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CONNECTICUT REPORTS

Vol. 341

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* A. B.*
(SC 20471)

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

Syllabus

Pursuant to this court's decision in *State* v. *Crawford* (202 Conn. 443), the issuance of an arrest warrant within the time period prescribed by the applicable criminal statute of limitations commences a prosecution for purposes of satisfying that statute of limitations, so long as the warrant is executed without unreasonable delay.

The state, on the granting of permission, appealed from the trial court's dismissal of an information charging the defendant with possession of child pornography in the first degree. In 2009, the police executed a search warrant at the defendant's residence and seized two of his computers. Thereafter, the defendant signed a sworn statement in which he admitted to possessing child pornography. The defendant was not

* Following notice to the public and a hearing, the Appellate Court granted the defendant's motion to seal the defendant's name. See Practice Book §§ 77-3 and 77-4.

arrested at that time but was informed by the police that he would be arrested as soon as a forensic examination of his computers was completed. In 2011, the defendant moved to California. In 2013, after the state forensic laboratory issued a report confirming the presence of child pornography on the computers, and after the police confirmed the defendant's address in California, an arrest warrant for the defendant was issued. Between 2009 and 2018, the police, despite having the defendant's cell phone number, never attempted to communicate with the defendant about the status of his case. In 2018, nearly five years after the warrant was issued and more than three years after the applicable statute of limitations ((Rev. to 2009) § 54-193 (b)) purportedly expired, the defendant was arrested and charged with possession of child pornography in the first degree. Thereafter, the defendant filed a motion to dismiss the information, claiming that the delay in the execution of the arrest warrant was unreasonable under *Crawford* and, therefore, that his prosecution was time barred. In response, the state argued that, because the defendant had moved to California in 2011, the tolling provision of § 54-193 (c), which extends the time within which an information may be brought with respect to a person who fled from and resided outside of the state after the commission of the offense, tolled the limitation period within which the warrant could be executed. In granting the defendant's motion to dismiss, the trial court concluded that the tolling provision was inapplicable because the arrest warrant was issued within the limitation period, the defendant had not fled the state within the meaning of the tolling provision, the defendant met his burden of demonstrating his availability for arrest, and the state failed to meet its burden of demonstrating that the nearly five year delay in the warrant's execution was not unreasonable under *Crawford*. On appeal, the state, conceding that the five year delay in the execution of the arrest warrant was unreasonable, claimed that the trial court nevertheless incorrectly concluded that the tolling provision of § 54-193 (c) was inapplicable in light of the fact that the arrest warrant was issued within the limitation period. *Held* that the trial court correctly concluded that the tolling provision of § 54-193 (c) was inapplicable, as that provision tolls the limitation period solely with respect to the time within which a prosecution may be brought and does not purport to address prosecutions, such as the present one, that have already been brought, at which point there is no need for tolling because the statute of limitations has already been satisfied; moreover, contrary to the state's assertion that this court's interpretation of § 54-193 (c) penalizes it for obtaining an arrest warrant within the limitation period, this court's case law indicates that, so long as the warrant is executed without unreasonable delay, the state can continue to prosecute the defendant as soon as it is able to locate and arrest him.

Argued April 29—officially released October 1, 2021**

** October 1, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Information charging the defendant with the crime of possession of child pornography in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Wilkerson Brillant*, *J.*, granted the defendant's motion to dismiss the information, and, on the granting of permission, the state appealed; thereafter, the court, *Wilkerson Brillant*, *J.*, granted the state's motion for reargument but denied the relief requested therein, and the state filed an amended appeal. *Affirmed.*

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Matthew Kalthoff*, assistant state's attorney, for the appellant (state).

Andrew P. O'Shea, for the appellee (defendant).

Opinion

KELLER, J. In *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), this court held that the issuance of an arrest warrant within the limitation period set forth in General Statutes (Rev. to 1983) § 54-193 (b) commences a prosecution for purposes of satisfying that statute of limitations, so long as the warrant is executed without unreasonable delay. Id., 450–51. The defendant, A. B., was charged with possession of child pornography in the first degree in violation of General Statutes (Rev. to 2009) § 53a-196d and was arrested pursuant to a warrant on or about March 16, 2018, nearly five years after the warrant was issued and more than three years after the applicable five year statute of limitations had expired. See General Statutes (Rev. to 2009) § 54-193 (b).[1] The defendant filed a motion to dismiss the infor-

[1] General Statutes (Rev. to 2009) § 54-193 (b) provides in relevant part: "No person may be prosecuted for any offense . . . for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed. . . ."

In the interest of simplicity, hereinafter, unless otherwise indicated, all references to § 54-193 in this opinion are to the 2009 revision of the statute.

mation, arguing that, under *Crawford*, the delay in the warrant's execution was unreasonable and, therefore, that the prosecution was time barred. The state responded that, because the defendant had moved to California in 2011, § 54-193 (c)[2] tolled the limitation period within which the warrant could be executed. The trial court rejected the state's argument, concluding that the tolling provision of § 54-193 (c) was inapplicable once the warrant was issued within the limitation period set forth in § 54-193 (b) and that the nearly five year delay in the warrant's execution was unreasonable under *Crawford*. Accordingly, the trial court granted the defendant's motion to dismiss. On appeal,[3] the state claims that the trial court incorrectly concluded that the statute of limitations was not tolled by § 54-193 (c). We disagree and, accordingly, affirm the decision of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. On December 22, 2009, the Ansonia police executed a search warrant on the defendant's Ansonia residence. During the search, the police seized two of the defendant's computers and related electronics equipment. The defendant was aware that child pornography was the subject of the search and cooperated with the police by providing them with the passwords to his computers. Afterward, he voluntarily drove himself to police headquarters to be interviewed by Detective Gerald Tenney. During the interview, the defendant signed a sworn statement in which he admitted to pos-

[2] General Statutes (Rev. to 2009) § 54-193 (c) provides: "If the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it may be brought against such person at any time within such period, during which such person resides in this state, after the commission of the offense."

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

sessing child pornography on his computers. Although the defendant was not arrested at that time, Detective Tenney informed him that an arrest warrant would be forthcoming as soon as a forensic examination of his computers was completed.

One and one-half years went by, during which the defendant did not hear back from Detective Tenney or anyone else from the Ansonia Police Department. On August 30, 2011, the defendant moved to Huntington Beach, California, where he lived until his arrest on or about March 16, 2018. While in California, the defendant resided at a single address, which was listed on his federal and state tax returns, on his California Department of Motor Vehicles records and on all of his bills. The defendant also maintained a Facebook account in his own name and posted accurate information about himself on that website. Between 2010 and 2013, Detective Tenney diligently checked on the status of the forensic laboratory's examination of the defendant's computers. On April 15, 2013, the forensic laboratory issued a report confirming the presence of child pornography on the computers. Shortly thereafter, Detective Tenney ascertained the defendant's California address through the LexisNexis law enforcement database and confirmed through the Huntington Beach police that the defendant still resided at that address.

A warrant for the defendant's arrest was issued on May 22, 2013, charging him with possession of child pornography in the first degree. Although Detective Tenney had requested that the warrant be extraditable, it was not authorized as such. Despite having the defendant's cell phone number, Detective Tenney never attempted to contact the defendant to inform him about the arrest warrant. Indeed, between 2009 and 2018, the Ansonia police never once attempted to communicate with the defendant about the status of his case. In September, 2016, Detective Tenney retired from the Anso-

nia Police Department. At the time of his retirement, no other officer had been assigned to work on the defendant's case.

In early 2018, a clerk of the Superior Court in the judicial district of Ansonia-Milford contacted Lieutenant Wayne Williams of the Ansonia Police Department to inquire about the status of the defendant's case and open arrest warrant. At that time, Lieutenant Williams requested and received permission from the state's attorney's office to extradite the defendant from California. On or about March 16, 2018, the defendant was arrested by the Huntington Beach police, posted bail, and was released with the understanding that he would organize his affairs and return to Connecticut to turn himself in to the Ansonia police, which he did on April 17, 2018. In light of the defendant's cooperation, no extradition proceedings were needed or conducted.

On December 18, 2018, the defendant filed a motion to dismiss the information, claiming that his prosecution was barred by the five year statute of limitations set forth in § 54-193 (b). The defendant argued that, although the arrest warrant was issued within the limitation period, the nearly five year delay in its execution was unreasonable under *Crawford*. The state opposed the motion, arguing that, because the defendant had moved to California prior to the issuance of the warrant, the defendant could not meet his burden of proving that he was available for arrest, as required by *Crawford*. Alternatively, the state argued, citing *State* v. *Ward*, 306 Conn. 698, 52 A.3d 591 (2012), that the statute of limitations was tolled under § 54-193 (c) because the defendant "fled" Connecticut in 2011.

An evidentiary hearing on the defendant's motion to dismiss was held over a period of two days, after which the trial court granted the defendant's motion. In so doing, the court rejected the state's contention that,

even though the arrest warrant was issued within the limitation period, § 54-193 (c) had tolled the statute of limitations within which the police were required to execute the warrant because of the defendant's relocation to California in 2011. The trial court concluded that § 54-193 (c) applies only to toll the limitation period within which a prosecution may be brought, not the time period within which a defendant must be notified of a prosecution that has already been initiated. Accordingly, the court considered whether the nearly five year delay in the execution of the arrest warrant by the Ansonia Police Department was reasonable under *Crawford*. In considering this question, the court explained that, in *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017), this court held that, once a defendant who has raised a statute of limitations defense "presents evidence of his availability for arrest during the limitation period, the burden shifts to the state to present evidence of its due diligence in executing the warrant." Id., 803. The trial court further explained that, under our case law, a defendant can demonstrate his availability for arrest by presenting evidence "suggest[ing] that he was not elusive, was available, and was readily approachable" during the relevant time period. Applying this standard, the court concluded that the defendant had met his burden. Specifically, the court found that, "although the defendant was residing out of state, the state was aware of his whereabouts . . . and could have easily executed the warrant within the [limitation] period or sooner than it did in 2018," that, "[a]fter the search of the defendant's home, the defendant voluntarily went to the police station and provided a sworn statement to the police in which he admitted to possessing child pornography," and that "[t]he police had the defendant's cell phone number and knew where he lived both in Connecticut and subsequently in California."

In light of its determination that the defendant had met his burden of demonstrating his availability for arrest, the trial court considered whether the state had met its burden of proving that the delay by the Ansonia police in executing the arrest warrant was not unreasonable. The trial court concluded that the state had not met its burden. Indeed, the court noted that the state had failed to present any evidence with respect to this issue. In light of the foregoing, the court concluded that the delay by the police in executing the warrant was unreasonable and granted the defendant's motion to dismiss.

Thereafter, the state filed a motion for reargument in which it claimed that the trial court incorrectly had determined that the defendant's motion to dismiss was controlled by *Crawford* rather than the tolling provision of § 54-193 (c), as interpreted by this court in *Ward*. The state further sought to address the significance of the Appellate Court's then recent decision in *Roger B.* v. *Commissioner of Correction*, 190 Conn. App. 817, 212 A.3d 693, cert. denied, 333 Conn. 929, 218 A.3d 70 (2019), and cert. denied, 333 Conn. 929, 218 A.3d 71 (2019),[4] which the defendant had filed with the trial court as supplemental authority following the hearing on his motion to dismiss. In *Roger B.*, the Appellate Court held that, when an arrest warrant is issued within

[4] In *Roger B.*, the petitioner appealed from the judgment denying his petition for a writ of habeas corpus, alleging ineffective assistance of counsel on the basis of his trial counsel's failure to assert a statute of limitations defense. *Roger B.* v. *Commissioner of Correction*, supra, 190 Conn. App. 819–20. The habeas court denied the petition, reasoning, in part, that the statute of limitations was tolled under the tolling provision as a result of the petitioner's relocation outside of Connecticut. Id., 821–22. The Appellate Court agreed with the petitioner's claim on appeal that the habeas court incorrectly had concluded that the statute of limitations was tolled. Id., 831. The Appellate Court determined that, "[b]ecause the [arrest] warrant was issued within the limitation period, [the tolling provision] became irrelevant. The only question that remained was whether the warrant was executed without unreasonable delay." Id., 838.

the applicable limitation period, the statute of limitations is satisfied such that the tolling provision becomes irrelevant, and the only question is whether the warrant was executed without unreasonable delay. Id., 838. In its motion for reargument, the state claimed that *Roger B.* and the trial court's ruling on the defendant's motion to dismiss were inconsistent with this court's interpretation of § 54-193 (c) in *Ward*. The trial court disagreed and reaffirmed its ruling granting the defendant's motion to dismiss. The trial court further concluded that, even if § 54-193 (c) were applicable, it would not change the outcome of this case because the defendant had not fled the state within the meaning of that statute, and, therefore, the statute's tolling provision was never triggered.

