comment that suggested he knew that Pleasant, Otero, and Johnson were police officers. Pleasant testified that "a rapid succession of gunshots" by the petitioner followed. Pleasant exited the automobile and began firing his police firearm in the direction of the petitioner, who was fleeing on foot. Pleasant testified that he attempted to assist Johnson, who had pursued the petitioner briefly but then "staggered back" to Pleasant and indicated that he was "hit." Pleasant testified, "I lay him down and I tore his clothes off, and I was able to observe a small wound, a burn, really, *where the bullet had impacted the bulletproof vest* and burned his skin from the twisting action of the bullet. And then I inspected [Otero], and it was clear to me that he was more grievously wounded because he had some blood coming out of his side." (Emphasis added.)

At the criminal trial, the petitioner admitted discharging his .40 caliber Glock semiautomatic handgun in the direction of the unmarked police automobile. He testified that he "was just firing" at the automobile because the driver appeared to be reaching for a firearm, and he was "scared for [his] life."

At the habeas trial, a forensic scientist and forensic criminologist, Brent E. Turvey, testified that his examination of the bulletproof vest that Johnson was wearing at the time of the shooting did not reveal any damage to the vest. Turvey also testified that, if a bulletproof

vest was struck by a bullet fired from a large caliber weapon, he "would expect that there would be damage to the vest. And if it was in an area where there was one of the metal plates, I would expect . . . some indication on that plate that it had been struck. But at least . . . any . . . strike of a bullet to the vest in any location I would expect to be damage to the exterior of that vest at that location." Turvey acknowledged, however, that it was possible that a bullet had struck Johnson but did not strike his bulletproof vest. At the habeas trial, Gross opined that Johnson's injury was consistent with a bullet hitting his bulletproof vest directly.

At the habeas trial, Pleasant testified that, when he examined Johnson following the shooting, his primary concern was to ascertain the nature of Johnson's injuries, not the condition of his bulletproof vest. He recalled neither examining the vest nor whether he noticed any damage to the vest. Pleasant testified that "Johnson made some statement to the effect that he had been struck. I also noticed [Otero] was attempting to join us, and I then examined both of them for any potential injuries. I examined [Johnson] first. In the course of my examination, I observed what I believed at the time was something consistent with an abrasion wound caused by what I assumed was the twerking of vest fibers from a bullet. I'm not a ballistics expert, but that was my impression, which was consistent with the events that occurred." Pleasant went on to explain that "a bullet twists due to the rifling in a barrel, and I thought that the mark on the skin would have been caused by . . . that twerk. Now, whether or not that actually happens, I don't know. . . . I am communicating to you what my thoughts were at that time."

The prosecutor at the petitioner's criminal trial, James Thomas, testified at the habeas trial that the testimony at issue from Pleasant was not false testimony because, "when [Pleasant] lifted the clothing,

there was a bulletproof vest up on top of the clothing, and I think he just assumed that whatever wound was underneath had impacted the outer clothing, which would have been the bulletproof vest." According to Thomas, the testimony appeared to have been based on inferences drawn by Pleasant on the basis of the injuries he witnessed when he inspected Johnson, as well as the clothing that Johnson was wearing at the time of the shooting. Thomas testified that he would have corrected Pleasant's testimony if he believed that it was false testimony, and he testified that he believed the evidence demonstrated that "Johnson was struck with a bullet over his bulletproof vest." Thomas also testified that he believed it was possible that a bullet could strike a bulletproof vest without causing damage to the vest.

In rejecting the petitioner's due process claim, the habeas court stated: "There is no need to engage in substantive discussion of this claim because the assertion that the state knowing[ly] submitted false testimony or that [Pleasant] knowingly testified falsely is wholly without merit.

"[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . . False testimony means testimony that is more than simply wrong or which can be challenged factually by some other evidence or testimony. . . . In law, [false] means something more than untrue; it means something designedly untrue and deceitful and implies an intention to perpetrate some treachery or fraud. The totality of [Pleasant's] testimony on this issue

was as follows: '[The petitioner] ran north through an alley, at which point [Johnson] broke off his pursuit and staggered back and said to me, boss, I'm hit. And I lay him down and tore his clothes off, and I was able to observe a small wound, a burn, really, where the bullet had impacted the bulletproof vest and burned his skin from the twisting action of the bullet.' . . .

"Pleasant also testified before this court and was found to be a credible witness who simply testified to his honest belief about what he saw in the midst of a chaotic and traumatic event. There is no dispute that [Johnson] suffered a significant localized injury during this incident.[4] What the petitioner disputes is whether the bulletproof vest shows visible evidence of damage from the bullet strike. While his testimony may be subject to challenge, or even contradicted by other evidence, the petitioner has failed to provide the slightest shred of evidence that there was any design or intent by [Pleasant] to testify to something he knew to be untrue. . . . The petitioner has attempted to turn a standard conflict between eyewitness recollection and physical evidence into an intentional falsehood. His claim is dubious and fails for a lack of credible evidence." (Citations omitted; footnote in original.)

In a motion for articulation, the petitioner made the following request of the trial court: "On what basis did the court decline to apply the legal standard and reasoning set forth . . . [in] *Henning* v. *Commissioner of Correction*, 334 Conn. 1, [219 A.3d 334] (2019), including but not limited to the commentary found on page 4 at footnote 3 that, 'under *Brady* [v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] and its progeny, it makes no difference whether [the

[4] The habeas court stated that Johnson "was ultimately diagnosed with a bruised liver and [a] cracked rib on his right side."

testimony of a state's witness] . . . was intentionally false or merely mistaken'?"[5]

The habeas court granted the motion for articulation with respect to this request. The court stated: "*Brady* . . . is [the] beginning of the line of cases standing for the state's obligation to disclose exculpatory evidence, and the line of cases that [hold that] . . . materially inaccurate testimony will be imputed to the state's attorney. In the present case, however, *Brady* was not violated as a matter of law. Defense counsel had the opportunity to examine the vest in question during a pretrial conference . . . and, at least in the opinion by [Paetzold], did not believe the vest in question to have any visible damage. '*Brady* cannot be violated if the [defendant] had actual knowledge of the relevant information or if the documents are part of public records and defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.' *United States* v. *Zamari*, 111 F.3d 307, 320 (2d Cir.), cert. denied sub nom. *Herzog* v. *United States*, 522 U.S. 983, 118 S. Ct. 445, 139 L. Ed. 2d 381 (1997), and cert. denied sub nom. *Shay* v. *United States*, 522 U.S. 988, 118 S. Ct. 455, 139 L. Ed. 2d 390 (1997). Therefore, although the court's reasoning under the memorandum of decision was different, the result is the same." (Footnote omitted.)

The petitioner claims that the court's analysis of his claim was legally flawed. The petitioner argues that, "[a]t the habeas trial, [he] proved that the prosecuting authority had presented testimony that it knew or should have known was false or misleading about the vest that [Johnson] was wearing at the time of the

[5] "The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in *Brady* v. *Maryland*, [supra, 373 U.S. 86–87]." *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369, 71 A.3d 512 (2013).

shooting. In rejecting the claim, the habeas court mischaracterized the nature of the claim, calling it a dispute about 'whether the bulletproof vest shows visible evidence of damage from the bullet strike.' . . . In fact, the claim was that the vest was not damaged, that the vest would be damaged if it had been struck by a bullet, that the prosecutor knew or should have known it was not damaged, and that his failure to correct the testimony suggesting that it was damaged misled the jury on a key issue that drove to an essential element of one of the serious charges the petitioner was facing at trial. Put simply, the available evidence displays Johnson's vest was not damaged because Johnson was not shot. Pleasant's testimony about observing damage to the vest was false or misleading. There is a reasonable likelihood that this altered the jury's verdict because, if the jury had not been misled, there is a reasonable likelihood that they would conclude that Johnson was not shot, and they would at least acquit the petitioner on one count of assault in the first degree. There is also a reasonable likelihood [that] it would have altered their entire verdict at the criminal trial. Further, the habeas court erred by focusing on the mental state of the witnesses who suggested to the jury that the vest was damaged, overlooking the well established case law holding that a witness' subjective understanding of the truthfulness of their testimony is not the dispositive question in a false testimony claim. The habeas court also erred in assessing the harm from the violation . . . because it relied [on] the subjective beliefs of a witness in delivering testimony that would seemingly be physically impossible." (Emphasis omitted; footnote omitted.)

Having discussed the petitioner's claim, we set forth relevant legal principles. As a general proposition, "[d]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected

when it appears." (Internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010). This constitutional safeguard prohibits not only the solicitation of *false* evidence, which is objectively untruthful, but the solicitation of evidence that *substantially mischaracterizes* facts and, thus, has a tendency to mislead the finder of fact. In the context of a due process claim arising from the testimony of two state's witnesses concerning the existence of inducements in exchange for their testimony, our Supreme Court explained: "If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, [controlling precedent] require[s] the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading." (Internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 175, 243 A.3d 1163 (2020).

"The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States Supreme Court in *Brady* v. *Maryland*, [supra, 373 U.S. 86–87] . . . [in which] the court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . The United States Supreme Court also has recognized that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . Accordingly, the *Brady* rule applies not

just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . .

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. . . . In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. . . . A reasonable probability of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . .

"When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair . . . and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . .

"Furthermore, it is well established that this stringent materiality test applies when a prosecutor elicits testimony that he or she knows or should know to be false, [*r*]*egardless of the lack of intent to lie on the part of*

the witness . . . . This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial [impropriety], but more importantly because they involve a corruption of the [truth seeking] function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . In accordance with these principles, our determination of whether . . . false testimony was material under *Brady* and its progeny requires a careful review of that testimony and its probable effect on the jury, weighed against the strength of the state's case and the extent to which the petitioner . . . [was] otherwise able to impeach [the witness]. . . . Finally, because our role in examining the state's case against the petitioner is to evaluate the strength of that evidence and not its sufficiency, we do not consider the evidence in the light most favorable to the state. . . . Rather, we are required to undertake an objective review of the nature and strength of the state's case." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 23–26.

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Accordingly, [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. . . . 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."

(Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012). In the present case, the material facts found by the habeas court are not in dispute, and the issue may be distilled to whether the prosecutor's failure to correct Pleasant's testimony concerning Johnson's bulletproof vest deprived the petitioner of his right to due process.

In its initial decision, the habeas court rejected the petitioner's due process claim after concluding that Pleasant did not intend to deceive the jury. In contrast, in its articulation, the habeas court relied on the fact that defense counsel had the opportunity to examine the vest prior to the start of the trial. We agree with the petitioner and the respondent that the court's analysis was legally flawed in both respects. As we have stated previously, the proper focus of the habeas court's analysis should have been on the substance of the relevant evidence to determine if it was *false* or *substantially misleading*. Notwithstanding the error in the court's analysis, we may affirm the result reached by the court if, in our plenary review of the issue of whether the petitioner's due process rights were violated, we conclude that the same result is required by law. "An appellate court may affirm the judgment of the [habeas] court although it may have been grounded on a wrong reason . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 208 Conn. App. 204, 214 n.9, 264 A.3d 121, cert. denied, 340 Conn. 911, 264 A.3d 1001 (2021).

Following our plenary review of the relevant facts and Pleasant's testimony, which are not in dispute, we conclude that the testimony was neither false nor substantially misleading. Pleasant testified at the petitioner's criminal trial that he "was able to observe a small wound, a burn, really, where the bullet had impacted the bulletproof vest and burned [Johnson's] skin from

the twisting action of the bullet." This testimony conveys only that Pleasant observed Johnson wearing a bulletproof vest and that he observed a small wound or a burn on Johnson's torso. Pleasant did not state that he inspected the vest or that he observed damage to the vest. Pleasant's reference to the injury being located "where the bullet had impacted the bulletproof vest and burned [Johnson's] skin from the twisting action of the bullet" does not convey, as the petitioner suggests, that Pleasant witnessed damage to the vest. To the extent that Pleasant referred to a bullet impacting the vest, that appears to be his attempt at suggesting how the physical injury that he observed may have been caused, which was not something that the prosecutor invited Pleasant to do. Thus, we interpret Pleasant's reference to the vest as incidental to his description of the injuries he observed when he examined Johnson in the immediate aftermath of the shooting. Moreover, as we previously have discussed, the evidence fully supported Pleasant's reference to the fact that a shooting occurred, as the parties agree that the evidence reflected that Johnson was wearing a bulletproof vest at the time that the petitioner discharged his .40 caliber Glock semiautomatic handgun into the automobile in which Johnson was an occupant.

Even if we were to conclude that Pleasant's testimony was false or substantially misleading, however, the petitioner is unable to demonstrate that the prosecutor's failure to correct it was fundamentally unfair because there is no reasonable likelihood that the false testimony could have affected the judgment of the jury. The petitioner has not demonstrated that the condition of Johnson's vest was relevant to any material issue in the case, including the defense of self-defense. There also was no evidence that something other than one of the bullets discharged by the petitioner could have caused

Johnson's injury. In evaluating whether the state disproved the defense of self-defense, the jury was asked to focus on the circumstances in which the petitioner used deadly physical force and whether the petitioner reasonably believed that his undisputed use of deadly physical force was necessary to repel the alleged attack.[6] In the context of the defense of self-defense, it was inconsequential for the jury to determine what the petitioner struck when he used deadly physical force by discharging his handgun. As we stated previously, the petitioner testified that he fired on the officers and explained the reasons for his actions. He testified that he "was just firing" his handgun and that the bullets "landed where they landed. That's what it was, but I was firing, man. I was trying to get out of there. That's all I was trying to do . . . ."

The condition of Johnson's vest also was not relevant to any of the offenses of which the petitioner was convicted. Following the petitioner's trial testimony, the evidence was not in dispute that the petitioner committed the offenses of carrying a pistol without a permit and criminal possession of a firearm. The petitioner is unable to demonstrate that the condition of the vest was relevant to the charge of assault in the first degree with respect to Otero, the charge of assault in the first degree with respect to Johnson, or the charge of attempt to commit assault in the first degree with respect to Pleasant. The state presented overwhelming and undisputed evidence that the petitioner emptied his firearm in the direction of the unmarked police automobile in

[6] As the court instructed the jury in this case, "[t]he starting point of the inquiry is whether the [petitioner] believed that the degree of force he used was necessary. Next, you must focus on whether that belief was reasonable. In doing so, you must view the [petitioner's] belief from his standpoint at . . . the time and under all of the existing circumstances. The test is not what the complainants in this case intended—that would be [Johnson, Otero and Pleasant]—but what the [petitioner], in fact, believed and whether that belief was reasonable."

which Otero, Johnson, and Pleasant were occupants. The petitioner admitted to using deadly physical force because he believed that one or more occupants of the automobile was about to harm him. His use of the firearm in this manner, and not the possibility that Johnson's vest may have sustained damage caused by a bullet, was overwhelming evidence of his intent to cause serious physical injury.

The petitioner argues that, "[i]f the state acknowledged that the vest was not damaged, and that Pleasant was mistaken in his testimony, the jury would logically be left to wonder how Johnson's injury was caused. . . . If the jury was presented with [evidence of] minor injuries [to Johnson] and the information that the vest was not struck by a bullet, there would be a reasonable doubt whether Johnson was shot." The petitioner also asserts that Pleasant's testimony about Johnson's bulletproof vest was relevant to an assessment of Johnson's credibility because the officers' version of events was hotly contested and "whether Johnson was shot was put into question at the habeas trial . . . ." These arguments are flawed because they overlook the fact that, regardless of the existence of damage to Johnson's vest, the jury reasonably could have found that one of the bullets fired by the petitioner caused Johnson's injury, the injury could have resulted from a bullet impact regardless of whether there was any damage to the vest, and the injury sustained by Johnson was the result of a bullet that did not strike his vest. Moreover, the existence of damage to Johnson's bulletproof vest would not have tended to undermine his trial testimony. Johnson testified that the petitioner approached the police automobile and, from an arm's distance, pointed his gun at him. He testified that the laser sight of the petitioner's gun was aimed at his head. According to Johnson, he got out of the automobile, striking the

petitioner with the door. The petitioner fired two gunshots. Johnson said that he felt pain in the area of his ribs after either the first or second gunshot. Johnson testified that he experienced a "burning sensation from the inside" of his body near his ribs. Johnson did not testify that his vest had been impacted or that it had sustained damage of any type during the shooting.

In light of the foregoing, we conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying certification to appeal with respect to the issue of whether his due process rights were violated by the prosecutor's purported failure to correct Pleasant's testimony concerning the bulletproof vest worn by Johnson at the time of the shooting.

III

Next, we consider the petitioner's claim that his trial counsel's performance was deficient and deprived him of his right to the effective assistance of trial counsel. We are not persuaded.

In his petition for a writ of habeas corpus, the petitioner alleged that his trial counsel were deficient in many respects. In this claim, the petitioner challenges the habeas court's ruling by focusing on three aspects of his ineffective assistance of counsel claim. We will address these subparts of the petitioners claim in turn. Before doing so, however, we set forth relevant legal principles.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"The sixth amendment to the United States constitution guarantees a criminal defendant the assistance of counsel for his defense. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground. . . .

"We . . . are mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Similarly, the United States Supreme Court has emphasized that

a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he or she] did. . . .

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable. . . . In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 856–58, 257 A.3d 343, cert. denied, 339 Conn. 905, 260 A.3d 484 (2021).

A

First, the petitioner argues that the habeas court improperly rejected his claim that trial counsel failed to take adequate steps to inspect the bulletproof vest worn by Johnson at the time of the shooting and failed to investigate the condition of the vest in an attempt to demonstrate that it contradicted the officers' version of events.

In its decision, the court stated: "[T]he petitioner asserts that counsel was ineffective for failing to have [Johnson's] bulletproof vest examined by an expert witness and to have presented that evidence to the jury. This claim . . . fails. While [Pleasant] testified that he witnessed damage to [Johnson's] vest on the night of the incident, when the attorneys examined it in the course of a pretrial hearing several weeks before the trial, there did not appear to be any dispute between

counsel that there was no visible damage. The petitioner's expert also testified [at the habeas trial] that it would be normal to find some indication of damage on a bulletproof vest that had been struck by a bullet, but he could not find any such indication on [Johnson's] vest. Notwithstanding, [Gross], the trauma physician who treated [Johnson], testified that it was his opinion that the large circular bruising and internal injuries suffered by [Johnson] were caused by a bullet strike into the bulletproof vest. [Gross], who also had significant experience as a military trauma surgeon in active combat zones, testified that the shape and significance of [Johnson's] injuries could not have been explained by banging into the door on his way out of the [police] vehicle. The injury, in his opinion, was caused by a high velocity object striking his vest.

"In the end, the court finds that the petitioner has failed to prove prejudice. While the petitioner could well have presented his expert to testify that there was no visible external sign of a bullet strike on [Johnson's] vest, the court found [Gross] credible that a high velocity projectile was the only way to explain the injuries he suffered.[7] Therefore, the petitioner has failed to show that there is a reasonable probability that the inclusion of this evidence would have resulted in a more favorable outcome for the petitioner."[8] (Footnotes omitted.)

[7] The court noted that the evidence at the petitioner's criminal trial reflected that Johnson had sustained a bruised liver and a cracked rib.

[8] The court also stated: "While the petitioner was convicted of assault [in the] first degree as to [Johnson], which necessarily required proof that he caused injury with a deadly or dangerous weapon, he was also charged with attempt to commit assault in the first degree, in the alternative. Therefore, even if counsel had been successful in convincing a jury that the petitioner's bullet did not actually strike [Johnson], there is irrefutable evidence that he pointed the gun directly at him and fired at least twice, and [a] conviction for attempted assault in the first degree would have exposed him to the same penalties."

We note that, although the court incorrectly stated that the petitioner had been charged with assault in the first degree with respect to Johnson, its rationale is still sound, as the state was entitled to seek a lesser included

At the habeas trial, Kestenband and Paetzold testified that there were strategic reasons for not challenging the evidence that a bullet had caused Johnson's injury. Essentially, defense counsel believed that pursuing such a strategy tended to detract from the petitioner's self-defense claim. Also, defense counsel reasoned that, even if the petitioner could have cast doubt on whether a bullet caused the injuries, it would not have afforded him any practical benefit with respect to either the attempted murder charge concerning Johnson, which did not require proof of injury, or the assault charge concerning Johnson. With respect to the latter charge, the state could have requested a lesser included offense instruction for attempt to assault, which did not require proof of injury. Moreover, there also was a belief that the presence of visible damage to the vest was not significant. Defense counsel Paetzold, a former criminologist employed by the state, testified at the habeas trial that he believed that it was possible that a bullet may have impacted the vest without causing visible damage to the vest.

With respect to this claim, the court did not focus on the performance prong of *Strickland* but focused on whether the petitioner had satisfied his burden of demonstrating prejudice. In our plenary review, we agree with the court's analysis. The court properly focused on the importance of Gross' testimony, which was not effectively refuted at the habeas trial, that regardless of whether the vest reflected visible damage, a gunshot was the only way to explain Johnson's injuries. Moreover, in light of the undisputed evidence concerning the petitioner's use of a firearm at the time of the shooting, the issue of whether Johnson actually was struck by a bullet was unrelated to the overriding theory advanced by the defense, namely, that the petitioner

offense instruction with respect to the charge of attempt to commit assault in the first degree.

had acted in self-defense. It also was not relevant to the issues of whether he had assaulted Otero or attempted to assault Pleasant, as charged. In light of the evidence of the timing and nature of the injuries sustained by Johnson, the petitioner failed to demonstrate how the condition of the vest was likely to undermine a finding that he caused the injuries during the shooting. And, as the court aptly explained, even if the jury had found that the petitioner was not the cause of Johnson's injuries, the state would have been entitled to an instruction on the lesser offense of attempt to commit assault concerning Johnson, which offense would have exposed the petitioner to the same penalty as a conviction of assault, which is a class B felony. See General Statutes § 53a-59b (b) (defining class of offense); General Statutes § 53a-51 (attempt is crime of same grade and degree as most serious offense that is attempted, except that attempt to commit class A felony is class B felony).