On appeal, the state does not challenge the trial court's determination that the nearly five year delay in the execution of the arrest warrant by the Ansonia Police Department was unreasonable and, therefore, that the prosecution was time barred under *Crawford*. The state concedes that the delay was not reasonable. The state contends, however, that the trial court incorrectly determined that, because the arrest warrant was issued within the limitation period, the tolling provision of § 54-193 (c) was inapplicable. The state maintains that § 54-193 (c) is not only applicable but that, under *Ward*, its tolling provision was triggered when the defendant left the state for California, thereby "[giving] the state . . . an indefinite period to issue and execute the warrant . . . ." We disagree.

"Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo." (Internal quotation marks omitted.) *State* v. *Kallberg*, 326 Conn. 1, 12, 160 A.3d

1034 (2017). Whether the trial court correctly determined that § 54-193 (c) is inapplicable to the present case presents a question of statutory interpretation over which we also exercise plenary review.[5] See, e.g., *State* v. *Ward*, supra, 306 Conn. 707. We previously have explained that "§ 54-193, like other criminal statutes of limitation, is remedial in nature. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. . . . Indeed, it is because of the remedial nature of criminal statutes of limitation that they are to be liberally interpreted in favor of repose." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 677, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

[5] "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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006).

General Statutes (Rev. to 2009) § 54-193 (b) provides in relevant part that "[n]o person may be prosecuted for any offense . . . for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed. . . ." General Statutes (Rev. to 2009) § 54-193 (c), in turn, provides that, "[i]f the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it may be brought against such person at any time within such period, during which such person resides in this state, after the commission of the offense." In determining whether the Ansonia police were required to execute the arrest warrant without unreasonable delay or whether § 54-193 (c) tolled the limitation period within which the warrant could be executed, we do not write on a blank slate. In *Crawford*, this court considered whether the issuance of an arrest warrant within the limitation period commenced the prosecution for purposes of satisfying[6] the statute of limitations set forth in § 54-193 (b). *State* v. *Crawford*, supra, 202 Conn. 447. The defendant, Ronald L. Crawford, filed a motion to dismiss the charges against him, arguing that they were barred by the applicable one year statute of limitations because the warrant for his arrest, which had been issued approximately two months after the commission of the charged offenses, was not executed until more than one year after the limitation period had expired. Id., 445. The trial court denied his motion, and this court

[6] In *Crawford*, this court used the term "tolled," and other forms of the verb "toll," rather than "satisfied," to describe the state's meeting its obligation under § 54-193 (b) to have "prosecuted" a crime within the relevant limitation period. See, e.g., *State* v. *Crawford*, supra, 202 Conn. 447. In *State* v. *Ali*, 233 Conn. 403, 660 A.2d 337 (1995), we explained that "satisfie[d]" is the appropriate term to describe the state's meeting such obligation under § 54-193 (b) and that "[o]nly § 54-193 (c) specifically concerns the tolling of the statute of limitations." Id., 413 n.8.

upheld the trial court's ruling, holding that the issuance of an arrest warrant within the limitation period satisfies the statute of limitations. Id., 446, 452. Specifically, we held that, "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied]." (Footnote omitted.) Id., 450.

We further concluded, however, that "some limit as to when an arrest warrant must be executed after its issuance is necessary in order to prevent the disadvantages to an accused attending stale prosecutions, a primary purpose of statutes of limitation[s]." Id., 450. Thus, we held that, "in order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations of § 54-193 (b), must be executed without unreasonable delay." Id., 450–51. In so concluding, we declined to "adopt a per se approach as to what period of time to execute an arrest warrant is reasonable." Id., 451. Instead, we held that "[a] reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to [satisfy] the statute of limitations."[7] Id.

[7] Because the statute of limitations is an affirmative defense and Crawford had failed to prove by a preponderance of evidence that the warrant was not served with due diligence, this court affirmed the trial court's denial of

In reaching our determination in *Crawford*, we noted that "[§ 54-193 (c)], which tolls the statute [of limitations] as to a person who has fled from and resides outside the state after the commission of the offense, simply extends the time within which an 'indictment, information or complaint' may be brought." Id., 450 n.12. We further explained that, although "the issuance of an arrest warrant within the period of limitation might accomplish the same result [i.e., toll the statute of limitations], there may be valid reasons why the prosecuting authority cannot procure an arrest warrant while an accused is absent from the state." Id. Thus, although not essential to our holding in *Crawford*, we interpreted the tolling provision of § 54-193 (c) to apply when a defendant, by fleeing the state, has made the procurement of an arrest warrant within the limitation period impossible. See id., 451. We further explained, however, that the timely issuance of an arrest warrant satisfies the statute of limitations, just as § 54-193 (c) tolls it with respect to the person who has fled the state, so long as any delay in the execution of the warrant is not unreasonable. See id., 450–51.

Subsequently, in *State* v. *Ali*, 233 Conn. 403, 660 A.2d 337 (1995), the defendant, Showkat Ali, claimed that the trial court improperly failed to instruct the jury to consider whether one of the charges against him was barred by the applicable statute of limitations. Id., 409.

Crawford's motion to dismiss. *State* v. *Crawford*, supra, 202 Conn. 451–52. In *State* v. *Swebilius*, supra, 325 Conn. 793, however, we clarified that, in asserting a statute of limitations defense, a defendant need only demonstrate that he was not elusive, was available, and was readily approachable during the limitation period. Id., 809. We stated that, "once a defendant has demonstrated his availability and nonelusiveness during the statutory period, the state must then demonstrate the reasonableness of any delay between the issuance and the service of an arrest warrant, at least when service occurs after the expiration of the limitation period." Id. We further stated that "the reasonableness determination must be made on a case-by-case basis in light of the particular facts and circumstances presented." Id., 809–10.

Ali, a resident of New York, was accused of kidnapping, sexually assaulting, and threatening his former wife in her New London home on July 9, 1991. Id., 405–409. After the victim reported the incident to the New London police, the police secured a warrant for Ali's arrest on July 19, 1991, well within the one year limitation period for the crime of threatening. Id., 409–10. Ali was not arrested pursuant to that warrant, however, for nearly two years, at which time New York authorities contacted the New London police and told them that Ali was in custody and willing to waive extradition. Id., 410. The New London police determined, however, that the July 19, 1991 arrest warrant must be vacated because they could not locate the victim, from whom they had failed to take a statement. Id. As a result, a second arrest warrant was secured on August 19, 1993, and executed on August 23, 1993. Id., 411.

At trial, Ali filed a request to charge, asking that the jury be allowed to consider his affirmative defense that the threatening count was barred by the applicable one year statute of limitations, which the trial court denied. Id. On appeal, this court agreed with Ali that the trial court improperly declined to instruct the jury on his statute of limitations defense because Ali had produced evidence that the police had not acted with due diligence in executing the arrest warrant.[8] Id., 416. In reaching our determination, we rejected the state's argument that "[Ali's] departure from the state [was] dispositive of [his statute of limitations defense]. Rather, we conclude[d] that the outcome [was] controlled by [*Crawford*], [in which] we held that the issuance of an arrest warrant qualifies as a 'prosecution' within the meaning of § 54-193 (b) only if the state executed it without

[8] This court agreed with the state that "the first and second warrants were essentially the same and that the issuance of the first warrant, within one year of the offense, satisfied [the statute of limitations]." *State* v. *Ali*, supra, 233 Conn. 412 n.7.

unreasonable delay and that, in determining whether the state executed the warrant without unreasonable delay, the fact finder may consider whether the defendant left the jurisdiction and was difficult to apprehend."[9] Id., 412.

In *State* v. *Ward*, supra, 306 Conn. 698, this court concluded that the trial court correctly determined that the limitation period set forth in § 54-193 (b) was tolled pursuant to § 54-193 (c) because the defendant, James T. Ward, had "fled" the state by returning to his home in Massachusetts after committing the charged offense. Id., 706, 713–14. Ward was convicted of sexually assaulting the victim inside her Killingly home in November, 1988. Id., 700–701. After the assault, Ward immediately returned to his home in Massachusetts. See id., 703–704. Unable to identify the perpetrator of the assault, the state police closed its investigation in March, 1990. Id., 704. Subsequently, in June, 2005, it reopened the investigation after receiving a tip that Ward was the person who committed the offense. Id. After DNA testing confirmed that Ward was the perpetrator; id.; the state police obtained and executed a warrant for his arrest in August, 2007, almost nineteen years after he committed the offense and fourteen years beyond the applicable five year statute of limitations. Id., 705. Ward filed a motion to dismiss the sexual assault charge on the ground that it was barred by the statute of limitations. Id. The trial court denied the motion, concluding that "§ 54-193 (c) operated to toll the statute of limitations because the state had proven that [Ward] fled from the state immediately after the commission of the crime and that he resided outside of the state during the period of limitation." Id.

[9] Although we did not expressly say so in *Ali*, a review of the record and briefs in that case indicates that the state relied on § 54-193 (c) as support for its assertion that Ali's departure from the state had tolled the statute of limitations within which the police were required to execute the arrest warrant.

Following his conviction, Ward appealed to this court, claiming that the trial court improperly denied his motion to dismiss because the state had failed to present evidence that he was aware of a criminal investigation against him and that he had fled the state to avoid prosecution. Id., 710. The state argued in response that the term "fled" in § 54-193 (c) does not require an intent to avoid arrest or prosecution. Id. Because the term "fled" was not defined in the statute, we consulted a dictionary definition of the word "flee," which "is defined alternatively as 'to run away often from danger of evil' and 'to hurry toward a place of security . . . .' " Id., 709. We observed that the "common usage of the term fled connotes a meaning that a defendant is running away from something. The term fled as we have ascertained from the dictionary definition means to run away from danger—in the context of § 54-193 (c), we understand this term to mean investigation—and [to] hurry toward a place of security—in the context of § 54-193 (c), we understand this term to mean outside of the jurisdiction." Id., 711. We further noted that the legislature's failure to include language in § 54-193 (c) requiring that a defendant must have fled for the purpose of avoiding prosecution supported the conclusion that no such intent was required under the statute. See id., 710. Because, when Ward returned home to Massachusetts, he had a reason to believe that an investigation would ensue into his criminal conduct at the victim's home, we agreed with the trial court that he had fled the state within the meaning of § 54-193 (c). See id., 711. Specifically, we concluded that "§ 54-193 (c) may toll the statute of limitations when a defendant absents himself from the jurisdiction with reason to believe that an investigation may ensue as the result of his actions." Id.

Most recently, in *State* v. *Swebilius*, supra, 325 Conn. 793, we were asked to determine whether a delay in

the execution of an arrest warrant could be reasonable as a matter of law. In that case, the defendant, Jon Swebilius, "was charged with possession of child pornography in the first degree . . . and was arrested thirty-two days after the issuance of [the] warrant for his arrest and thirteen days after the expiration of the applicable five year statute of limitations . . . . [Swebilius] moved to dismiss the charge on the ground that the prosecution was barred by the statute of limitations because . . . the delay in the execution of the warrant was unreasonable. The trial court denied the motion, and [Swebilius] appealed to the Appellate Court, which affirmed the judgment of the trial court, concluding that the delay was reasonable as a matter of law under *Crawford* and its progeny." (Footnote omitted.) Id., 796. We reversed the Appellate Court's judgment; id., 815; concluding that it "incorrectly determined that some delays in the execution of an arrest warrant may be so brief as to be reasonable as a matter of law for the purpose of tolling the applicable statute of limitations." Id., 801. Such a conclusion, we explained, was inconsistent "with this court's observation in *Crawford* that, '[i]f . . . the accused [does] not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to toll the statute of limitations.' " Id., 807, quoting *State* v. *Crawford*, supra, 202 Conn. 451.