B

Next, the petitioner claims that the court improperly rejected his claim that trial counsel rendered deficient representation by failing to investigate and present certain evidence in support of his claim of self-defense. Specifically, the petitioner claims that trial counsel should have presented the testimony of a forensic psychologist to explain relevant issues concerning his mental health. In support of this aspect of the claim, he relies on the opinions expressed by Wendy Levy, a clinical psychologist who testified at the habeas trial on his behalf. Levy testified that she reviewed materials related to the events at issue and evaluated the petitioner over the course of two days in December, 2018, and February, 2019. Levy opined that events in the petitioner's childhood caused the petitioner to suffer from a developmental trauma disorder that left him in a state of exhibiting "hyperarousal" and "hypervigilance." Levy

also testified that this disorder would have made the petitioner more likely than a person without this disorder to believe that circumstances he encountered were dangerous. The petitioner argues that "a mental health professional would have been critical in this case to educate the jury about [his] specific history of trauma and how that actually had an objective impact on [his] perception and response to the events on that night." Evidence of this nature was not presented during the petitioner's criminal trial.

The petitioner also argues that counsel should have presented the testimony of Josiah Pinault, who testified at the habeas trial but was not contacted by defense counsel at the time of the criminal trial. Pinault testified at the habeas trial that, at or about 10 a.m. on the day of the shooting, he overheard an individual named Angel Rosa deliver a lethal threat to the petitioner. Pinault testified that, at the time of the petitioner's criminal trial in 2004, he was living in Connecticut and would have testified with respect to the threat. The petitioner argues that Pinault would have corroborated his version of events and that doing so was "critical to convincing the jury that [he] was in fear for his life at the time of the incident with the officers. The reality of the prior threat was crucial to display to the jury that the petitioner had reasons to be particularly fearful in the situation. The need to investigate and present other witnesses [like Pinault] was especially crucial considering Rosa's invocation of his fifth amendment privilege [at the time of the criminal trial]."

With respect to this claim, the habeas court stated: "[The petitioner] makes numerous claims that defense counsel failed to properly investigate and present witnesses to support [his] claim that he was in legitimate fear for his life on the night of the incident because . . . [Rosa] had threatened his life earlier that day and that he believed the plainclothes police had come to

carry out that threat. This claim fails because the petitioner has failed to establish prejudice. . . . The petitioner offered the testimony of [Pinault] at the habeas trial. He was only able to offer that he heard the verbal disagreement and the threat being made to the petitioner on the morning of the incident. The petitioner also presented [Levy], a clinical psychologist. She offered that the petitioner has suffered a history of trauma and was likely in a hypervigilant state on the night of the incident. The sum of this testimony, however, was merely cumulative to the . . . [testimony of the petitioner], who was allowed to testify to the threat that had been made on his life and to his general state of mind on the night of the incident. The addition of the testimony provided by Pinault and [Levy] was hardly significant or compelling enough to support the slightest probability of a more favorable outcome. The claim fails because there was no prejudice." (Citation omitted.)

We agree with the habeas court that the petitioner is unable to demonstrate that he was prejudiced by trial counsel's failure to present Pinault's testimony and the type of psychological opinion testimony reflected in Levy's testimony. The petitioner argues that this testimony, in addition to his testimony at the criminal trial, would have helped to corroborate his theory of self-defense and would have made his subjective fear for his life at the time of the shooting more reasonable. We disagree with the court that the failure to present this evidence was not prejudicial because the evidence was, to some extent, cumulative of the petitioner's trial testimony. We are, however, persuaded that the court reached the correct result because the evidence at issue was unlikely to have affected the outcome of the criminal trial.

We note that, although Pinault would have corroborated the petitioner's trial testimony that he had been

threatened earlier on the day of the shooting, his testimony could not have shed light on whether the petitioner subjectively believed that the threat was credible or whether he actually feared for his life at the time of the shooting. Also, we disagree with the petitioner's belief that the type of expert opinion presented in the form of Levy's testimony shed light on his mental state at the time of the shooting. The value of Levy's opinions is undermined by the fact that they were based on her evaluation of the petitioner in late 2018 and early 2019. The shooting took place in 2003. Levy did not testify that her diagnosis would have been the same at the time of trial in 2004. In fact, she testified that her diagnosis of "developmental trauma disorder" was not a disorder listed in the Diagnostic and Statistical Manual of Mental Disorders, which she described as the "bible" of her profession. Levy testified, however, that the petitioner "probably" suffered from post-traumatic stress disorder in 2003 but that she could not be "certain" about that diagnosis.

Ultimately, however, the petitioner's attempt to demonstrate prejudice is hampered by the fact that, even if he had been able to demonstrate that he subjectively feared for his life at the time of the shooting, the evidence presented at trial did not support a conclusion that his use of deadly physical force was objectively reasonable. "[General Statutes §] 53a-19 sets forth the narrow circumstances in which a person is justified in using deadly physical force on another person in self-defense. Under § 53a-19 (a), a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . [T]he test a jury must apply . . . is a subjective-objective one. The jury must view the situation

from the perspective of the defendant . . . [but] . . . the defendant's belief ultimately must be found to be reasonable. . . .

"Thus, with regard to the first requirement of self-defense, the jury must make two separate affirmative determinations for the defendant's claim of self-defense to succeed. The jury must determine whether, on the basis of all of the evidence presented, the defendant in fact believed that the victim was about to use deadly physical force. . . . This initial determination typically requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief is in fact credible. . . . If the jury determines that the defendant did not believe that the victim was about to use deadly physical force when the defendant employed deadly force, the defendant's self-defense claim must fail. . . . Even if the jury finds that the defendant may have held such a belief, if that belief was not objectively reasonable, the self-defense claim must fail." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Hughes*, 341 Conn. 387, 398–99, 267 A.3d 81 (2021). We already have discussed the facts the jury reasonably could have found concerning the petitioner's use of deadly physical force against the undercover police officers. We are persuaded that the evidence at issue in this claim was unlikely to have swayed the jury to find that his use of force was objectively reasonable. Thus, we conclude that there is no reasonable probability that if this evidence had been presented at trial, it would have led to a different outcome.

C

Next, the petitioner claims that the court improperly rejected his claim that the representation he received from trial counsel was ineffective because they failed

to "make an adequate and appropriate objection, pursuant to *State* v. *Morales*, [232 Conn. 707, 657 A.2d 585 (1995)], to the state's failure to preserve and make available the vehicle that the officers occupied at the time of the shooting . . . ." We are not persuaded.

With respect to this claim, the court stated: "The vehicle the officers occupied appears to have been stored in a police storage yard following the incident but was ultimately released to a local junkyard about a year after the incident, where it was left uncovered and exposed to the elements. [Paetzold] and Kestenband did go to view the vehicle at the junkyard, once hired, and found it to be in a general state of disrepair. The petitioner . . . has failed to prove his claim.

"Where a defendant claims a violation of his right to a fair trial due to missing or destroyed evidence, 'the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence.' *State* v. *Johnson*, 288 Conn. 236, 275–77, 951 A.2d 1257 (2008), quoting *State* v. *Morales*, supra, 232 Conn. 726–27. In the present case, the petitioner has failed to establish that anything truly 'material' to his defense was actually destroyed or lost by the failure of the police to store the vehicle in a different fashion. He offered the possibility that various tests or examinations could have been run on the vehicle but failed to support those claims with any substantive evidence that those tests or examinations would have resulted in anything significant to the defense. The petitioner's own expert testified that he would be speculating when asked about possible examinations that could have been conducted on the vehicle. For those reasons, the claim fails."

In order to understand the type of objection that is at the heart of this claim, we note that, in *Morales*, our Supreme Court considered what degree of protection the due process clause of our state constitution guarantees to criminal defendants when the police fail to preserve potentially useful evidence. Ultimately, the court reasoned that "the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law. . . . [W]e . . . reject [the notion of using a] litmus test of bad faith on the part of the police . . . . Rather, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must . . . [weigh] the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence." (Footnote omitted; internal quotation marks omitted.) *State* v. *Morales*, supra, 232 Conn. 726–27. In *Morales*, our Supreme Court did not mandate a universal remedy that should be afforded a defendant to offset any prejudice suffered as a result of unavailable evidence, instead noting that "a trial court must decide each case depending on its own facts, assess the materiality of the unpreserved evidence and the degree of prejudice to the accused, and formulate a remedy that vindicates his or her rights." Id., 729.

In order to sustain his burden of proof with respect to his claim that trial counsel rendered ineffective assistance by failing to raise a claim pursuant to *Morales* at trial, the petitioner had to demonstrate not only that

counsel performed deficiently but that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See *Harris* v. *Commissioner of Correction*, supra, 205 Conn. App. 858. Mindful of this burden, we briefly review the evidence presented at the habeas trial that is relevant to the present claim. This evidentiary record includes evidence from the petitioner's criminal trial, including several photographs depicting the undercover police automobile, bullet holes in the automobile, and trajectory rods placed in the bullet holes for the purpose of shooting incident reconstruction. At the criminal trial, Timothy Shaw, a police detective, testified that the police were able to "reconstruct the target lines or trajectory lines on six out of the nine [bullet] holes in the vehicle." During cross-examination, defense counsel elicited through Shaw that one "trajectory line" from the bullet holes in the automobile pointed in the direction of a cluster of spent shell casings that were consistent with the type of firearm used by the petitioner during the shooting. Through questioning of Shaw, defense counsel elicited testimony that the physical position of these particular shell casings at the shooting scene was consistent with the petitioner's version of how the shooting occurred, specifically, in terms of his distance from the undercover police automobile when he discharged his handgun.

Moreover, defense counsel devoted a significant portion of closing argument to inviting the jury to review the shooting scene evidence and to find that it was consistent with the petitioner's version of how the shooting occurred. For example, defense counsel argued that the location of the shell casings from the petitioner's handgun undermined the testimony of the police officers that the petitioner was in close proximity to the undercover police vehicle. Relying on photographic evidence of the shooting scene that depicted

the location of the undercover police vehicle and the location of the shell casings from the petitioner's gun, defense counsel argued that it was not possible that the petitioner could have been near the vehicle and fired the gunshots where the casings were located. Defense counsel stated, "[t]here is no way he was near that car." Defense counsel argued that the shell casings, identified in the photographs of the shooting scene, "show where everybody was." Defense counsel also argued that the photographs reflect that the petitioner "was never near that car . . . ." Relying on the location of the shell casings, defense counsel argued, "[t]he physical evidence and your common sense tells you he was not near that car the way [Johnson] puts him there and the officers put him there. It just didn't happen that way."