We further observed that "a rule making some delays reasonable without any showing of due diligence is inconsistent with the purposes of statutes of limitations. As we have observed, such statutes serve several functions, among them '(1) prevent[ing] the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown

potential liability, and (2) . . . aid[ing] in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.' . . . *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 809–10, 12 A.3d 852 (2011); see also [1 A.L.I. Model Penal Code and Commentaries (1985) § 1.06, comment, p. 86]. It is precisely because of these concerns that we require statutes of limitations to be strictly construed in favor of the accused. . . . Thus, although the precise length of any statutory limitation period is necessarily somewhat arbitrary, such statutes nevertheless reflect the will of the legislature that, at least in the absence of special or compelling circumstances, the limitation period shall serve as a firm bar to prosecution. See, e.g., [*State* v. *Whiteman*, 204 Conn. 98, 100, 526 A.2d 869 (1987)] (prosecution for sexual assault was barred when warrant was issued ten days after expiration of statute of limitations). It is also well established that statutes of limitations are not primarily concerned with demonstrable prejudice. . . . Instead, after the passage of the specified period of time, evidence of prejudice becomes less important than the virtues of predictability, repose, and societal stability. See, e.g., *United States* v. *Marion*, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) ('[S]tatutes [of limitations] represent legislative assessments of relative interests of the [s]tate and the defendant in administering and receiving justice; they are made for the repose of society and the protection of those who may [during the limitation period] . . . have lost their means of [defense]. . . . These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.' . . .) . . . ." (Citations omitted; footnote omitted.) *State* v. *Swebilius*, supra, 325 Conn. 812–814.

In reaching our determination, we explained that the burden shifting approach adopted by the Appellate

Court for determining whether, under *Crawford*, an arrest warrant was executed without unreasonable delay "encourages diligence by law enforcement officials in providing timely notice of charges to defendants. Although we decline[d] to specify the precise actions that they must undertake to serve a warrant with due diligence, or the precise timeline within which they must act, [we held that] such officials must present some credible and persuasive factual basis for inaction when they fail to observe the statute of limitations. This requirement is consistent with the principle that, when a judicial doctrine, 'for all practical purposes, extends the statute [of limitations] beyond its stated term,' that doctrine 'should be applied in only limited circumstances . . . .' " Id., 808–809, citing *Toussie* v. *United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970).

Finally, we noted that it was "unlikely . . . that the legislature ever intended to allow the statute of limitations to be tolled simply by the issuance of a warrant without further efforts to apprise the defendant of the warrant's existence. Doing so would contravene the policy of notice fundamental to statutes of limitations." *State* v. *Swebilius*, supra, 325 Conn. 809 n.11. Thus, we concluded that "*Crawford* is more properly viewed as an exception to the rule that a defendant must have notice of prosecution within the limitation period. In that sense, it benefits the state by extending the period of limitation beyond its stated term and must be applied judiciously." Id.

Against this backdrop, we turn to the state's claim that the trial court incorrectly concluded that, because a warrant for the defendant's arrest was issued within the limitation period, the tolling provision of § 54-193 (c) was inapplicable such that, under *Crawford*, the Ansonia police were required to execute the warrant without unreasonable delay. The state argues that,

although this court and the Appellate Court consistently have analyzed statute of limitations cases involving timely issued arrest warrants using the *Crawford* framework, including cases in which the defendant left the state before or after the warrant was issued, in none of those cases did the state specifically claim that § 54-193 (c) had tolled the statute of limitations. Thus, according to the state, these cases "can hardly be read as an affirmative holding that, once warrants are issued, they must be served promptly even on those who fled the jurisdiction." The state further contends that, "in creating the . . . tolling exception to [§ 54-193 (b), the legislature] intended to toll the statute [of limitations] when suspects flee the state, regardless of whether a warrant has issued." Specifically, the state argues that, "given the lack of any reference in [the] tolling provision to issuance or execution of warrants, its plain language mandates that limitation periods be tolled regardless of the existence or status of any arrest warrant." Finally, the state contends that, when the defendant left Connecticut for California in 2011, he "fled" the state within the meaning of § 54-193 (c), as interpreted by this court in *Ward*, such that the statute of limitations was tolled until the defendant's return in 2018.

The defendant responds that the trial court properly utilized the *Crawford* framework in concluding that the nearly five year delay in the execution of the arrest warrant by the Ansonia police was unreasonable, and, therefore, the defendant's prosecution was barred by the statute of limitations. The defendant contends that, although § 54-193 (c) tolls the limitation period within which a prosecution may be commenced, *Crawford* and its progeny firmly establish that, once an arrest warrant has been issued, "the state must serve it without undue delay." We agree with the defendant.

By its express terms, § 54-193 (c) extends the time within which "an indictment, information or complaint[10] . . . may be brought" when a defendant has "fled from and resided out of this state . . . after the commission of the offense." (Footnote added.) Within the parlance of the law, an "action brought" is "[a]n action commenced." Ballentine's Law Dictionary (3d Ed. 1969) p. 19. Although § 54-193 (c) does not expressly refer to the issuance or execution of warrants as the point at which an action is "brought" for purposes of satisfying the time limits imposed under § 54-193 (b), this court has long ascribed that meaning to the word when applying the provisions of that statute. See, e.g., *State* v. *Ali*, supra, 233 Conn 416 ("the issuance of an arrest warrant is sufficient 'prosecution' to satisfy the statute of limitations . . . if the warrant is executed with due diligence"); *State* v. *Crawford*, supra, 202 Conn. 448 ("it is generally held that the prosecution is commenced, and the statute [satisfied], at the time a complaint is laid before a magistrate and a warrant of arrest is issued"). In light of the foregoing, we conclude that § 54-193 (c) tolls the limitation period solely with respect to the time within which a prosecution may be brought and does not purport to address prosecutions that have *already* been brought, at which point, as the Appellate Court aptly determined in *Roger B.* v. *Commissioner of Correction*, supra, 190 Conn. App. 838, there is no need for tolling because the statute of limitations has already been satisfied. See, e.g., *State* v. *Ali*, supra, 233 Conn. 413 n.8 (distinguishing satisfying statute of limitations from tolling statute of limitations and noting

[10] An "indictment, information or complaint" are the formal means by which prosecutions are, or in the past were, brought against a defendant. General Statutes (Rev. to 2009) § 54-193 (c). As we explained in *Crawford*, "General Statutes § 54-46 previously required an indictment for crimes punishable by death or life imprisonment. This provision, however, was amended by No. 83-210 of the 1983 Public Acts. All felonies in Connecticut are now prosecuted by information and misdemeanors by information or complaint." *State* v. *Crawford*, supra, 202 Conn. 448 n.9; see also Practice Book § 36-11.

that "[o]nly § 54-193 (c) specifically concerns the tolling of the statute of limitations").

Our interpretation is consistent with our statement in *Ward* that § 54-193 (c) was intended to toll the statute of limitations when an offender has fled the state and, as a result, made an investigation into his crimes—and hence the timely procurement of an arrest warrant—impracticable if not impossible.[11] See *State* v. *Ward*, supra, 306 Conn. 712 (§ 54-193 (c) addresses "the practical problems that Connecticut police officers face in identifying and apprehending nonresident criminals" because "[i]nvestigation of crimes is easier for law enforcement officials when people central to the incident, and who may have vital information, are located within the state" (internal quotation marks omitted)); see also *United States* v. *Marshall*, 856 F.2d 896, 899–900 (7th Cir. 1988) ("[T]he statute of limitations, along with its companion tolling provisions, is designed to balance two competing interests. The statutes are intended to allow the government sufficient time to investigate and prosecute criminal conduct, while shielding the defendant from the burden and jeopardy of confronting distant offenses. . . . The tolling statute reflects the [legislature's] belief that [when] the defendant impedes the discovery and prosecution of his criminal conduct by fleeing from justice, his right to avoid prosecution for distant offenses is diminished while the government's need for additional discovery time is strengthened." (Citations omitted; internal quotation marks omitted.)).

We have long held that the primary purpose of statutes of limitations is to "encourag[e] law enforcement officials promptly to investigate suspected criminal

[11] We note that the statutory language at issue dates back to at least 1821; see General Statutes (1821 Rev.), tit. 59, § 11; long before the advent of modern forensic science, the Internet and jet travel, when a person's flight from the state after committing an offense likely would have ended any hope of solving the crime.

activity"; (internal quotation marks omitted) *State* v. *Ward*, supra, 306 Conn. 712; so as "to ensure that a defendant receives notice, within a prescribed time, of the acts with which he is charged . . . ." (Internal quotation marks omitted.) *State* v. *Almeda*, 211 Conn. 441, 446, 560 A.2d 389 (1989). When law enforcement is prevented from solving a crime because the perpetrator has fled from and resided outside of the state, the legislature has determined that the state should be allowed additional time within which to identify and bring to justice the offender. When, however, an offender's absence from the state poses no impediment to an investigation and the police are able to procure an arrest warrant within the time proscribed by § 54-193 (c), we can perceive no reason, and the state has identified none, why the state should not be required to promptly notify the defendant of the crimes with which he is charged. Such notice is the raison d'être of statutes of limitations. See, e.g., *State* v. *Swebilius*, supra, 325 Conn. 809 n.11 ("policy of notice [is] fundamental to statutes of limitations"); *State* v. *Almeda*, supra, 211 Conn. 446 ("[a]t the core of the limitations doctrine is notice to the defendant").

The state argues nonetheless that our interpretation of § 54-193 (c) penalizes it for obtaining a warrant because, "once warrants [are] issue[d], they must be served promptly under *Crawford*, regardless of whether the suspect [has] fled the state." We disagree. This court stated unequivocally in *Crawford* that "[a]n accused should *not* be rewarded, [in the absence of] evidence of a lack of due diligence on the part of the officer charged with executing the warrant, for managing to avoid apprehension to a point in time beyond the period of limitation." (Emphasis added.) *State* v. *Crawford*, supra, 202 Conn. 450. Thus, we adopted what we believed to be "the sensible approach of the [M]odel [P]enal [C]ode," which requires that arrest warrants be served "without unreasonable delay." Id., 450–51. In so

doing, we emphasized that "what period of time to execute an arrest warrant is reasonable . . . *is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable.*" (Emphasis added.) Id., 451. Applying this standard, our courts routinely have determined that delays in the execution of an arrest warrant were reasonable when the defendant's departure from the state prevented the prompt execution of a warrant. See, e.g., *State* v. *Swebilius*, supra, 325 Conn. 811 n.14 ("delays that have been deemed to be reasonable [under *Crawford*] have been as long as fourteen years [when defendant left state]"); *Roger B.* v. *Commissioner of Correction*, supra, 190 Conn. App. 845 (citing cases and noting that "Connecticut [courts] have determined that a delay in executing an arrest warrant is not unreasonable when a defendant has relocated outside of the state" (internal quotation marks omitted)); *State* v. *Derks*, 155 Conn. App. 87, 89–90, 95, 108 A.3d 1157 (delay of nearly twelve years was reasonable under *Crawford* when defendant moved out of state and was difficult to locate), cert. denied, 315 Conn. 930, 110 A.3d 432 (2015); *State* v. *Henriquez*, Superior Court, judicial district of New Haven, Docket Nos. CR-09-96308 and CR-09-96309 (February 4, 2011) (fourteen year delay in serving arrest warrant was not unreasonable under *Crawford* when defendant left state within days of committing offense and lived under assumed name, making it difficult for police to apprehend him).

Thus, our case law belies the state's assertion that obtaining an arrest warrant within the limitation period set by the legislature places the state at a disadvantage. So long as the warrant is executed without unreasonable delay—the state makes no claim and presented no

evidence in the trial court that the delay in the present case was reasonable—the state can continue to prosecute the defendant as soon as it is able to locate and arrest him. What the state cannot do under our case law, however, is what the state did in the present case—obtain an arrest warrant within the limitation period and then wait nearly five years before attempting to serve it, knowing all along the defendant's precise whereabouts. See, e.g., *State* v. *Swebilius*, supra, 325 Conn. 814 (statute of limitations should not be tolled "[when] the warrant is issued but no effort is made to arrest a defendant whose whereabouts are known" (internal quotation marks omitted)); *State* v. *Woodtke*, 130 Conn. App. 734, 744, 25 A.3d 699 (2011) ("[t]he mere fact that a police department is 'a very busy urban police department' is not enough for it to avoid its obligation to serve . . . warrants in a timely manner"). Such dilatory practices are antithetical to the fundamental policies furthered by our criminal statutes of limitations.[12]

The decision of the trial court is affirmed.

In this opinion the other justices concurred.

[12] The state contends that, under our decision, it would have been better off if it had not obtained an arrest warrant within the limitation period. Specifically, the state argues that, "had [the] police not sought a warrant until the defendant returned to Connecticut, [this court's decision in *Ward*]—bizarrely—[would have] allow[ed] [his] prosecution because the defendant 'fled from and resided out of this state.' " Because we conclude that § 54-193 (c) is inapplicable under the circumstances of this case, we need not address this argument except to say that we are dismayed by it. Although it is not our role to advise the state on such matters, it concerns us that something this court might have said in *Ward* would cause the state to think that, despite having enjoyed the defendant's full cooperation and knowing exactly how to locate him from 2009 onward, the state would have been better off to delay the defendant's prosecution for years merely because he relocated out of state. To the extent that this court's decision in *Ward* can be read to countenance any such tactics on the part of the state, it certainly was not our intention to convey that impression. *Ward* involved the paradigmatic case of an offender fleeing the state immediately after committing a serious felony. *State* v. *Ward*, supra, 306 Conn. 706. His identity was not revealed until almost nineteen years later through a fortuitous tip later confirmed by DNA testing. Id., 704. The sole issue before this court was

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(SC 20450)

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

Syllabus

The defendant appealed to this court from the judgment of the Appellate Court, which affirmed the trial court's judgments following his conditional pleas of nolo contendere to the charges of sale of a controlled substance and violation of probation. The charges stemmed from the discovery by probation officers of marijuana in the defendant's possession while they were conducting a visit at his home. The defendant had filed motions to dismiss, claiming that the legislature's enactment of the statute ((Rev. to 2017) § 21a-277 (b)) criminalizing the sale of, inter alia, marijuana was based on a racially discriminatory motive and, therefore, violated his rights under the federal constitution. Following a hearing on the defendant's motions, the trial court concluded that, although the defendant, a Caucasian, was not a member of a minority group that § 21a-277 (b) allegedly discriminated against, he had standing to pursue his challenge in his individual capacity because he was aggrieved by the application of an unconstitutional law. The trial court nevertheless denied the defendant's motions to dismiss on the merits. Subsequently, the defendant appealed to the Appellate Court from the trial court's judgments, claiming that the trial court had improperly denied his motions to dismiss. The Appellate Court affirmed the trial court's judgments on the alternative ground that the defendant lacked standing to assert his constitutional claim, and the defendant, on the granting of certification, appealed to this court. On appeal, the defendant claimed

whether, *under the facts of that case*, the defendant had "fled" the state within the meaning of § 54-193 (c) such as to trigger the tolling provision. See, e.g., *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006) (in construing a statute, "we seek to determine . . . the meaning of the statutory language *as applied to the facts of* [*the*] *case*, *including the question of whether the language actually does apply*" (emphasis added; internal quotation marks omitted). We were not required to determine whether a person who signed a sworn confession and then two years later relocated outside of the state, after fully cooperating with the police and providing them with a valid cell phone number at which he could be reached, and who took no evasive actions to avoid detection, also could be deemed to have fled the state within the meaning of the statute. To the extent that the state reads *Ward* as having resolved that question, it is quite mistaken.

that he had standing, in his individual capacity, to raise a due process challenge to his conviction under § 21a-277 (b) because that statute violated the equal protection clause of the United States constitution insofar as it was enacted for the purpose of discriminating against African Americans and Mexican Americans. *Held* that the defendant lacked standing to assert his claim that § 21a-277 (b) violated the equal protection rights of African Americans and Mexican Americans, as the defendant, a Caucasian, was not aggrieved by the legislature's enactment of a law that allegedly discriminated against other racial and ethnic groups: the defendant failed to demonstrate a specific, personal and legal interest, rather than a general interest shared by the community, in the underlying equal protection challenge to Connecticut's criminalization of the sale of marijuana, as the defendant did not claim that he was a member of the group of racial or ethnic minorities that § 21a-277 (b) was allegedly enacted to discriminate against; moreover, the defendant's reliance on this court's decision in *State* v. *Long* (268 Conn. 508) and on Justice Ruth Bader Ginsburg's concurrence in *Bond* v. *United States* (564 U.S. 211) was misplaced, as the analysis in *Long* was confined to the second prong of the two-pronged inquiry for determining classical aggrievement, whereas this case turned on whether the defendant satisfied the first prong of that inquiry, and as Justice Ginsburg's concurrence was not controlling precedent and was based on federal third-party standing doctrine that was inapplicable to the defendant because he did not assert standing in a representative capacity.

(*One justice dissenting*)

Argued March 26—officially released October 5, 2021*

Procedural History

Information, in the first case, charging the defendant with the crimes of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school and sale of a controlled substance, and information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Middlesex, where the court, *Keegan*, *J.*, denied the defendant's motions to dismiss; thereafter, the defendant was presented to the court on conditional pleas of nolo contendere to the charges of sale of a controlled substance and violation of probation; judgments in accordance with the pleas; subse-

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

quently, the state entered a nolle prosequi on the charge of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school, and the defendant filed separate appeals with the Appellate Court, which consolidated the appeals; thereafter, the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Sheldon*, *Js.*, affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell Zentner*, supervisory assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. Today we are called on to decide whether a defendant has standing to assert a violation of his right to due process based on his conviction under a statute that he claims is unconstitutional. The twist in that otherwise straightforward question is that the defendant, who is Caucasian, claims that Connecticut's statute criminalizing the sale of marijuana violates the equal protection clause of the United States constitution because it was enacted to discriminate against African Americans[1] and Mexican Americans.

The defendant, William Hyde Bradley, appeals from the judgment of the Appellate Court affirming the trial court's judgments following his conditional pleas of nolo contendere to charges of sale of a controlled substance and violation of probation. The defendant's prin-

[1] We recognize that the term "African American" is restrictive in that it does not necessarily encompass the entire Black population in America. Nevertheless, to remain consistent with the parties' briefs, the Appellate Court opinion, and the certified issues before this court, we use the term "African American" throughout this opinion.

cipal claim on appeal is that the Appellate Court incorrectly concluded that he lacked standing to argue that his conviction for sale of a controlled substance in violation of General Statutes (Rev. to 2017) § 21a-277 (b)[2] violated his due process rights because he was convicted under an unconstitutional statute. Specifically, he contends that the Appellate Court erroneously held that a defendant cannot bring a constitutional challenge, in his individual capacity, based on an alleged violation of others' equal protection rights. Because the defendant cannot meet the requirements to establish classical aggrievement, we affirm the judgment of the Appellate Court. Accordingly, we do not reach the merits of the defendant's equal protection claim in this appeal.

The Appellate Court's decision sets forth the facts and procedural history; see *State* v. *Bradley*, 195 Conn. App. 36, 38–41, 223 A.3d 62 (2019); which we summarize in relevant part. In 2017, while the defendant was serving a sentence of probation for a prior conviction of possession of marijuana with intent to sell, probation officers conducting a visit at the defendant's home discovered marijuana in the defendant's possession. Consequently, the state charged the defendant, in two separate informations, with one count of sale of a controlled substance in violation of § 21a-277 (b), and with one count of violation of probation in violation of General Statutes § 53a-32.[3]

Relevant to this case, the defendant subsequently filed motions to dismiss, arguing, among other things, that the state's criminalization of the sale of marijuana

[2] Hereinafter, all references to § 21a-277 in this opinion are to the 2017 revision of the statute.

[3] The defendant was also charged with one count of possession of one-half ounce or more of marijuana within 1500 feet of a school in violation of General Statutes (Rev. to 2017) § 21a-279 (b). The state subsequently entered a nolle prosequi with respect to this charge.

was based on a racially discriminatory motive and, therefore, violated the equal protection clause of the fourteenth amendment to the United States constitution and the equal protection guarantees under article first, § 20, of the Connecticut constitution, as amended. Following a hearing on the defendant's motions, the trial court ordered the parties to file supplemental memoranda of law regarding the issue of standing. In particular, the court ordered the parties to address whether the defendant, who the trial court found to be Caucasian, could raise an equal protection claim on the ground that the legislature's purpose in enacting a law criminalizing the sale of marijuana was to discriminate against members of a minority group of which the defendant was not a member.[4] In his supplemental memoranda in support of his motions to dismiss, the defendant argued that his prosecution under § 21a-277 (b) violated his due process right not to be convicted under an unconstitutional statute. Although the defendant conceded that he is not a member of a minority group that the statute was allegedly enacted to discriminate against, he claimed that he had standing to pursue this challenge in his individual capacity, arguing that he is aggrieved by the application of an unconstitutional law.

[4] We acknowledge the numerous complexities of race. For example, critical race theorists maintain that "race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient." R. Delgado & J. Stefancic, Critical Race Theory: An Introduction (New York University Press 3d Ed. 2017) p. 9. In this case, however, the defendant does not dispute the trial court's finding that he is Caucasian. Although the defendant claimed in his motions to dismiss that the legislature's purpose in enacting a statute criminalizing the sale of marijuana was to discriminate against African Americans and Mexican Americans, the defendant makes no argument that he identifies as African American or Mexican American. Rather, the defendant consistently argues that, although he is *not* a member of either class, he is aggrieved because of his prosecution and conviction under an unconstitutional statute. Accordingly, we confine our analysis to whether a Caucasian defendant has standing to raise a challenge to a statute on the basis that it violates the equal protection rights of a class of persons of which he is not a member.

The trial court agreed with the defendant, reasoning that a party need not be a member of the class discriminated against in order to have standing to challenge an allegedly unconstitutional statute. The court noted that, because the defendant was charged—and could be convicted—under the challenged statute, he established classical aggrievement consistent with our holding in *State* v. *Long*, 268 Conn. 508, 533, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). Ultimately, however, the trial court denied the defendant's motions to dismiss on the merits, finding that the defendant could not prove that the legislature's purpose in enacting the law criminalizing the sale of marijuana was to discriminate against African Americans or Mexican Americans.

Thereafter, the defendant entered pleas of nolo contendere to the charges of sale of a controlled substance and violation of probation, conditioned on preserving his right to appeal from the conviction of sale of a controlled substance and finding of violation of probation based on the trial court's denial of his motions to dismiss. The trial court sentenced the defendant for his conviction of sale of a controlled substance to an unconditional discharge, and, on his violation of probation, the defendant's probation was revoked, and he was sentenced to a term of five and one-half years of incarceration, execution suspended, and two years of probation.

The defendant appealed from the judgments to the Appellate Court, claiming that the trial court improperly denied his motions to dismiss. *State* v. *Bradley*, supra, 195 Conn. App. 41. The defendant again argued that Connecticut's statute criminalizing the sale of marijuana violates the equal protection clause of the United States constitution. Id. The defendant did not, however, challenge the trial court's denial of his alternative equal protection claim under the Connecticut constitution.

Id. The Appellate Court subsequently affirmed the judgments of the trial court on the alternative ground that the defendant lacked standing to assert his claim. Id., 59.