Defense counsel also devoted a portion of his argument to discussing the evidence related to the bullet trajectory analysis that had been performed by the state using the undercover police vehicle. Referring to photographs of the shooting scene, defense counsel argued, "[h]ow about the trajectory of the bullets? . . . If you take a look at that when you're deliberating, you'll see that the angle of those bullets does not support the notion [that the petitioner] was shooting from anywhere near the front of the car. The angle was from the rear of the car. It didn't happen the way the state wants you to believe it happened, and that's their theory. . . .

"The state's theory here, that he walks up to that car, identifies them as police officers, and starts firing because of that [and] the physical evidence tells you that it just did not happen that way."

At the habeas trial, Kestenband testified that, prior to the criminal trial, he and Paetzold examined the automobile in the junkyard where it was being stored by the police, but that neither he nor Paetzold consulted an expert to inspect the automobile or raised a claim

pursuant to *Morales* during trial. Kestenband recalled that there was a lack of funds to hire an investigator.

Kestenband testified that, at the criminal trial, there was a conflict between the version of events surrounding the shooting as described by the police officers and the petitioner. He aptly described this difference: "[T]he officers said that [the petitioner] approached the car in an effort to sell them drugs. That he either got really close to the car, maybe even had, like, stuck his head in. And, according to the officers, they testified that he identified them as police officers. And the way they reached that conclusion, as I recall, was that they said he said that you all look like a bunch of jakes. And jakes was slang for police officers. And [the petitioner's] version was that he was further back from the car. That they had driven into a parking lot where, I believe, he was the sole occupant. That . . . it was raining, and he might have been under a tree at one point. He was saying to avoid the rain. That they either drove up to him or summoned him over to the car. . . . And that, at one point, he believed he was about to be robbed and that he used the word jukes, not jakes, and that jukes was slang for a robbery. And that, by virtue of the fact that he thought he was about to be robbed, he started firing." Kestenband testified that determining where the petitioner discharged his firearm, in terms of his distance from the automobile, was relevant in an assessment of which version of events was accurate. He testified, however, that he did not believe that determining the trajectory of the gunshots was "that important" because it "focused more on the angle of the shots . . . [and] that the distance at which the shots were fired was more important . . . ." Kestenband testified that he presumed that, "if the car had been preserved and gunshot residue could have been obtained, that either would have supported or undermined the idea that [the petitioner] was close to

the car." Kestenband testified that if he had believed evidence should have been preserved that was not preserved, he would have raised a claim at trial pursuant to *Morales*.

Similarly, Paetzold acknowledged that, at the criminal trial, there was a dispute between the version of events related by the officers and the version of events related by the petitioner. Paetzold testified that, although it could have been helpful to try to undermine the version of events related by the police officers so as to undermine their credibility, his goal was to focus on the "big picture" in this case, meaning the defense of self-defense. Paetzold testified that he vaguely recalled observing the automobile prior to the trial. He said that, "in a shooting case, physical evidence is always important and should be accessible to both sides to investigate and see if there's anything of evidentiary value, including . . . looking at the holes [in the automobile] and seeing the trajectory of . . . if it's possible to determine the angle of how the bullets entered into the holes." Paetzold testified that "it would have been helpful to look at the car for determination of whether there's gunshot residue . . . if you can get it off the car. . . . [I]f the car was . . . outside, gunshot residue may not be available anymore because of weather conditions, et cetera."

Paetzold testified that, although it was "possible" that he could have brought a claim under *Morales* in this case, he did not recall why he did not do so. Paetzold testified that he "probably" relied on his own forensic science background in an evaluation of whether the state had created a situation in which helpful evidence was unavailable to the defense.

Turvey, a forensic scientist and forensic criminologist hired by the petitioner to testify at the habeas trial, stated that, to his knowledge, the automobile was not

available for him to inspect prior to the habeas trial because it had been "abandoned to a junkyard, and the location of this vehicle is now unknown." Turvey testified that the automobile was a key piece of evidence for purposes of reconstructing the shooting and that he had examined photographs of the automobile that reflected an attempt to reconstruct the shooting by means of bullet trajectory analysis. Turvey testified, in general terms, that trajectory analysis is a component of shooting incident reconstruction and that it could yield information concerning a shooter's distance from a target. He testified that "shooting incident reconstruction" involves such things as trajectory analysis, ballistics analysis, and gunshot residue analysis. He testified that "[t]here's an actual whole series of things that can be done inside of shooting incident reconstruction to determine the position and angle of the shooter, what weapon they were using, their intended target, their skill level. All these things can be inferred . . . once you have done that shooting incident reconstruction." Turvey testified, however, that, although there was photographic evidence of trajectory analysis having been performed using the automobile, he was unaware of any report having been generated from that analysis in the present case.

Turvey testified that he could "[n]ot reliably" draw any conclusions about the shooting without being able to examine the automobile itself to make necessary measurements. Turvey also testified that outdoor storage of an automobile was "a very bad idea" in terms of preserving it for forensic analysis because such storage not only causes chain of custody problems but permits erosion by means of the elements, thus leading to the physical destruction of the evidence itself. Turvey testified that "the outside elements are really bad, depending on the region. Like, it can be . . . in some regions it could be in extreme heat. It can be extreme

cold. It can be extreme weather conditions like rain and wind. These things can destroy items of evidence very quickly in terms of erosion, rust, the changes of the items given the heat, given the cold, and washing away of evidence, given the rain."

The first factor under the *Morales* test is materiality of the missing or destroyed evidence. As this court has explained, "if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, little more is required than a showing that the test could have been performed and results obtained which, in the context of the defendant's version of the facts, would prove exculpatory. . . . Our courts have . . . clarified that [missing] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Citation omitted; internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 207, 274 A.3d 870, cert. denied, 343 Conn. 929, A.3d (2022). This court also has stated that "[t]he defendant's mere speculation that the [lost evidence] could have been beneficial *or not* does not meet the standard necessary to prove materiality." (Emphasis in original; internal quotation marks omitted.) *State* v. *Fox*, 192 Conn. App. 221, 237–38, 217 A.3d 41, cert. denied, 333 Conn. 946, 219 A.3d 375 (2019).

Our careful review of the evidence presented at the habeas trial amply supports the court's determination that the petitioner failed to demonstrate that anything material to the defense was lost by virtue of the manner in which the police stored the automobile. It is undisputed, and the court found, that trial counsel observed the automobile in a junkyard prior to the criminal trial. Counsel did not pursue testing at that time and did not make any further request with respect to the evidence.

Although the petitioner, by means of Turvey's testimony, raised the possibility that, had the police stored the automobile in a different manner, certain forensic testing of it, in addition to that which the state already had been performed, could have taken place prior to the petitioner's criminal trial. Turvey, however, lacking any reliable data from which to draw conclusions, essentially speculated about what such testing might have entailed, let alone what it might have revealed. "The petitioner cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Cox* v. *Commissioner of Correction*, 127 Conn. App. 309, 314, 14 A.3d 421, cert. denied, 301 Conn. 902, 17 A.3d 1043 (2011). Moreover, the petitioner argues that the materiality of the forensic testing that was not performed would have been relevant to disproving the version of the shooting that was described by the police. Proving that the petitioner was farther away from the undercover vehicle when he discharged his firearm, he argues, would have undermined the state's case and supported his claim of self-defense.[9]

As we stated previously in our discussion of the present claim, at the criminal trial, defense counsel utilized the results of forensic analysis of the shooting scene, including the results of trajectory analysis that had been performed with the use of the automobile. Rather than suggesting that the defense was left without the benefit of trajectory analysis, defense counsel's cross-examination and arguments at the time of trial reflect defense counsel's belief that the forensic analysis of the crime

[9] The petitioner argues that he satisfied *Morales*' materiality requirement because Turvey "testified [that] a preserved car would be critical to examine questions of the position and distance of the petitioner at the time of the shooting, a question that drove to the core of the disputed facts at the petitioner's criminal trial."

scene and the automobile that had been performed by the state provided the defense with ample fodder to undermine the state's theory of the shooting. Simply put, the petitioner in the present claim has not demonstrated what benefit further testing could have provided the defense above and beyond what was already presented to the jury, let alone that such further testing could have been conducted. Thus, the petitioner has failed to demonstrate the materiality of the allegedly destroyed evidence in the sense that the result of the proceeding would have been different if it had been available to the defense at the time of the criminal trial.

Accordingly, we agree with the habeas court that the petitioner has failed to demonstrate that his defense was prejudiced as a result of counsel's failure to raise a claim under *Morales* on the ground that the automobile was unavailable for testing due to the manner in which it had been stored. The petitioner has failed to prove that, had defense counsel at trial raised a claim under *Morales* with respect to the automobile, such claim would have been successful.

For the foregoing reasons, we conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying certification to appeal with respect to the issue of whether he had been deprived of his right to a fair trial because of ineffective representation afforded him by trial counsel.

IV

Next, the petitioner claims that his appellate counsel's performance was deficient and deprived him of his right to the effective assistance of appellate counsel. We are not persuaded.

In this claim, the petitioner challenges the court's rejection of three aspects of his claim of ineffective assistance of prior appellate counsel. First, he argues

that appellate counsel should have "raised a more reasonable challenge to the trial court's actions related to [Rosa]." Second, he argues that appellate counsel should have raised a claim under *State* v. *Morales*, supra, 232 Conn. 707, "related to the trial court's refusal to take action related to the lack of preservation of the officers' vehicle." Third, he argues that, although appellate counsel raised a claim of prosecutorial impropriety in the petitioner's direct appeal, the claim did not encompass the fact that, during closing argument, the prosecutor vouched for Johnson's credibility. Thus, the petitioner argues that "[a]ppellate counsel failed to raise a critical component of the prosecutorial impropriety claim on appeal."

We note that, in its memorandum of decision, the habeas court rejected all of the petitioner's ineffective assistance of appellate counsel claims by means of the following analysis: "The petitioner . . . claims that [Evans] was ineffective in representing him in his direct appeal. The court decided this matter based on the fact that it finds no deficiency in appellate counsel's performance. [Evans] testified credibly that she read through the petitioner's case, prepared those issues she believed had a best chance on appeal, and winnowed out weaker arguments. That is appellate counsel's job. . . . The petitioner failed to present any credible evidence that appellate counsel's decision on the issues she raised was objectively unreasonable or that she failed to raise some other issue that had an objectively reasonable possibility of succeeding on appeal. For those reasons, [the claim of ineffective representation by appellate counsel] fails." (Citation omitted.)

Before addressing the arguments raised by the petitioner, we set forth the applicable standard of review. "The two-pronged test of *Strickland* v. *Washington*, [supra, 466 U.S. 687], applies to claims of ineffective assistance of appellate counsel. . . . *Strickland*

requires that a petitioner satisfy both a performance and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . .

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities. . . .

"To establish that the petitioner was prejudiced by appellate counsel's ineffective assistance, the petitioner must show that, but for the ineffective assistance, there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed." (Citations omitted; internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 211 Conn. App. 77, 98–99, 271 A.3d 1058, cert. denied, 343 Conn. 924, 275 A.3d 1213 (2022).