Thereafter, the defendant filed a petition for certification to appeal, which we granted, limited to the following two issues: (1) "Did the Appellate Court correctly conclude that the defendant did not have standing to raise a due process challenge to his prosecution under a criminal statute, namely, [§ 21a-277 (b)], that he claims was enacted for the purpose of discriminating against minority groups to which he does not belong?" And (2) "[i]f the answer to the first question is 'no,' was § 21a-277 (b) enacted for the purpose of discriminating against African Americans and/or Mexican Americans?" *State* v. *Bradley*, 334 Conn. 925, 223 A.3d 379 (2020).

On appeal to this court, the defendant maintains that he has standing to challenge his conviction of sale of a controlled substance in violation of § 21a-277 (b) on the ground that it violates his right to due process. Specifically, the defendant contends that the statute criminalizing the sale of marijuana violates the equal protection clause of the United States constitution because it was enacted for the purpose of discriminating against African Americans and Mexican Americans, and, consequently, the statute is unconstitutional. The defendant argues that—regardless of the challenger's own race or ethnicity—every person has a right to be free from conviction under an unconstitutional statute. Thus, the defendant contends that the application of § 21a-277 (b) to him, as a basis for his conviction, violates his due process rights. On this basis, the defendant argues that he has established classical aggrievement as articulated by this court in *State* v. *Long*, supra, 268 Conn. 531–32, because he has been "specially and injuriously affected" by the application of § 21a-277 (b), insofar as he has been charged, prosecuted, and con-

victed under the statute. (Internal quotation marks omitted.) Id., 532.

The state disagrees and contends that the Appellate Court correctly concluded that the defendant lacked standing to claim that § 21a-277 (b) violates the equal protection rights of minorities because the defendant is not a member of a minority class. Specifically, the state claims that the defendant cites no authority for the proposition that there is a "due process right not to be prosecuted under a statute [that] violates the equal protection rights of others . . . ." It also contends that the defendant has not been aggrieved by the legislature's enactment of a law that allegedly discriminates against African Americans and Mexican Americans. Finally, the state contends that, "[although] the defendant, and indeed the state, share the concern of 'all members of the community as a whole' in preventing discrimination, the defendant cannot demonstrate a 'specific, personal and legal interest in [the subject matter of the challenged action],' " as required to demonstrate classical aggrievement under *State* v. *Long*, supra, 268 Conn. 531. We agree with the state.

We begin our analysis with the standard of review and relevant legal principles. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination." *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214, 982 A.2d 1053 (2009).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or

representative capacity, some real interest in the cause of action . . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring [an action] or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a [well settled] twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) Id., 214–15.

This court has explained that the two prongs of the standing analysis are distinct and, thus, cannot be conflated. See, e.g., *New England Rehabilitation Hospital of Hartford, Inc.* v. *Commission on Hospitals & Health Care*, 226 Conn. 105, 122–23 and n.12, 627 A.2d 1257 (1993) (noting that party claiming aggrievement must demonstrate "certainty of a specific personal and legal interest in the subject matter of the decision," which is separate from "the second prong of the aggrievement test that requires only a possibility . . . that some legally protected interest has been adversely affected" (internal quotation marks omitted)). When a defendant cannot demonstrate that he has a specific, personal and legal interest in the subject matter of the challenged action, a court need not decide whether his interest

has been specially and injuriously affected. See, e.g., *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, 214 Conn. 726, 730–34, 573 A.2d 736 (1990) (explaining that, when plaintiffs could not establish legal interest in subject matter of certain settlement agreements at issue, as distinct from interest of general public, it was unnecessary for court to consider second part of test for aggrievement).

We first note that the defendant challenges his conviction, as well as the constitutionality of the state's statute prohibiting the sale of marijuana, in his individual capacity. He does not claim that he was authorized by statute to bring such a challenge or that he has third-party standing to bring the challenge in a representational capacity on behalf of others. Rather, the defendant claims that he has been aggrieved by the statute's unconstitutionality because he was prosecuted and convicted thereunder. Accordingly, we confine our analysis to whether the defendant has standing, in his individual capacity, to challenge the state's statute criminalizing the sale of marijuana on the ground that it violates the equal protection rights of others.

To substantiate his claim to standing, the defendant principally relies on this court's decision in *State* v. *Long*, supra, 268 Conn. 508. In *Long*, the defendant, who had been charged with assault in the second degree, was found not guilty by reason of mental disease or defect and was subsequently committed to the custody of the Commissioner of Mental Health and Addiction Services for initial confinement and examination. Id., 511–12. Following a mandatory psychiatric evaluation, "the commissioner issued a report concerning the defendant's mental health . . . ." (Footnotes omitted.) Id., 512. On the basis of the report, the trial court ultimately found that the defendant was "a person who should be confined" and ordered him to be committed

to the jurisdiction of the Psychiatric Security Review Board. (Internal quotation marks omitted.) Id. Although the defendant was initially to be committed to the jurisdiction of the board for a period of five years, the state successfully petitioned the trial court to extend the defendant's commitment four additional times pursuant to the court's authority under the challenged statute. Id., 512–13. When the state, for a fifth time, filed a petition for recommitment, the defendant moved to, among other things, dismiss the state's petition. Id., 513. The defendant argued that, once an acquittee reaches his maximum term of commitment, any order granting the state's petition for recommitment pursuant to the challenged statute was unconstitutional. Id. The trial court ultimately granted the defendant's motion to dismiss and concluded, in relevant part, that the challenged statute, as applied to the defendant, deprived him of his liberty without giving him the right to a mandatory periodic judicial review of his commitment, a right that is afforded to convicted prisoners who are civilly committed to psychiatric treatment facilities after they are incarcerated. See id., 514.

On appeal, the state claimed, among other things, that the defendant lacked standing to assert his constitutional claim, arguing that the defendant had not satisfied the traditional, two-pronged test for classical aggrievement. See id., 527–28. The state did not claim that the defendant lacked a "specific, personal and legal liberty interest in [the subject matter of the challenged action]"; id., 532; as it was clear that the defendant, an acquittee challenging his recommitment, had a specific interest in a statute prescribing standards for acquittee recommitment proceedings. Instead, the state challenged the defendant's ability to meet the second prong of the test. Id. In particular, the state claimed that the defendant could not prove that he was "specially and injuriously affected" by his recommitment because, as

an acquittee, the defendant received more judicial review of his commitment than a civil committee would have been entitled to receive. (Internal quotation marks omitted.) Id. This court ultimately concluded that the defendant had standing to challenge the statute at issue, explaining that a showing of classical aggrievement can rest on the likelihood of a defendant's future recommitment. Id., 533. Specifically, we explained: "[I]n the present case, the defendant challenges the acquittee recommitment statute . . . which, if applied to him in the future, could subject him to further recommitment that adversely would affect his liberty interest. Moreover, the trial court specifically found at the most recent recommitment hearing that the defendant still suffered from a mental illness and posed a danger to others were he discharged from confinement. These factual findings demonstrate a genuine likelihood that the defendant is susceptible to the deprivation of his liberty interest in the future via recommitment . . . . Consequently, because the defendant risks actual prospective deprivation of his liberty interest under the challenged statute, we conclude that he is classically aggrieved, and has standing to challenge the statute." (Internal quotation marks omitted.) Id.

The defendant relies on this court's holding in *Long* to establish his standing in this case. Specifically, the defendant maintains that he was aggrieved because he had been prosecuted and convicted under an unconstitutional statute. In contrast to the defendant in *Long*, the defendant in this case correctly notes that he faces more than a "genuine likelihood" of *future* application of the challenged statute; he has *actually been prosecuted and convicted* under the statute, and, thus, he contends that he satisfies the test for aggrievement. The defendant's argument, however, collapses the two distinct inquiries under the two part standing analysis. Antecedent to his claim that his interest has been spe-

cially and injuriously affected, the defendant must establish that he has a "specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole." (Internal quotation marks omitted.) Id., 531. Because the defendant has not specifically made this showing, he is not "classically aggrieved," as that concept is defined by our standing jurisprudence.

As the Appellate Court correctly noted, our holding in *Long* cannot be construed as conferring on parties a right to assert constitutional challenges, in their individual capacities, based on the alleged violation of *others'* constitutional rights. See *State* v. *Bradley*, supra, 195 Conn. App. 47. Indeed, this court has previously explained: "Only members of a class whose constitutional rights are endangered by a statute may ask to have it declared unconstitutional. . . . Courts are instituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties; and a party whose rights have not been invaded cannot be heard to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress." (Citations omitted; internal quotation marks omitted.) *Shaskan* v. *Waltham Industries Corp.*, 168 Conn. 43, 49–50, 357 A.2d 472 (1975). *Long*, instead, stands for the proposition that, although a party has individual standing to challenge alleged violations of his own rights, such challenges are not necessarily confined to ongoing violations but may also include future violations of such rights that are reasonably likely to occur. See *State* v. *Long*, supra, 268 Conn. 532–33. The defendant in *Long* was not aggrieved simply because he faced future commitment. It was the combination of this future threat and the fact that he was also a member of the class of insanity acquittees whose rights he sought to vindicate that gave him standing. Indeed,

the parties in *Long* agreed that the defendant had a "specific, personal and legal liberty interest in [the subject matter of the challenged action]," as the defendant was an acquittee whose personal and legal interests were squarely implicated by the challenged statute. Id., 532. Our analysis, accordingly, was confined to the second prong of the two part test for classical aggrievement, namely, whether the party's interest was "specially and injuriously affected" by the challenged action. (Internal quotation marks omitted.) Id. In *Long*, we did not discuss the first prong of the test for classical aggrievement, let alone determine whether a defendant who asserts a violation of the constitutional rights of others satisfies the first prong. In sum, our holding in *Long*—a case in which the parties agreed that the first prong of our test for classical aggrievement was satisfied—is wholly inapplicable to the present case, in which the question turns on whether the defendant has satisfied the first prong of the classical aggrievement test.

Our case law addressing the first prong of the test for classical aggrievement states that a defendant has a specific, personal and legal interest when his property rights are affected; see, e.g., *Brady-Kinsella* v. *Kinsella*, 154 Conn. App. 413, 417, 106 A.3d 956 (2014) (concluding that, in marital dissolution action, plaintiff had "specific, personal, and legal interest in equitable distribution of the marital property"), cert. denied, 315 Conn. 929, 110 A.3d 432 (2015); when he is within the class of persons implicated by the challenged statute; see, e.g., *State* v. *Long*, supra, 268 Conn. 533 (holding that acquittee had standing to challenge statute pertaining to acquittee recommitment); *Ramos* v. *Vernon*, 254 Conn. 799, 810–11, 761 A.2d 705 (2000) (holding that minor and his mother had standing to challenge town ordinance that imposed curfew on minors and corresponding penalties for minors' parents); and when

the defendant's conduct is the very essence of the dispute. See, e.g., *Rose* v. *Freedom of Information Commission*, 221 Conn. 217, 219, 231, 602 A.2d 1019 (1992) (noting that, in arguing that Freedom of Information Commission had wrongfully denied them party status, plaintiffs satisfied first prong of aggrievement test because plaintiffs' conduct during "mock arrest" was substance of "board's investigation, executive session and vote"); *Cannavo Enterprises, Inc.* v. *Burns*, 194 Conn. 43, 47, 478 A.2d 601 (1984) (holding that defendant had personal and legal interest in subject matter of default judgment, namely, whether defendant should be held liable for services rendered by plaintiff). Common among all of these cases is the direct connection between the challenger and the subject matter of the dispute, a correlation between the harm to be avoided and the person subjected to the harm. This correlation cannot be found here. The defendant has not demonstrated a *specific* interest in his underlying equal protection challenge to Connecticut's criminalization of the sale of marijuana. The defendant does not claim to be a member of the group of racial or ethnic minorities that he asserts the statute was enacted to discriminate against. We can all agree that nonminorities might share in the general interest in eradicating racial discrimination, and, indeed, the defendant's own asserted interest—premised on an equal protection claim to vindicate others' rights—cannot be distinguished from that of the interest of the general community, at large.

Furthermore, the defendant's standing argument is circular. To frame his due process argument, the defendant maintains that he was charged and convicted under an unconstitutional statute, the constitutionality of which is the subject of the merits of his underlying claim, which we cannot reach unless we conclude that the defendant has standing to assert such a claim. The defendant impermissibly relies on this court's assumption of certain predicate conclusions—namely, that the

challenged statute is unconstitutional—prior to our disposition regarding the defendant's standing to challenge the constitutionality of the statute at issue. In other words, the defendant's argument that he has standing because he has a right not to be convicted under an unconstitutional statute assumes the merits of his equal protection claim.

The defendant also contends that Justice Ruth Bader Ginsburg's concurrence in *Bond* v. *United States*, 564 U.S. 211, 226, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011) (Ginsburg, J., concurring), supports his contention that he has standing based on a due process right not to be convicted under an unconstitutional statute. We are not persuaded. In *Bond*, the United States Supreme Court considered whether a citizen of Pennsylvania, Carol Anne Bond, had the authority to challenge a federal statute on the ground that it violated the tenth amendment to the United States constitution or, alternatively, whether her rights to challenge the statute belonged to the state. Id., 214. The majority concluded that Bond, who was indicted for violating the federal statute, had standing to bring her tenth amendment claim, reasoning that an "individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines." Id., 220. It emphasized that, when a party can establish article three standing, namely, proof of "actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision"; id., 225; "she is not forbidden to object that her injury results from disregard of the federal structure of our [g]overnment." Id., 225–26. Because Bond met the requirements for article three standing, and because she asserted a cognizable tenth amendment violation, the court concluded that she had standing to raise her claims.[5] See id.

[5] The United States Supreme Court's holding in *Bond* has largely been interpreted as confirming federalist principles. The court ultimately con-

Justice Ginsburg joined the majority's opinion but wrote separately to emphasize one observation. In her concurrence, Justice Ginsburg maintained that—regardless of whether a defendant asserted a tenth amendment challenge, or a due process challenge, or one rooted in the establishment clause—"a court has no 'prudential' license to decline to consider whether the statute under which the defendant has been charged lacks constitutional application to her conduct." Id., 226–27 (Ginsburg, J., concurring). Whereas the majority held that a defendant has standing to assert a claim alleging a violation of the *tenth amendment*, Justice Ginsburg asserted that—regardless of the alleged constitutional violation a defendant asserts—courts "must entertain the objection—and reverse the conviction—even if the right to equal treatment resides in someone other than the defendant." Id., 227 (Ginsburg, J., concurring).

Here, the defendant relies on Justice Ginsburg's concurrence for the proposition that he has standing to challenge the constitutionality of a statute that violates the equal protection rights of others. The defendant's argument, however, centers on an isolated quote from the concurrence, in which Justice Ginsburg wrote: "[A]ny . . . defendant . . . has a personal right not to be convicted under a constitutionally invalid law. . . . Due process . . . is a guarantee that a man should be tried and convicted only in accordance with valid laws

cluded: "Just as it is appropriate for an individual, in a proper case, to invoke [separation of powers] or [checks and balances] constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Bond* v. *United States*, supra, 564 U.S. 223–24. Indeed, among scholars, the court's decision in *Bond* has provided an opportunity to opine on contemporary and future federalism doctrine. See generally, e.g., H. Gerken, Comment, "Slipping the *Bonds* of Federalism," 128 Harv. L. Rev. 85 (2014); see also, e.g., A. LaCroix, "Redeeming *Bond*?," 128 Harv. L. Rev. F. 31 (2014) (response to H. Gerken, supra, 128 Harv. L. Rev. 85).

of the land." (Citations omitted; internal quotation marks omitted.) Id., 226 (Ginsburg, J., concurring). The defendant reasons that, because he was convicted under a statute that he claims violates equal protection, his due process right to be free from "convict[ion] under a constitutionally invalid law" has been violated. Id.

The defendant's reliance on Justice Ginsburg's concurrence is misplaced. In addition to the fact that it is neither controlling with respect to this court nor binding on the United States Supreme Court, Justice Ginsburg's concurrence in *Bond* relies on precedent distinguishable from the case now before us, including federal third-party standing precedent.[6] See, e.g., *Eisenstadt* v. *Baird*, 405 U.S. 438, 440, 445–46, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (holding that defendant, who was convicted of giving contraceptive to woman in violation of state statute, could prove aggrievement in representative capacity on behalf of unmarried persons entitled to contraceptives); see also, e.g., *Craig* v. *Boren*, 429 U.S. 190, 191–92, 194–97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (holding that licensed vendor of beer could bring action challenging state statute that prohibited sale of beer to males under age of twenty-one and females under age of eighteen on basis of gender discrimination

[6] In addition to her reliance on third-party standing cases, Justice Ginsburg cited *Grayned* v. *Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), a case holding that a defendant had standing to assert an overbreadth challenge to a local ordinance. *Bond* v. *United States*, supra, 564 U.S. 227 (Ginsburg, J., concurring); see *Grayned* v. *Rockford*, supra, 114. According to United States Supreme Court precedent, a defendant is "permitted to raise [a statute's] vagueness or unconstitutional overbreadth as applied to others" under the first amendment to the United States constitution. (Internal quotation marks omitted.) *Gooding* v. *Wilson*, 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972). First amendment overbreadth challenges are unique in that speakers may challenge a statute because it is overbroad as applied to others, not themselves. See, e.g., *New York* v. *Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (empowering persons to "attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected"). The defendant has not asserted any such first amendment overbreadth challenge in this case or demonstrated that a similar exception to challenging the rights of others exists in this context.

because buyers' market of vendor was effectively constricted by statute). We have never applied the federal third-party standing doctrine under Connecticut law, and, as we previously discussed in this opinion, the defendant does not assert that he has standing in a representative capacity. Accordingly, we are not persuaded by the defendant's reliance on Justice Ginsburg's concurrence in *Bond*.

The defendant also relies on a number of other federal cases for the proposition that a defendant has standing to challenge a statute on the ground that it is unconstitutional as applied to others. Notably, nearly all of the cases the defendant relies on also refer exclusively to third-party standing.[7] These cases are inapplicable to the present case because the defendant does not assert a third-party standing claim. Third-party standing is a distinct legal concept from the individual standing argument the defendant advances to support his own aggrievement.[8]

[7] The defendant also cites *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), and *Doe* v. *Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), cases in which the United States Supreme Court concluded that physicians had standing to challenge statutes criminalizing abortion because, in both cases, the physicians asserted a "sufficiently direct threat of personal detriment," as their conduct was of the type the statutes criminalized. (Internal quotation marks omitted.) *Planned Parenthood of Central Missouri* v. *Danforth*, supra, 62, quoting *Doe* v. *Bolton*, supra, 188. In contrast to the physicians in *Doe* and *Danforth*, who had standing to assert claims based on the unconstitutionality of the statute at issue because the statutes affected their rights to render abortion services and also subjected them to criminal punishment, the defendant here does not allege a specific injury to himself as a seller of marijuana. Put differently, the defendant challenges his conviction under § 21a-277 (b) because it violates the equal protection rights of others, *not* because he was injured by the application of the statute as a vendor of marijuana. Thus, precedent that bases a party's standing on the intertwined relationship between doctor and patient—or buyer and seller—is inapplicable.

[8] The United States Supreme Court has explained that a party may bring an action on behalf of third parties when it meets the requirements of article three standing and makes two additional showings. See, e.g., *Kowalski* v. *Tesmer*, 543 U.S. 125, 129–30, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004). First,

The defendant cites no authority, and we found none, in which a court concluded that a defendant had standing—in his *individual* capacity—to assert a claim based on the alleged violations of others' constitutional rights. When a defendant has not established individual standing and has not asserted a claim based on third-party standing, this court is without subject matter jurisdiction to consider the merits of his underlying claim. Cf. *Steeneck* v. *University of Bridgeport*, 235 Conn. 572, 589, 668 A.2d 688 (1995) ("[when] a plaintiff lacks standing to sue, the court is without subject matter jurisdiction").

Although federal precedent has permitted parties to establish standing by proving classical aggrievement in a representative capacity based on alleged violations of others' constitutional rights, it has never expanded the scope of classical aggrievement in an individual capacity to eliminate the requirement that a party must be personally aggrieved by the alleged violation. Because the defendant in this case has failed to establish any specific, personal and legal interest in the equal protection argument, which forms the basis of his due process claim, challenging the state's law criminalizing the sale of marijuana, as distinguished from a general interest, the defendant has not established that he is classically aggrieved and, therefore, does not have standing to assert any such claim. Accordingly, we affirm the judgment of the Appellate Court and decline to consider the merits of the defendant's constitutional claim.

"the party asserting the right [must have] a 'close' relationship with the person who possesses the right. . . . Second . . . there [must exist] a 'hindrance' to the possessor's ability to protect his own interests." (Citation omitted.) Id., 130, quoting *Powers* v. *Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The defendant expressly maintained before the Appellate Court; *State* v. *Bradley*, supra, 195 Conn. App. 50; and at oral argument before this court, that he does not claim to have met the requirements to assert any such representational claim.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and D'AURIA and KAHN, Js., concurred.

ECKER, J., dissenting. The majority holds that the defendant, William Hyde Bradley, does not have standing to challenge the constitutionality of the statute under which he was convicted, General Statutes § 21a-277 (b). This holding is counterintuitive because the standing doctrine exists, as the majority correctly states, to ensure that a litigant has a " 'real interest,' " as opposed to merely a " 'general interest,' " in the subject matter of the controversy. "Standing . . . is a *practical* concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions [that] may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Emphasis added; internal quotation marks omitted.) *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 96–97, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019). In my view, a defendant facing prosecution under § 21a-277 (b), which carries a maximum sentence of seven years of incarceration and a $25,000 fine for a first offense; see General Statutes § 21a-277 (b) (2) (A); has sufficient motivation vigorously to pursue a claim that the statute is unconstitutional under the equal protection clause of the United States constitution, regardless of the defendant's race or ethnicity. I respectfully dissent for this reason.

Elemental to the rule of law is the precept that "an act of the legislature, repugnant to the constitution, is void . . . ." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Justice Ruth Bader Ginsburg stated a corollary to that proposition in *Bond* v. *United*

States, 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011): "[a criminal] defendant . . . has a personal right not to be convicted under a constitutionally invalid law." Id., 226 (Ginsburg, J., concurring). Among other authorities, Justice Ginsburg cites in support an article written by Professor Richard H. Fallon, Jr., a leading legal scholar in the field of constitutional law. See id., citing R. Fallon, "As-Applied and Facial Challenges and Third-Party Standing," 113 Harv. L. Rev. 1321, 1331–33 (2000). Professor Fallon explains the connection between Chief Justice John Marshall's "valid law"[1] pronouncement in *Marbury* and a defendant's standing to challenge a conviction under an allegedly invalid criminal law: "Within [Professor Fallon's] understanding of constitutional law, the valid rule requirement is fundamental. Its roots lie in the history and structure of the [c]onstitution and in the deeper values that the [c]onstitution serves. The notion that an 'invalid law' is not law at all underlies *Marbury* . . . . And the foundations of *Marbury*, in turn, inhere in the ideal of the rule of law, which demands that '[t]he law should rule officials, including judges,' and precludes them from imposing legal disabilities not authorized by (valid) law. This ideal explains why it is almost universally acknowledged that criminal defendants must be set free when the statutes under which they were convicted are held invalid (under the [f]irst [a]mendment, for example), even when their conduct is not absolutely privileged against governmental regulation, and even when a lawmaking authority has attempted to prohibit their conduct. If the statute under which a defendant is convicted is invalid . . . the defendant's conviction must be reversed for the sole and simple reason that there is no constitutionally valid rule of law under which the

[1] The " 'valid rule requirement' " encompasses "the notion that everyone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law." R. Fallon, supra, 113 Harv. L. Rev. 1331.

defendant could be sanctioned . . . . Through the history of American constitutionalism, there has been wide debate about which (if any) 'remedies' for constitutional violations are constitutionally required, but never about the proposition that a defendant cannot be sanctioned without the authority of a valid law." (Footnotes omitted.) R. Fallon, supra, 1331–33.