A

The first claim of ineffective assistance of appellate counsel pertains to the claim raised in the petitioner's direct appeal with respect to Rosa's invocation of his fifth amendment privilege during the petitioner's criminal trial. We previously have discussed the petitioner's

trial testimony concerning Rosa in part III B of this opinion. The record from the petitioner's criminal trial reflects that, outside of the presence of the jury, Rosa invoked his fifth amendment privilege and that the state declined the request of the petitioner's trial counsel to grant Rosa immunity.

In his petition for a writ of habeas corpus, the petitioner alleged in relevant part that appellate counsel rendered ineffective assistance because she "failed to raise a challenge to the trial court's refusal to allow the petitioner to call [Rosa] as a defense witness and have any invocation of Rosa's fifth amendment privilege occur before the jury," and "failed to raise a challenge to the trial court's refusal to allow the petitioner to call [Rosa] as a defense witness and have any invocation of Rosa's fifth amendment privilege occur on a question-to-question basis . . . ." In his posttrial brief before the habeas court, the petitioner, relying on the evidence presented at the habeas trial, also argued that appellate counsel was ineffective for failing to claim that the court erred by not addressing Rosa's invocation of his right not to testify. Specifically, the petitioner argued that appellate counsel should have claimed that the trial court erred "by not giving an appropriate instruction related to Rosa in the event he was not called to testify." The petitioner presently argues that an appropriate instruction would have been "to inform the jury that Rosa did exist and that the jury should not take any adverse inference from either party's failure to call him."

The petitioner argues that, although appellate counsel raised a claim in the direct appeal related to Rosa's invocation of his right against self-incrimination, counsel followed a deficient tactical path because she "pursued a low probability Hail Mary [claim] where several

more viable paths to victory were available."[10] The petitioner argues that counsel should have raised the additional arguments concerning Rosa set forth herein. He characterizes these additional claims as "complementary alternative claims."

It suffices to observe that, in the petitioner's appellate brief, he merely asserts that the aforementioned errors were committed by the trial court. He has failed to present this court with any authority in support of his assertions that the court acted improperly with respect to Rosa's invocation of his fifth amendment privilege or that it was obligated to instruct the jury concerning Rosa's unavailability. Although the petitioner disputes the explanation provided by appellate counsel for not challenging on appeal the lack of a jury instruction concerning Rosa, he does not cite to any authority for the proposition that the trial court was compelled to deliver the instruction in the first place. Setting aside these fundamental deficiencies, the petitioner merely asserts in conclusory fashion that "[t]here is a reasonable probability that a properly presented claim related to the testimony of Rosa would have been successful on appeal."

We agree with the court that the petitioner has failed to demonstrate that his appellate counsel's performance was deficient for having failed to raise these

[10] In the petitioner's direct appeal, this court summarized the petitioner's claim as follows: "The [petitioner] raises multiple claims regarding the assertion by a witness, Angel Rosa, of his fifth amendment privilege against self-incrimination. On appeal, the [petitioner] claims that he was deprived of his constitutional right to compulsory process to produce witnesses on his behalf under the sixth amendment to the United States constitution and that he was forced to waive his constitutional right to remain silent under the fifth amendment. The [petitioner] argues that his constitutional rights were violated by Rosa's assertion of an invalid fifth amendment privilege against self-incrimination and, in the alternative, by the court's refusal to compel the prosecution to grant the witness immunity." (Footnote omitted.) *State* v. *Ayuso*, supra, 105 Conn. App. 309–10. This court rejected the petitioner's claims in this regard. See id., 315, 319.

claims. We also agree with the respondent that the petitioner's claim amounts to little more than speculation that, even if appellate counsel's performance was deficient and she had raised the claims at issue, the result of the direct appeal would have been different. As we have explained previously, it was not sufficient for the petitioner to demonstrate that one or more trial errors occurred that were left unchallenged on appeal by appellate counsel. To prevail with respect to any aspect of the present claim at the habeas trial, the petitioner bore the burden of demonstrating not merely that a reviewing court would have found error but that raising the claims would have resulted in a reasonable probability that he would have prevailed on direct appeal. See, e.g., *Lewis* v. *Commissioner of Correction*, supra, 211 Conn. App. 99. He has failed to do so.

B

The petitioner asserts that appellate counsel rendered ineffective assistance by failing to raise a claim under *Morales* "related to the trial court's refusal to take action related to the lack of preservation of the officers' vehicle." In part III C of this opinion, we rejected the petitioner's claim that trial counsel rendered ineffective assistance by virtue of their failure to raise a claim under *Morales*; facts underlying the *Morales* claim are adequately set forth therein. The petitioner correctly acknowledges that, when the issue of the police automobile was raised at his criminal trial, defense counsel did not seek any type of remedy. At the criminal trial, Paetzold represented to the court that he had seen the automobile, that it was located in a Wethersfield junkyard, and that "[i]t's a question . . . whether the defense has an opportunity to view the [automobile] in the same condition as it was in at the time that the incident took place." Nonetheless, Paetzold stated, "[w]e are not making an issue at this point about that." In fact, to the extent that defense counsel

had made representations or arguments concerning the automobile, Paetzold emphasized that "it would be appropriate to have the car stored in a better situation than where it is now. But as far as an issue about the car, I agree with [the prosecutor], at this point there is no issue about the car [being raised before the court]." The court responded, "Excellent. Now we have an agreement by all three of us."

Presently, the petitioner argues that, despite the foregoing representations by defense counsel and, in particular, the fact that the court was not asked to provide the petitioner with any type of remedy vis-à-vis the automobile, "[t]he record was . . . adequate for appellate counsel to raise a claim under [the bypass doctrine in *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)] that the petitioner's right to have the state . . . preserve potentially helpful evidence was violated by the state's failure to preserve the evidence." The petitioner also observes that, when appellate counsel was asked about this potential claim during the habeas trial, she "offered no explanation for her failure to raise this claim on appeal."

In *Golding*, our Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond

to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

With respect to the reviewability prong of *Golding*, our Supreme Court stated that "[t]he defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." Id., 240. Subsequently, this court stated that "[i]t is axiomatic that this court will not resort to speculation and conjecture in avoidance of an inadequate record." *State* v. *Durdek*, 184 Conn. App. 492, 505, 195 A.3d 388, cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018).

The petitioner bears the burden of demonstrating that, had appellate counsel raised the claim at issue under *Morales*, there was a reasonable probability that he would have prevailed in his direct appeal. See, e.g., *Lewis* v. *Commissioner of Correction*, supra, 211 Conn. App. 99. Thus, the petitioner bears the burden of demonstrating that, even if appellate counsel's performance was deficient for having failed to raise the present unpreserved claim under *Golding*, as he argues, such deficient representation was prejudicial because there was a reasonable probability that a reviewing court would have found a *Golding* violation that entitled him to relief.

The petitioner has not provided this court with an analysis of the claim under all four prongs of *Golding*. With respect to *Golding*'s first prong, he merely argues, without citation to authority or the record, that the record was adequate to raise a *Golding* claim. Even a

cursory review of the trial court record flatly contradicts this assertion. The record is devoid of an adequate factual record with respect to whether a *Morales* violation had occurred. That is, despite the assumptions made by the petitioner in his arguments before this court, at the time of trial, there was no record made of whether the manner in which the automobile was being stored had resulted in the loss of material evidence. The petitioner did not attempt to satisfy that burden until the time of the habeas trial. There is more than a reasonable probability that a reviewing court would have disposed of a *Golding* claim, if it had been raised by appellate counsel, under *Golding*'s first prong. Consequently, on this record, we agree with the habeas court that the petitioner has failed to demonstrate that counsel acted deficiently for failing to raise this claim. Moreover, we are persuaded that, even if appellate counsel had acted deficiently, counsel's performance was not prejudicial. As we already have explained, if an unpreserved *Morales* claim had been raised in the direct appeal, a reviewing court most likely would have concluded that it failed under *Golding*'s first prong. For these alternative reasons, we conclude that the habeas court properly rejected this claim.

C

The petitioner next asserts that his appellate counsel rendered ineffective representation by failing to claim in his direct appeal that the prosecutor had improperly vouched for Johnson's credibility during closing argument to the jury. The petitioner argues that this claim of prosecutorial impropriety should have been raised in conjunction with other claims of prosecutorial impropriety that appellate counsel raised in the direct appeal.

The following additional facts are relevant to this claim. During the prosecutor's rebuttal closing argument, the prosecutor drew the jury's attention to a portion of defense counsel's closing argument that

attempted to cast doubt on Johnson's trial testimony. The prosecutor stated: "Now, [Johnson's] testimony has been criticized by my learned . . . cocounsel on defense, you know, if you listen back to [Johnson's] testimony, there is a point at which it's very chilling—at least I thought it was chilling in his description—and he describes the laser coming [from the petitioner's gun] up the car onto his body, onto his face, and that's when he reacted and he gets out of the car and he shoots, whether it was the first shot or second shot that hit him.

"Now, counsel makes much of the fact that this testimony didn't match up exactly with his police report and what he told the other officers. Well, I would argue to you that a reasonable inference could be drawn that, I would say, [Johnson] was a little bit upset by what had transpired. He said on the stand that he believes he fired his weapon at his attacker when he got out of the car. There is no evidence of that. In fact, there is no evidence . . . that he fired his weapon at all until he got down the alley and onto Park Street.

"Now, that tells you something about [Johnson]. He's a trained police officer. Someone just tried to kill him. He's in pain. Adrenalin is going. He never fires his weapon, never fires his weapon at the attacker until he gets onto Park Street after the other officers have already emptied their guns. What does that tell you about what's going through his mind? He's not thinking clearly. He's thinking, I just about got killed. He's got that loaded .45 caliber gun in his hand, and he doesn't discharge it. Was he nervous? I would say that almost being killed makes you kinda nervous. It shows that. Any surprise that his testimony here is not necessarily consistent with what actually happened that night or his report, which is written days after, trying to reconstruct this, this incident."

The petitioner's trial counsel did not object to this argument. The petitioner's appellate counsel did not raise a claim concerning this argument. Presently, the petitioner argues that "[t]his argument constitutes a harmful form of vouching: the prosecutor vouching that the inaccuracy in Johnson's testimony actually affirms the reliability of that testimony. In other words, if a trained police officer could not detail to the jury accurately what had happened, it could only be because the officer had been placed in extreme danger in the line of duty. This was inappropriate argument, and appellate counsel should have challenged it in the petitioner's direct appeal." The petitioner asserts that, at the habeas trial, the petitioner's appellate counsel did not provide a strategic reason for failing to raise this claim on direct appeal but, rather, reflected an erroneous belief that she had, in fact, raised this claim in the direct appeal.

The petitioner has failed to cite any authority to support a conclusion that appellate counsel was deficient in failing to raise this claim or that there was a reasonable probability that, if the claim had been raised, it would have affected the outcome of the direct appeal. Our assessment of the claim requires that we consider, under the appropriate analytical framework that the petitioner seemingly overlooks in the present appeal, the merits of the claim that impropriety deprived the petitioner of a fair trial.[11]

[11] "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . [T]he defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . .

"In determining whether the defendant was deprived of his due process right to a fair trial, we are guided by the factors enumerated by [our Supreme Court] in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted,

Our courts have recognized guiding principles that govern a prosecutor's leeway in commenting on the truthfulness of a witness' testimony. "We consistently have held that it is improper for a prosecuting attorney to express his or her own opinion, directly or indirectly, as to the credibility of witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Put another way, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . .

"We have held, however, that [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Citations omitted; internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 35–36, 917 A.2d 978 (2007). "In claims of

and [6] the strength of the state's case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 236–37, 210 A.3d 509 (2019).

improper vouching, our Supreme Court has noted that the degree to which a challenged statement is supported by the evidence is an important factor in determining the propriety of that statement. The Supreme Court [has] stated that [a] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *State* v. *Luther*, 114 Conn. App. 799, 812, 971 A.2d 781, cert. denied, 293 Conn. 907, 978 A.2d 1112 (2009).

The petitioner has not established that an impropriety occurred because he has failed to demonstrate that the prosecutor expressed a personal belief in Johnson's credibility. The prosecutor did not *baldly state* that Johnson was an honest, credible, or truthful person. Far from suggesting that the prosecutor's statements were the product of his familiarity with Johnson or facts outside of the record, his assessment of Johnson's trial testimony was obviously based on his explicit and repeated references to the evidence concerning the shooting and the reasonable inferences to be drawn therefrom. Here, the prosecutor, confining his comments to the facts in evidence, invited the jury to infer that any inconsistencies in Johnson's recollection of the shooting were the result of the emotional state he was in following the life-threatening events in which Johnson was involved.

Having concluded that no impropriety occurred, we agree with the habeas court that the petitioner failed to demonstrate that his appellate counsel's representation was deficient for having failed to raise this claim in the direct appeal. We likewise conclude that, even if such claim had been raised, it is not reasonably likely that it would have changed the outcome of the direct appeal.

For the foregoing reasons, we conclude that the petitioner has not demonstrated that the habeas court

abused its discretion in denying certification to appeal with respect to the issue of whether he had been deprived of his right to a fair trial because of ineffective representation afforded him by appellate counsel.

V

Finally, the petitioner claims that the habeas court committed an evidentiary error that entitles him to a new trial.[12] We are not persuaded.

The following additional facts are relevant to this claim. In the habeas petition, the petitioner alleged in count one that his right to due process and a fair trial were violated by the prosecutor's "knowing presentation of false testimony." Specifically, the petitioner alleged that "Pleasant falsely testified that Johnson was shot by the petitioner on June 5, 2003, with a bullet that was lodged in or otherwise damaged Johnson's bulletproof vest and that Pleasant witnessed damage to the vest shortly after the shooting." The petitioner alleged that "[t]he prosecuting authority and judicial authority *were aware that this testimony was false*." (Emphasis added.)

The record reflects that, during examination of the prosecutor by the petitioner's habeas counsel, the petitioner's counsel asked whether the prosecutor had "a belief about whether the vest could have been struck by a bullet and not be damaged . . . ." The prosecutor replied, "I think it's possible." The petitioner's counsel then asked the prosecutor if he undertook "any investigation in this case to look at that . . . ." The prosecutor replied that he did not recall. The petitioner's counsel then asked, "[a]nd if you had wanted to do that, did you know someone you could call to explore that?"

[12] We note that, in the petitioner's statement of the claim in his brief, he refers to the court's having committed "several evidentiary errors . . . ." The petitioner, however, limits his analysis of this claim to the single evidentiary ruling that we review herein.

The respondent objected on the ground that the inquiry was irrelevant to the petitioner's claim that the prosecutor *knew* that Pleasant had provided false testimony. The court sustained the objection. The court stated that any inquiry into what additional investigation could have been undertaken by the prosecutor was irrelevant to the petitioner's claim, which was based on "what he knew and what he did." The petitioner's counsel stated that be believed the inquiry was proper because it was relevant to proving that the prosecutor knew "or should have known that it was false."

The petitioner, without citing to any legal authority, argues that the court's ruling was erroneous because "the legal standard is whether the prosecuting authority knew or should have known that the testimony was false. Exploring the availability of reliable forensic information once the issue was raised with the prosecutor was relevant to the question of whether he knew or should have known that the jury was being misled."

"We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . The trial court has wide discretion to determine the relevancy [and admissibility] of evidence . . . . In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted; internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 818–19, 970 A.2d 710 (2009).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence."

Conn. Code Evid. § 4-1. "As it is used in our code, relevance encompasses two distinct concepts, namely, probative value and materiality. . . . Conceptually, relevance addresses whether the evidence makes the existence of a fact material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . In contrast, materiality turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. . . . If evidence is relevant and material, then it may be admissible." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Zillo*, 124 Conn. App. 690, 696–97, 5 A.3d 996 (2010), cert. denied, 334 Conn. 923, 223 A.3d 380 (2020).

Generally, "[a] habeas corpus action, as a variant of civil actions, is subject to the ordinary rules of civil procedure, unless superseded by the more specific rules pertaining to habeas actions . . . ." (Internal quotation marks omitted.) *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 782, 167 A.3d 952 (2017). "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Internal quotation marks omitted.) *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 202, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010). "[A] habeas petitioner is limited to the allegations in his petition, which are intended to

put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 789, 114 A.3d 925 (2015).

The petitioner does not dispute that the claim framed in count one of his amended petition was based on the prosecutor's *knowing* presentation of false evidence; he did not base his claim on the alternative ground that the prosecutor *should have known* that Pleasant's testimony was false. Likewise, the petitioner does not dispute that the inquiry prohibited by the court, into what further investigation the prosecutor could have undertaken concerning the bulletproof vest, was not relevant to what the prosecutor actually knew at the time of trial and what he did during the trial. To the extent that the inquiry might have been probative with respect to what the prosecutor should have known with respect to the vest and, thus, the veracity of Pleasant's testimony, it was not material to an issue framed by the petitioner's amended petition. Accordingly, we conclude that the court, relying on the ground of relevance, properly exercised its discretion by excluding the inquiry.[13]

For the foregoing reasons, we conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying certification to appeal with respect to the evidentiary issue addressed in this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

[13] The petitioner argues that, if the evidence did not demonstrate that the prosecutor knew or should have known that the testimony about the vest was false or misleading, "a remand is appropriate because the habeas court's limitation on this questioning was an abuse of discretion." Having concluded that the court properly limited the scope of the petitioner's inquiry, we reject this argument.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 215

MEMORANDUM DECISIONS

OHAN KARAGOZIAN v. MYEYEDR. OPTOMETRY OF CONNECTICUT, LLC, ET AL.
(AC 43970)

Prescott, Cradle and Clark, Js.

Argued September 8—officially released September 20, 2022

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *S. Richards*, *J.*

Per Curiam. The summary judgment rendered on February 13, 2020, for the named defendant is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

COMPANIONS AND HOMEMAKERS, INC. *v.* A&B HOMECARE SOLUTIONS, LLC, D/B/A NORTHWEST HOMECARE, SC 20642
Judicial District of Hartford

Torts; Whether Trial Court Erred in Finding Tortious Interference With Contracts That Were Void as Against Public Policy; Whether Defendant Had Duty to Disclose; Whether Defendant Caused Plaintiff to Suffer Loss; Whether Finding of CUTPA Violation Based on Tortious Interference Should Be Reversed. The plaintiff, Companions and Homemakers, Inc. (Companions), and the defendant, A&B Homecare Solutions, LLC, d/b/a Northwest Homecare (A&B), participate in the Connecticut Homecare Program for the Elderly (CHPE). The CHPE is operated by the state Department of Social Services (DSS) and utilizes medicaid funds to provide home care services to individuals who might otherwise require nursing home care. The parties employ caregivers to provide services for individuals assigned to them by DSS and receive reimbursement from the state. In March, 2016, DSS instituted an electronic system that providers would be required to use for billing and timekeeping functions. The parties joined together in legal actions, claiming that, due to operational problems with the system, they would be unable able to implement it by the January 1, 2017 deadline. When the deadline passed, DSS notified Companions that its contract would be terminated within thirty days. Companions subsequently reached an agreement with DSS that gave it additional time to implement the new system, but a number of its care recipients had already been assigned to other providers, including A&B. Unbeknownst to Companions, A&B had implemented the new system during the litigation process. Companions brought this action against A&B alleging tortious interference with contractual relations and violation of CUTPA. The trial court found that A&B tortiously interfered with Companions' contractual relations by misrepresenting to Companions throughout the course of the litigation that it had a uniform interest when, in reality, it was privately undermining Companions' position and working to implement the new system with the improper purpose of interfering with Companions' contract with DSS in order to get it removed from the CHPE. The trial court also found that A&B tortiously interfered with non-compete agreements that Companions had with its caregivers by accepting assignments of the caregivers after reassuring Companions that it would not do so

and by providing legal counsel to assist the caregivers in avoiding their obligations under the agreements. The trial court also found that A&B's tortious conduct violated CUPTA. The trial court rendered judgment in favor of Companions, A&B appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. A&B claims that the trial court erred in finding that (1) it tortiously interfered with non-compete agreements that are void as against public policy; (2) it engaged in misrepresentation by failing to disclose, where it owed Companions no duty to disclose; and (3) Companions suffered any loss caused by A&B's conduct. A&B also claims that the trial court's finding that it violated CUTPA must be reversed because it was based solely on its erroneous conclusion that A&B tortiously interfered with Companions' contracts.