The majority in the present case points out that Justice Ginsburg's opinion in *Bond* is a concurrence and finds it unpersuasive because the cases on which she relies involve claims of third-party standing. Justice Ginsburg's citation to third-party standing cases does not reflect any doctrinal confusion on her part. Her concurring opinion makes two points. First, as I discussed, Justice Ginsburg contends that a criminal defendant has first-party standing because he "has a *personal* right not to be convicted under a constitutionally invalid law." (Emphasis added.) *Bond* v. *United States*, supra, 564 U.S. 226 (Ginsburg, J., concurring). She relies on a fundamental due process principle, not third-party standing cases, in support of this assertion. See id., 226–27 (Ginsburg, J., concurring), citing *North Carolina* v. *Pearce*, 395 U.S. 711, 739, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (Black, J., concurring in part and dissenting in part) ("[d]ue process . . . is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land"), and *Ex parte Siebold*, 100 U.S. 371, 376–77, 25 L. Ed. 717 (1880) ("[a] conviction under [an unconstitutional law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment").

Justice Ginsburg then makes a second point, for which she cites the third-party standing cases: if a third party has standing to challenge "criminal laws infected with discrimination," then, a fortioari, the person actually prosecuted and punished under the allegedly unconstitutional law must have standing. *Bond* v.

United States, supra, 564 U.S. 227 (Ginsburg, J., concurring); see id., 227 ("[t]he [c]ourt must entertain the objection [of discriminatory animus]—and reverse the conviction—even if the right to equal treatment resides in someone other than the defendant").[2] If a litigant has standing to challenge an invalid statute as a third party on the basis of the harm it inflicts on another person, Justice Ginsburg states, then, of course, the person harmed (i.e., the criminal defendant) must have first-party standing to challenge the statute being enforced directly against him in a criminal prosecution. Cf. *Campbell* v. *Louisiana*, 523 U.S. 392, 400, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998) (holding that white defendant had third-party standing to raise equal protection challenge to discriminatory selection of grand jurors and also "ha[d] standing to litigate [the violation of] his . . . own due process rights").

I regret that the majority opinion does not give greater weight to Justice Ginsburg's trenchant analysis. I would suggest that the defendant in the present case, like the petitioner in *Bond*, has a personal interest in vindicating the underlying constitutional values at stake.[3] The

[2] In addition, numerous scholars have pointed out that the third-party standing cases easily can be recast as first-party standing cases. See, e.g., W. Fletcher, "The Structure of Standing," 98 Yale L.J. 221, 244 (1988) ("Properly understood . . . [third-party] standing cases are not conceptually different from other standing cases. In [third-party] standing cases, as in all standing cases, the issue is a question of law on the merits: Does the plaintiff have the right to enforce the legal duty in question?"); see also R. Fallon, supra, 113 Harv. L. Rev. 1360 (observing that "commentators have argued that many, if not most, seeming departures from the prohibition against third-party standing can be understood as applications of the familiar valid rule requirement [i.e., as first-party standing cases]").

[3] The majority contends that the defendant's standing argument is circular because his contention that "he has a right not to be convicted of [violating] an unconstitutional statute assumes the merits of his equal protection claim." The "circular" structure of defendant's argument is a relatively common feature of many cases in which a jurisdictional issue and the merits become intertwined or even indistinguishable. See, e.g., *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 466 n.11, 239 A.3d 272 (2020) (recognizing that, "in certain circumstances the question of jurisdiction [may be so] intertwined

defendant has a *personal* right not to be convicted under a constitutionally invalid rule and to vindicate the precious values that, for the past 150 years, have been enshrined in the equal protection clause. Racial and ethnic equality is a value from which every individual derives a profound and enduring benefit. Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972) (holding that white tenant had standing to bring suit for racial discrimination in housing because both white and black tenants are injured by "the loss of important benefits from interracial associations"). Indeed, it becomes increasingly obvious each day that all of us, regardless of our own particular race or ethnicity, hold a collective interest in equal treatment for all persons, and that such equality can be achieved only if nonminorities stand with other oppressed groups to enforce and vindicate equal rights. The goal of equality under the law is doomed to fail if only the oppressed groups themselves are permitted to advocate for equal treatment.

Finally, although there may be other litigants with a stronger interest than the defendant in vindicating the abstract principles underlying the equal protection clause, the standing doctrine does not require a litigant to be the best (or even a strong) representative of the interest at stake. See, e.g., *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 604, 239 A.3d 1162 (2020) ("[a]ggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected" (internal quotation marks omitted)). Various cases striking down discriminatory statutes animated by archaic and overbroad gen-

with the merits of the case [such] that the issue of whether the court has jurisdiction over the plaintiffs' claims and whether the plaintiffs ultimately can prevail on those claims appear to turn on the same question" (internal quotation marks omitted)); *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 277–78, 193 A.3d 520 (2018) (same).

eralizations regarding gender stereotypes, for example, were litigated by male plaintiffs. See, e.g., *Califano* v. *Goldfarb*, 430 U.S. 199, 201, 208, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977) (man challenged gender based discrimination under Federal Old-Age, Survivors, and Disability Insurance Benefits program, and court held that statute was unconstitutional because "female insureds received less protection for their spouses solely because of their sex"); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641, 651, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) (man challenged provision of Social Security Act, arguing that it was "unconstitutional to the extent that men and women are treated differently," and court agreed, holding that "the [gender based] distinction . . . is entirely irrational"). That fact may be ironic, but it does not dilute the importance of the right being vindicated or the personal interest motivating the party litigating the claim. The defendant in the present case was convicted and sentenced under what he claims to be an invalid penal law. The defendant therefore has a distinct personal interest sufficient to ensure that he vigorously will litigate his constitutional attack on the legitimacy of the statute

I would reverse the judgment of the Appellate Court and remand the case to that court for a decision on the merits of the defendant's claim.

STATE OF CONNECTICUT *v.* JAMAAL COLTHERST (SC 20401)

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

Syllabus

Pursuant to statute (§ 54-91g), when sentencing a child whose case has been transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court and the child has been convicted of a class A or B felony pursuant to such transfer, the sentencing court is required

to consider certain factors, including the defendant's age at the time of the offense and the hallmark features of adolescence.

Pursuant further to statute (§ 54-125a (f) (1)), a person convicted of a crime or crimes committed while such person was under the age of eighteen years of age and serving a sentence for that crime or crimes of more than fifty years of imprisonment shall be eligible for parole after serving thirty years.

The defendant, who had been convicted of numerous crimes, including capital felony, murder and felony murder, in connection with the shooting death of the victim, appealed to the Appellate Court, challenging the sentence imposed by the trial court following its granting of his motion to correct an illegal sentence. The defendant, who was seventeen years old at the time of the shooting and, pursuant to then applicable law, was charged and tried as an adult, originally had been sentenced to life imprisonment without the possibility of release followed by seventy-one years of imprisonment. In light of the enactment of legislation (P.A. 15-84), which, pursuant to certain of its provisions, retroactively afforded certain juvenile offenders, including the defendant, parole eligibility and rendered the defendant's capital felony conviction invalid, the defendant filed a motion to correct an illegal sentence in which he sought to have his conviction of capital felony vacated and argued that § 54-91g required the trial court, in resentencing him, to consider the relevant factors set forth therein. The trial court granted the defendant's motion and, following a hearing, dismissed the capital felony and felony murder counts, and sentenced the defendant to a total effective sentence of eighty years of imprisonment to run consecutively to a sentence of eighty-five years of imprisonment that he was serving in connection with his conviction of unrelated crimes. In resentencing the defendant, the trial court, pursuant to § 54-91g, considered youth related mitigating factors, as well as other relevant factors, and noted that the defendant would be eligible for parole. On appeal, the Appellate Court upheld the trial's court sentence, rejecting the defendant's claim that the trial court, in imposing that sentence, failed to account adequately for his youth at the time he committed the underlying crimes, as required by § 54-91g. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that the trial court had followed the statutory requirements of § 54-91g in resentencing him. *Held*:

1. The defendant, who was serving two definite sentences of 85 and 80 years imprisonment that were to run consecutively, will be eligible for parole after serving 30 years of the 165 year aggregate term of the two definite sentences; on the basis of its interpretation of § 54-125a (f) (1) and the statute (§ 53a-38 (b) (2)) governing the calculation of the aggregate term of multiple, definite sentences that run consecutively, and in light of the legislative history underlying 54-125a (f) (1), this court concluded that, when a defendant, such as the defendant in the present case, is

serving more than one definite sentence, his parole eligibility date for purposes of § 54-125a (f) (1) is calculated on the basis of the aggregate term of the definite sentences.

2. Contrary to the defendant's claim, § 54-91g did not apply to the defendant, as neither of the two conditions that would make that statute applicable to him and trigger its required sentencing considerations was met: the plain language of § 54-91g restricts its application to a child whose case has been transferred from the juvenile docket to the regular criminal docket and who has been convicted of a class A or B felony pursuant to that transfer, and, because the defendant, who was not a child under the applicable law ((Rev. to 1999) § 46b-120 (1)) when he committed his crimes, was charged as an adult and prosecuted under the regular criminal docket, his case was not transferred from the juvenile docket to the regular criminal docket, and he was not convicted pursuant to any such transfer; moreover, consistent with this court's decision in *State* v. *Delgado* (323 Conn. 801) and the plain language of § 54-91g, that statute does not apply retroactively to defendants, like the defendant in the present case, who, although under the age of eighteen when they committed their offenses, were initially charged and tried as adults; accordingly, although the trial court incorrectly applied § 54-91g in considering adolescent related mitigating factors in resentencing the defendant, the defendant received more consideration than that to which he was statutorily entitled, resulting in a much reduced sentence with the possibility of parole after he serves thirty years, and, therefore, the Appellate Court's judgment upholding the defendant's sentence was affirmed.

Argued March 30—officially released October 13, 2021*

Procedural History

Substitute information charging the defendant with the crimes of capital felony, murder, felony murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, robbery in the first degree, robbery in the second degree, larceny in the first degree and larceny in the fourth degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mulcahy*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the trial court's judgment; thereafter, the court, *Dewey*, *J.*, granted the defendant's

* October 13, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

motion to correct an illegal sentence, dismissed the charges of capital felony and felony murder, and resentenced the defendant, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Lavery*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Michael W. Brown, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Vicki Melchiorre*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. In this certified appeal,[1] the defendant, Jamaal Coltherst, appeals from the judgment of the Appellate Court affirming the judgment of the trial court, which resentenced him for crimes he committed in 1999, when he was seventeen years old. In his original brief to this court, the defendant claimed that the Appellate Court incorrectly concluded that the trial court followed the statutory requirements of General Statutes § 54-91g in resentencing him to eighty years of incarceration.[2] He argued that the statute created a presumption

[1] This court granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court had followed the statutory requirements under General Statutes § 54-91g in resentencing the defendant to eighty years of incarceration?" *State* v. *Coltherst*, 333 Conn. 946, 219 A.3d 377 (2019).

[2] General Statutes § 54-91g provides in relevant part: "(a) If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall:

"(1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and

"(2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated,

against the imposition of an effective life sentence, which can be overcome only upon the court's finding that the defendant is incorrigible. Because we conclude, as we explain in this opinion, that § 54-91g does not apply to the defendant, we do not reach the issue of whether the Appellate Court correctly concluded that the trial court followed the statutory requirements of § 54-91g in resentencing the defendant to a term of eighty years of incarceration.

Following oral argument, this court ordered the parties to file supplemental briefs addressing two issues: First, "[d]oes [§] 54-91g apply in cases where, as here, the defendant was not charged as a child and transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court pursuant to [General Statutes §] 46b-127 but, rather, [was] charged as an adult under the regular criminal docket of the Superior Court?" Second, "[i]s the defendant eligible for parole when he received two distinct total effective sentences of 85 years and 80 years, respectively, to run consecutively, and, if so, when is he eligible for parole on each case?" As to the second issue, we conclude, consistent with an affidavit submitted by Richard Sparaco, the executive director of the Connecticut Board of Pardons and Paroles (board), that the defendant will be eligible for parole after serving 30 years of the 165 year aggregate term of the two distinct total effective sentences that he is currently serving. As to the first issue, we conclude that § 54-91g does not apply to the defendant. Accordingly, we affirm the judgment of the Appellate Court.

how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

* * *

"(c) Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a. . . ."