DEUTSCHE BANK AG *v.* SEBASTIAN HOLDINGS, INC., et al.,
SC 20647
Judicial District of Stamford/Norwalk

Corporations; Choice of Law; Whether Trial Court Applied Law of Proper Jurisdiction in Action Seeking to Pierce Corporate Veil; Whether Trial Court Improperly Required Proof of Specific Intent; Whether Trial Court Improperly Found Specific Intent Was Not Proven. An English court rendered judgment in favor of the plaintiff, Deutsche Bank AG, in the amount of approximately $243 million plus interest in a lawsuit brought against the defendant, Sebastian Holdings, Inc. (SHI), for money owed due to an unfulfilled margin call on a trading portfolio that SHI operated through the plaintiff. When SHI failed to pay the judgment, the plaintiff brought this action seeking to pierce the corporate veil and hold SHI's sole shareholder and director, defendant Alexander Vik, personally liable based on allegations that Vik knew that SHI was facing significant trading losses and liabilities and that he transferred hundreds of millions of dollars from SHI to himself and to individuals and entities associated with him in order to shield the funds from the plaintiff. The trial court found that the law of the Turks and Caicos Islands, where SHI was incorporated, governed. The trial court then found that the plaintiff established that Vik completely dominated and controlled SHI and that there was ample evidence of commingling of funds between SHI and Vik. The trial court further found, however, that the plaintiff failed to prove that Vik diverted SHI's assets with the specific intent of rendering it unable to pay its debt. In that respect, the trial court found that Vik had no reason to believe that, after he made the

transfers, SHI's liabilities would exceed the amount that he retained in the account. The trial court also noted that Vik authorized the payment of five other margin calls and that a systems error by the plaintiff had overvalued SHI's assets and left SHI with a shortfall of over $80 million. The trial court, accordingly, concluded that the plaintiff failed to prove its claim and rendered judgment in favor of the defendants. The plaintiff appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. On appeal, the plaintiff claims that the trial court erred in failing to apply the law of the jurisdiction with the most significant relationship to the parties and the subject matter, which it argues is either Connecticut, where Vik resides and SHI operated, or New York, where it argues the brokerage relationship was based. The plaintiff also claims that, in applying the law of the Turks and Caicos Islands, the trial court improperly added a specific intent requirement, i.e., that Vik intended to produce the specific result of rendering SHI unable to pay its debt, rather than requiring the plaintiff to prove only that Vik intended to use his control over SHI for an improper purpose. The plaintiff further claims that, even if the trial court properly applied a specific intent requirement, it improperly found that the plaintiff did not establish that Vik acted with specific intent. The plaintiff additionally claims that the trial court erred in allowing Vik to testify that he made the transfers for estate planning purposes while claiming privilege over any evidence that would support that claim.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* RICHARD CANTILLON et al., SC 20655

Judicial District of New Britain

Administrative Appeal; Damages; Discrimination. Whether Human Rights Referee Adjudicating Housing Discrimination Claim Applied Proper Legal Principles in Awarding Complainant "Garden Variety" Emotional Distress Damages against Neighbor Who Repeatedly Subjected Complainant to Racially Motivated Verbal and Physical Harassment. The complainant filed a housing discrimination complaint with the Commission on Human Rights and Opportunities (CHRO) against her neighbor, alleging that the neighbor had subjected her to verbal and physical harassment in the form of racial slurs, obscene gestures, and threats of physical harm at the condominium complex where they both resided. After the neighbor was defaulted in the underlying administrative proceedings, a hearing in damages was held at which the CHRO requested $75,000 in compen-

satory damages. The human rights referee (referee) awarded $15,000 in compensatory damages for emotional distress. The CHRO appealed the decision of its own referee to the Superior Court, claiming primarily that the damages awarded were insufficient. The Superior Court disagreed and rendered a judgment dismissing the appeal and affirming the referee's decision. The CHRO then appealed to the Appellate Court, claiming that the referee misapplied *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679 (2012), and the factors set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco* (*Harrison*), CHRO No. 7930433 (June 3, 1985), in determining emotional distress damages. The CHRO first argued that the referee and the Superior Court had misinterpreted and misapplied *Patino*, which, according to the CHRO, stands for the proposition that in "garden variety" emotional distress claims, there is a presumptive monetary range of damages between $30,000 and $150,000 and that a tribunal calculating an award of damages should consider analogous decisions from neighboring jurisdictions in addition to awards granted in this state. The Appellate Court (207 Conn. App. 668) rejected these arguments, concluding that *Patino* did not establish a presumptive range of damages and contained no support for the proposition that out-of-state decisions should be considered. The CHRO further argued that the referee and the Superior Court had erred in interpreting and applying the factors set forth in *Harrison*. Specifically, the CHRO argued that the referee had erred in distinguishing the relationship between the complainant and the neighbor in the present case from other harassment cases involving a landlord-tenant relationship and in concluding that the discrimination in the present case was not public. The Appellate Court rejected these arguments, concluding that the referee had not acted unreasonably by considering the relationship between the complainant and the neighbor and that the referee's factual determinations related to the non-public nature of the discrimination were reasonable in view of the evidence. The CHRO was granted certification to appeal, and the Supreme Court will now decide whether the Appellate Court correctly concluded that the trial court had properly determined that the referee applied the proper legal principles in awarding the complainant "garden variety" emotional distress damages.

JON-JAY TILSEN *v.* MIRIAN E. BENSON, SC 20664
Judicial District of New Haven

Dissolution of Marriage; Whether Trial Court Properly Denied Plaintiff's Motion to Enforce Parties' Ketubah on First

Amendment Grounds; Whether Trial Court's Finding Regarding Plaintiff's Earning Capacity Was Clearly Erroneous; Whether Trial Court Abused Discretion in Making Financial Award. The plaintiff husband and defendant wife were married in accordance with Jewish tradition. Prior to their marriage, both parties agreed to and signed a ketubah, a traditional Jewish marriage contract. The ketubah provided, inter alia, that the parties agreed to divorce "according to Torah law." In 2018, the plaintiff initiated this dissolution action. The plaintiff filed a motion seeking to enforce the parties' ketubah as a prenuptial agreement and requested that the asset division and support award orders be entered accordance with Hebrew law based on the ketubah's choice of law provision. The trial court denied the plaintiff's motion, concluding that enforcement of the ketubah would violate the first amendment because "enforcement of the 'Torah law' provision of the parties' Ketubah would require the court to choose between competing rabbinical interpretations of Jewish law. This the court cannot do without violating the first amendment." After a contested trial on the merits, the court issued a memorandum of decision in which it granted dissolution of the marriage and issued several related financial orders. The court found the plaintiff's gross earning capacity to be $202,100 and awarded the defendant alimony of $5000 per month for fifteen years. The court also ordered the plaintiff to pay the defendant 25 percent of any distributions he receives from his limited partnership interest in Westview Park Apartments Limited Partnership ("WPA"). The plaintiff then filed this appeal in the Appellate Court, and the Supreme Court transferred the appeal to itself. On appeal, the plaintiff claims that the trial court erred when it denied, on first amendment grounds, his motion to enforce the parties' ketubah because the relevant Torah law governing the ketubah is secular, not religious. The plaintiff also claims that the trial court's finding that he has an earning capacity of $202,100 for fifteen years was clearly erroneous because the plaintiff's employment had been terminated at the time of the judgment and there was no evidence in the record regarding his employability or the compensation he could earn at that time or into the future. The plaintiff further claims that the trial court abused its discretion when it ordered him to pay to the defendant alimony of $5000 per month for fifteen years because such an order is out of proportion to the plaintiff's current financial circumstances. Finally, the plaintiff claims that the trial court abused its discretion when it ordered him to pay the defendant 25 percent of any distributions he receives from WPA because the plaintiff's father had gifted him the limited partnership interest in WPA, he has no enforceable

right to receive any distributions from WPA, and the court did not determine the value of the plaintiff's interest in WPA.

CITY OF HARTFORD POLICE DEPARTMENT *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES et al.,
SC 20669, SC 20674
Judicial District of New Britain

Administrative Appeal; Discrimination; Whether Human Rights Referee's Finding of Intentional Discrimination Was Supported by Substantial Evidence. During the first several months of his employment as a police officer for the city of Hartford (city), the complainant, Khoa Phan, received satisfactory performance evaluations and his daily performance reviews were generally acceptable. Phan, who is of Vietnamese ancestry, subsequently had two negative encounters with Sergeant Steven Kessler during which Kessler criticized Phan's English language proficiency, inquired into Phan's ethnicity and nationality, and derisively called into doubt Phan's ability to effectively interact with the public. When Phan asked Kessler to stop, Kessler warned Phan that he should watch what he says or he would not "be around long." Kessler thereafter told other sergeants about his concerns regarding Phan's performance and also sent an interoffice memorandum on the subject. Subsequently, Phan's favorable ratings decreased because numerous supervisors described him as argumentative and confrontational. Phan also was involved in several incidents that resulted in unsatisfactory ratings regarding his integrity and truthfulness, his overall attitude, and his adherence to policies and procedures; Kessler, however, was not involved in any of these incidents. Chief of Police Daryl K. Roberts ultimately dismissed Phan from his position, citing his lack of truthfulness and a demonstrated need for improvement in the areas of job knowledge and skills and human relations. Phan then filed an affidavit with the Commission on Human Rights and Opportunities (CHRO) alleging that the city terminated his employment as a result of his ancestry. Following a hearing, the presiding human rights referee (referee) concluded that the city had intentionally discriminated against Phan. The city appealed to the trial court, which affirmed the referee's decision. The city then appealed to the Appellate Court, claiming that the trial court had improperly held that there was substantial evidence to support the referee's finding of intentional discrimination. The city argued that Kessler's "stray remarks" did not permit an inference of discrimination because Kessler was not involved in the decision to terminate Phan.

The city further argued that Phan's acts of dishonesty and unprofessional behavior were not mere pretexts for discrimination because some incidents occurred before his encounters with Kessler and other incidents had no connection to Kessler. The Appellate Court (208 Conn. App. 755) concluded that Phan had failed to establish a prima facie case of intentional discrimination because there was no evidentiary basis to find a causal connection between Kessler's offensive remarks and Roberts' decision to terminate Phan's employment. The Appellate Court further concluded that, even if Phan had established a prima facie case, the record lacked substantial evidence to support the referee's conclusion that the city's reasons for the termination were pretextual. Accordingly, the Appellate Court reversed the trial court's judgment and remanded the case with direction to render judgment sustaining the city's appeal. Phan and the CHRO were granted certification to appeal, and the Supreme Court will now decide whether the Appellate Court properly concluded that the evidence was insufficient to support a determination of intentional discrimination.

GREGORY B. SMITH et al. *v.* AARON SUPPLE et al., SC 20730
Judicial District of Hartford

Appellate Jurisdiction; Whether the Denial of a Special Motion to Dismiss Filed Pursuant to General Statutes § 52-196a is an Appealable Final Judgment. The plaintiffs are Gregory B. Smith, a Trinity College professor; the Churchill Institute, an organization that he founded; and Nicholas Engstrom, a Trinity College student who founded a club for which Smith served as a faculty advisor. The defendants are Trinity College students. The defendants posted flyers around the Trinity College campus featuring the Churchill Institute's logo, Smith's photograph, and the phrase "the new racism is every bit as ugly as the old." The defendants posted similar flyers with a photograph of Engstrom. The plaintiffs thereafter brought an action alleging defamation, libel per se, libel per quod, and negligent infliction of emotional distress. The defendants filed a special motion to dismiss the action under General Statutes § 52-196a, which is known as the anti-SLAPP (strategic litigation against public policy) statute and provides for a "special motion to dismiss" with respect to "any civil action in which a party files a complaint . . . against an opposing party that is based on the opposing party's exercise of its right to free speech, right to petition the government, or right of association under the" federal or state constitution. The defendants argued that the plaintiffs' claims were based on their exercise of their first amendment rights

to speak and associate freely in a public forum in connection with a matter of public concern and that they were therefore entitled to dismissal of the claims under § 52-196a. The trial court disagreed and denied the defendants' special motion to dismiss, concluding that the Trinity College campus did not qualify as a public forum and that the posting of the flyers did not constitute the exercise of either free speech or free association for purposes of the first amendment. The defendants filed an appeal from the trial court's denial of their special motion to dismiss in the Appellate Court, and the Supreme Court transferred the appeal to its own docket pursuant to General Statutes § 65-1. The Supreme Court will decide in this appeal whether the denial of a special motion to dismiss filed pursuant to General Statutes § 52-196a is an appealable final judgment. The defendants argue that § 52-196a confers upon them the right to avoid litigation based upon their exercise of their constitutionally protected free speech and free association rights. They accordingly contend that the denial of their special motion to dismiss qualifies as an appealable final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27 (1983), which sets forth the test for determining the finality of interlocutory orders. The second prong of *Curcio* provides that an interlocutory order is an appealable final judgment when it so concludes the rights of the parties that further proceedings cannot affect them, and the defendants argue that their rights under § 52-196a will be irretrievably lost and that they will be irreparably harmed as a result thereof if they are not able to bring this interlocutory appeal.

MICHAEL ROBINSON et al. *v.* V.D., SC 20731
Judicial District of New London

Appellate Jurisdiction; Whether Denial of Special Motion to Dismiss Filed Pursuant to General Statutes § 52-196a is an Appealable Final Judgment. The plaintiffs, Michael Robinson and Mary Robinson, were employees of the United States Coast Guard Academy in New London. The defendant, V.D., was also an employee of the Coast Guard Academy. The defendant filed a grievance after he was denied a promotion, which he alleged was based on his involvement in his labor union and a quid pro quo arrangement with the successful candidate in which the plaintiffs had participated. The parties were also involved in a separate incident, after which the defendant informed the police that he was threatened by Michael Robinson and filed an application for a protective order against him. The plaintiffs filed an action, alleging libel, slander, false light invasion of privacy,

common-law and statutory vexatious litigation, and negligent and intentional infliction of emotional distress in connection with the aforementioned incidents. The defendant filed a special motion to dismiss the action under General Statutes § 52-196a, which is known as the anti-SLAPP (strategic litigation against public policy) statute and provides for a "special motion to dismiss" with respect to "any civil action in which a party files a complaint . . . against an opposing party that is based on the opposing party's exercise of its right to free speech, right to petition the government, or right of association under the" federal or state constitution. The defendant argued that the plaintiffs' claims were based on his exercise of his rights of free speech and to petition the government on matters of public concern, namely, labor rights and safety issues. The trial court disagreed and denied the defendant's special motion to dismiss. The trial court concluded that, despite the defendant's characterizations, the conduct at issue pertained to matters of private concern that implicated only his own personal interests, such that the plaintiffs' complaint was not subject to dismissal under § 52-196a for targeting his exercise of his rights of free speech and to petition the government. The defendant filed an appeal from the trial court's judgment in the Appellate Court, and the Supreme Court thereafter transferred the appeal to itself. The Supreme Court will decide whether the denial of a special motion to dismiss filed pursuant to § 52-196a is an appealable final judgment. The defendant notes that § 52-196a (d) provides that "the stay of discovery shall remain in effect until the court grants or denies the special the special motion to dismiss and *any interlocutory appeal thereof*" and argues that this language, combined with the rules of statutory construction, the legislative history and public policy underlying the statute, and the interpretation of similar statutes in other jurisdictions, counsels in favor of finding finality. The defendant also argues that the judgment at issue satisfies the second prong of the test for determining the finality of interlocutory orders set forth in *State* v. *Curcio*, 191 Conn. 27 (1983), because it so concludes his rights under the first amendment and corresponding provisions of the state constitution, as protected by § 52-196a, that further proceedings cannot affect them. Finally, the defendant argues that the Supreme Court should exercise its supervisory authority to allow the appeal to proceed if it concludes that the judgment at issue is not final by virtue of the express language of § 52-196a or under *Curcio*.

STATE *v.* RICHARD LANGSTON, SC 20734
Judicial District of Hartford

Criminal; Sentencing; Whether Trial Court Properly Denied Defendant's Motion to Correct Illegal Sentence Where Sentencing Court Relied on Conduct of Which Defendant Was Acquitted; Whether Supreme Court Should Exercise Its Supervisory Authority to Create Rule Prohibiting Consideration of Acquitted Conduct in Sentencing. In 1999, the defendant, Richard Langston, was convicted of robbery in the first degree, criminal possession of a firearm and commission of a class A, B or C felony with a firearm but was acquitted of assault in the first degree. At the sentencing hearing, the state argued that the sentencing court could consider the conduct underlying the assault charge if the court found that the conduct had been proven by a preponderance of the evidence. Before imposing sentence, the sentencing court had stated, inter alia, that "the victim [had] started to walk away and was shot in the back of both legs by the defendant" and that, "because this defendant elected to fire a handgun," the victim "has been denied the opportunity to pursue a meaningful vocational career." The court then sentenced the defendant to twenty-five years of imprisonment. Thereafter, the defendant filed a motion to correct an illegal sentence in which he argued that the sentencing court violated his due process rights under the federal and state constitutions by taking into consideration the assault charge on which he had been acquitted when it sentenced him. The trial court denied the defendant's motion to correct an illegal sentence, finding that, pursuant to the precedent established by *U.S.* v. *Watts*, 519 U.S. 148 (1997), and *State* v. *Huey*, 199 Conn. 121 (1986), the sentencing court was entitled to consider the conduct of which the defendant had been acquitted so long as that court found the acquitted conduct proven by a preponderance of the evidence. The defendant filed this appeal in the Appellate Court, and the Supreme Court thereafter transferred the appeal to itself. On appeal, the defendant claims that the trial court improperly denied his motion to correct an illegal sentence because the sentencing court's consideration of conduct for which the defendant had been acquitted violated his constitutional rights to due process and trial by jury. The defendant argues that the trial court erred in its reliance on *Watts* and *Huey* because neither case examined the issue presented in this appeal, namely, whether a sentencing court's reliance on acquitted conduct in imposing sentence is inconsistent with a defendant's constitutional rights to due process and trial by jury. Rather, according to the defendant, *Huey* involved the question of whether, following a defendant's guilty plea,

a sentencing court can factor in the defendant's denial of facts related to an element of a more serious originally-charged offense to which the defendant did not plead guilty. The defendant further argues that *Watts* was decided on double jeopardy grounds and that the United States Supreme Court did not consider in that case whether a sentencing court's reliance on acquitted conduct violates a defendant's rights to due process. The defendant also claims that the Supreme Court should exercise its supervisory authority to create a rule prohibiting the consideration of acquitted conduct in sentencing decisions.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

NOTICE OF INTENT TO ADOPT PROCEDURES

In accordance with the provisions of Sections 1-121 and 15-120k of the Connecticut General Statutes, notice is hereby given that the Tweed — New Haven Airport Authority proposes to adopt procedures for the following matters:

AIRPORT OPERATING RULES AND REGULATIONS

1.0 GENERAL CONDITIONS

- 1.1 Application of Rules and Regulations
- 1.2 General Conditions of Airport Use
- 1.3 Personal Conduct
- 1.4 Fees
- 1.5 Noncommercial Speech

2.0 AERONAUTICAL OPERATIONS

- 2.1 General
- 2.2 Public Use
- 2.3 Licenses and Registrations
- 2.4 Airport Closure
- 2.5 Engine Starting & Run-Up
- 2.6 Landings and Takeoffs
- 2.7 Taxiing Operations
- 2.8 Flying Clubs

3.0 SAFETY, SECURITY, AND ENVIRONMENTAL PROTECTION

- 3.1 Airport Security
- 3.2 Acquisition of Security Keys
- 3.3 Identification Badges and Proxy Cards
- 3.4 Dangerous and Hazardous Materials
- 3.5 Fire Hazards
- 3.6 Fire Equipment
- 3.7 Aircraft Fueling Operations
- 3.8 Fuel Spills
- 3.9 Restricted Areas
- 3.10 Disposal of Toxicants/Pollutants
- 3.11 Self-Servicing of Aircraft
- 3.12 Aircraft Deicing

4.0 VEHICLE OPERATING PROCEDURES

- 4.1 Generally
- 4.2 Operator Requirements
- 4.3 Vehicle Requirements
- 4.4 Vehicle Operations
- 4.5 Right-of-Way
- 4.6 Vehicle Parking

5.0 SEVERABILITY

MINIMUM STANDARDS FOR COMMERCIAL AERONAUTICAL ACTIVITIES

1.0 INTRODUCTION TO MINIMUM STANDARDS

2.0 AUTHORITY AND PURPOSE

3.0 GENERAL PROVISIONS

4.0 ADMINISTRATION AND ENFORCEMENT

5.0 ADDITIVE STANDARDS AND CONFLICTS

6.0 WAIVERS AND VARIANCES

7.0 APPLICABILITY

8.0 NON-COMMERCIAL ACTIVITIES

9.0 FUELING AND SELF-SERVICE

10.0 SUBCONTRACTING, SUBLEASING, AND ASSIGNMENT

11.0 REQUIREMENTS FOR ALL COMMERCIAL AERONAUTICAL OPERATORS

- 11.1 Application
- 11.2 Financial Responsibility
- 11.3 Experience
- 11.4 Requirement of A Written Agreement
- 11.5 Insurance
- 11.6 Motor Vehicles on Airport
- 11.7 Miscellaneous
- 11.8 Grounds for Denial

12.0 REQUIREMENTS FOR SPECIALIZED AERONAUTICAL SERVICE OPERATORS (SASOs)

- 12.1 Aircraft Sales (New and/or Used)
- 12.2 Airframe and Power Plant Repair
- 12.3 Aircraft Rental
- 12.4 Flight Training
- 12.5 Specialized Aircraft Repair Services
- 12.6 Aircraft Charter and Air Taxi
- 12.7 Specialized Commercial Flying Services
- 12.8 Aircraft Storage
- 12.9 Commercial Self-Service Fueling

13.0 MINIMUM REQUIREMENTS FOR FIXED BASED OPERATORS (FBOs)

- 13.1 Fueling Operations Requirements

14.0 SEVERABILITY

STATEMENT OF PURPOSE: To establish and standardize procedures for the above referenced matters. All interested parties are invited to submit written data, views and comments in connection with the proposed procedures for the matters listed above no later than thirty [30] days after publication of this notice.

Copies of the proposed procedures are available from, and written comments may be submitted to:

Tweed — New Haven Airport Authority
155 Burr Street
New Haven, CT 06512
Attention: Airport Manager

or by email to:

administration@flytweed.com with ‘‘New Procedures’’ included in the subject line.

NOTICES

Notice of Application for Reinstatement of Rebecca L. Johnson NNH-CV05-4012328-S

Notice is hereby given that, pursuant to Connecticut Practice Book Section 2-53, a hearing on the Application for Reinstatement of Rebecca L. Johnson shall be held before the New London County Standing Committee on Recommendations for Admissions to the Bar on Tuesday, September 27, 2022 at 10:00 a.m. at the Law Offices of Waller, Smith & Palmer, located at 52 Eugene O'Neill Drive, New London, Connecticut.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of August 18, 2022:

Janet A. Brody	Financial Accounting Foundation

Certified as of September 8, 2022:

Vanessa N. McKenzie	Yale New Haven Health System

Hon. Patrick L. Carroll III
Chief Court Administrator