The following facts and procedural background are relevant to the resolution of this appeal. This case arose from the October 15, 1999 carjacking, kidnapping, and murder of the victim, Kyle Holden, by the defendant and Carl Johnson. See *State* v. *Coltherst*, 263 Conn. 478, 485–86, 820 A.2d 1024 (2003). On the day that the defendant was released from juvenile detention, where he had been incarcerated for violating probation after having been convicted on charges of assault in the third degree, the defendant and Johnson planned to commit a carjacking. Id., 483–84. They scouted out various locations and potential targets before settling on the victim, whose car was parked outside an exotic dance club in East Hartford. Id., 484–85. When the victim exited the club, Johnson held a gun to his head, and Johnson and the defendant forced the victim into his car. Id., 485. Johnson then drove the car to an automated teller machine (ATM), while the defendant, who held the gun, sat with the victim in the backseat. Id. They used the victim's bank card to withdraw money from the ATM and then brought the victim to a nearby entrance ramp to Interstate 84, where Johnson shot the victim in the head, killing him almost instantly. Id., 485–86. Over the next eight days, the defendant and Johnson continued to use the victim's car and made withdrawals from his bank account using his bank card. Id., 486. Thereafter, they were arrested by the police, who had been on the lookout for the victim's car after the victim was reported missing. See id., 486–87.

Because the defendant was seventeen years old at the time he committed these crimes, he was tried as an adult under the then applicable law. See General Statutes (Rev. to 1999) § 46b-120 (1) (limiting, as general rule, for purposes of delinquency, definition of "child" to persons under sixteen years of age at time of offense). "After a jury trial, the defendant was convicted of capital felony, murder, felony murder, kidnapping in the

first degree, robbery in the first degree, robbery in the second degree, larceny in the first degree, conspiracy to commit kidnapping in the first degree, and larceny in the fourth degree. The trial court merged the convictions of capital felony, murder, felony murder and kidnapping in the first degree and imposed a sentence of life imprisonment without the possibility of release on the capital felony count, twenty years imprisonment on the count of robbery in the first degree, ten years imprisonment on the count of robbery in the second degree, twenty years imprisonment on the count of larceny in the first degree, twenty years imprisonment on the count of conspiracy to commit kidnapping in the first degree, and one year imprisonment on the count of larceny in the fourth degree, all to be served consecutively to the sentence of life imprisonment, for a total effective sentence of life imprisonment without the possibility of release followed by seventy-one years [of] imprisonment." *State* v. *Coltherst*, supra, 263 Conn. 487–88.

Subsequent to the defendant's original sentencing, significant changes in juvenile sentencing law prompted the resentencing proceedings that are the subject of this appeal. We recently summarized the effect of those changes: "Under the federal constitution's prohibition [against] cruel and unusual punishments, a juvenile offender cannot serve a sentence of imprisonment for life, or its functional equivalent, without the possibility of parole, unless his age and the hallmarks of adolescence have been considered as mitigating factors. *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 60–61, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016)."

State v. *Williams-Bey*, 333 Conn. 468, 470, 215 A.3d 711 (2019). The United States Supreme Court has held that *Miller* applies retroactively to cases on collateral review. *Montgomery* v. *Louisiana*, 577 U.S. 190, 206, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The court clarified, however, that "[g]iving *Miller* retroactive effect . . . does not require [s]tates to relitigate sentences, let alone convictions, in every case [in which] a juvenile offender received mandatory life without parole. A [s]tate may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id., 212.

To comply with the decision of the United States Supreme Court in *Miller*, as well as this court's decisions in *Riley* and *Casiano*, the legislature enacted No. 15-84 of the 2015 Public Acts (P.A. 15-84). Section 1 of P.A. 15-84, codified at General Statutes § 54-125a (f) (1), ensures parole eligibility for all persons convicted of crimes committed when they were under eighteen years of age who received a sentence of ten years or more.[3] Section 2 of P.A. 15-84, codified at § 54-91g, requires a sentencing court to consider, inter alia, the "the hallmark features of adolescence" and the differences between the brain development of a child and

[3] General Statutes § 54-125a (f) (1) provides: "Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions."

an adult when sentencing a child who has been convicted of a class A or B felony following transfer of the child's case from the docket for juvenile matters to the regular criminal docket of the Superior Court.

The defendant became eligible for resentencing pursuant to § 6 of P.A. 15-84, which repealed General Statutes § 53a-46a, the capital felony provision, pursuant to which the defendant had been sentenced. The substitute provision, codified at General Statutes (Supp. 2016) § 53a-46a, made persons who committed a capital felony when they were under eighteen years of age ineligible for the death penalty.[4] The passage of P.A. 15-84, therefore, rendered the defendant's capital felony conviction invalid.[5] Relying on that change in the law, the defendant filed a motion to correct an illegal sentence.

[4] This court has since held that, regardless of a defendant's age at the time of the commission of a crime, the death penalty violates article first, §§ 8 and 9, of the Connecticut constitution. See *State* v. *Santiago*, 318 Conn. 1, 119, 122 A.3d 1 (2015).

[5] Because the passage of § 6 of P.A. 15-84 rendered § 53a-46a, the provision under which the defendant had been sentenced, invalid, this case is distinguishable from *State* v. *McCleese*, 333 Conn. 378, 215 A.3d 1154 (2019), and *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016). In each of those cases, this court concluded that the trial court lacked subject matter jurisdiction over the defendant's motion to correct an illegal sentence. See *State* v. *McCleese*, supra, 387; *State* v. *Delgado*, supra, 813. In those cases, the sole defect relied on by the defendants in seeking resentencing was the failure of the trial court, in the original sentencing, to consider the mitigating factors of youth in sentencing each of them to a sentence without eligibility for parole. See *State* v. *McCleese*, supra, 385; *State* v. *Delgado*, supra, 803–804. Because the passage of §1 of P.A. 15-84, codified at § 54-125a, made those defendants eligible for parole, we explained, their sentences were no longer invalid. See *State* v. *McCleese*, supra, 387; *State* v. *Delgado*, supra, 812.

By contrast, in the present case, although the defendant is now eligible for parole, it is indisputable that his capitol felony conviction and sentence were rendered invalid by the passage of § 6 of P.A. 15-84. Thus, not only did the trial court retain jurisdiction to modify his sentence, but, because the sentence had been rendered invalid, the court was required to resentence him. See Practice Book § 43-22 ("[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner").

He sought to have his conviction of capital felony vacated and argued that, upon resentencing, § 54-91g (a) (1) required the trial court to consider his age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the developmental differences between child and adult brains. He also argued that § 54-91g (a) (2) required the court, if it proposed to sentence him to a lengthy sentence under which he would be likely to die while incarcerated, to consider how the factors listed in subsection (a) (1) counseled against such a sentence.

At the hearing on the defendant's motion, neither the state nor the trial court questioned the defendant's reliance on § 54-91g. In resentencing the defendant, the court considered the mitigating factors of youth but also took into account the horrific nature of the crimes, the defendant's level of involvement in them, his criminal history, his attempts to deflect blame for his crimes, and his disciplinary record in prison. The court dismissed the counts of capital felony and felony murder, and sentenced him to a total effective sentence of eighty years of imprisonment on the remaining counts.[6] The court further ordered the defendant's total effective sentence in the present case to run consecutively to the sentence of eighty-five years of imprisonment the

[6] The court sentenced the defendant as follows: on count two, for murder in violation of General Statutes §§ 53a-8 and 53a-54a (a), forty years; on count four, for kidnapping in the first degree in violation of General Statutes §§ 53a-8 and 53a-92 (a) (2) (B), twenty years; on count five, for robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), ten years; on count six, for robbery in the second degree in violation of General Statutes (Rev. to 1999) § 53a-135 (a) (1), five years; on count seven, for larceny in the first degree in violation of General Statutes (Rev. to 1999) §§ 53a-8 and 53a-122 (a) (3), ten years; on count eight, for conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 and 53a-92 (a) (2) (B), ten years; and, on count nine, for larceny in the fourth degree in violation of General Statutes (Rev. to 1999) § 53a-125 (a), one year. Counts two, four, five, and eight run consecutively. Counts six, seven, and nine run concurrently to counts two, four, five, and eight.

defendant is serving for a conviction involving his shooting of another victim four days after he and Johnson killed the victim in the present case. See *State* v. *Coltherst*, 87 Conn. App. 93, 95–98, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005). The court noted that the defendant would be eligible for parole.

In his appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court improperly failed, pursuant to § 54-91g, "to account adequately for the defendant's youth at the time he committed the underlying crimes . . . ."[7] *State* v. *Coltherst*, 192 Conn. App. 738, 740, 218 A.3d 696 (2019). The Appellate Court rejected the defendant's argument that § 54-91g creates a presumption against the imposition of an effective sentence of life imprisonment—in the present case, eighty years—for defendants who were minors at the time they committed their crimes. Id., 752–53. The court grounded its decision on the plain and unambiguous language of the statute; see id., 751; which requires that the sentencing court "[c]onsider" how the scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development counsels against the imposition of a lengthy sentence under which it is likely that the child will die while incarcerated. General Statutes § 54-91g (a) (1) and (2); see also *State* v. *Riley*, 190 Conn. App. 1, 26–28, 209 A.3d 646 (rejecting, on basis of plain language of § 54-91g, defendant's argument that language and legislative history of P.A. 15-84 created "a presumption against the imposition of a life sentence on a juvenile defendant,[8] and such exceedingly rare sentences can only be

[7] The defendant also claimed that the trial court improperly allowed him to provide additional remarks to the court at the time of resentencing, in violation of his rights to counsel, due process, and allocution. *State* v. *Coltherst*, 192 Conn. App. 738, 740–41, 218 A.3d 696 (2019). The Appellate Court's rejection of that claim is not before us in this appeal.

[8] Although the defendant in the present case often refers to himself as a "juvenile" because he was a minor when he committed the crimes, we emphasize that, in 1999, the law did not afford him juvenile status for

imposed after a specific finding that the juvenile being sentenced is permanently incorrigible, irreparably corrupt, or irretrievably depraved" (footnote added; internal quotation marks omitted)), cert. denied, 333 Conn. 923, 217 A.3d 993 (2019).[9] This certified appeal followed.

I

We first address the question of whether and when the defendant, who has received two distinct total effective sentences of eighty-five years of imprisonment and eighty years of imprisonment, respectively, to run consecutively, will be eligible for parole. On the basis of the parties' submissions, we conclude that the defendant will be eligible for parole after serving thirty years of the aggregate term of the two definite sentences of imprisonment that he is currently serving.

The following additional facts are relevant to our resolution of this issue. Four days after the defendant and Johnson killed the victim in the present case, they, along with a third person, Rashad Smith, accosted Michael Clark in the parking lot of an insurance firm in Wethersfield where Clark worked. *State* v. *Coltherst*, supra, 87 Conn. App. 96. They took Clark's laptop and credit card, and were in the process of forcing him into his car when he broke free and ran, but Johnson tackled him. Id., 97. The defendant and Clark then struggled, and the defendant shot Clark in the head. Id. Grievously injured, Clark nonetheless survived the shooting. See

purposes of delinquency proceedings. Seventeen year olds were not afforded juvenile status until 2012. See generally Public Acts, Spec. Sess., June, 2007, No. 07-4, §§ 73 through 78; Public Acts, Spec. Sess., September, 2009, No. 09-7, §§ 69 through 89.

[9] The United States Supreme Court recently held that *Miller* does not require a sentencing court, prior to imposing a discretionary sentence of life imprisonment without the possibility of parole on defendants convicted of a homicide committed when they were under the age of eighteen, to make a separate factual finding of permanent incorrigibility. See *Jones* v. *Mississippi*, U.S. , 141 S. Ct. 1307, 1318–19, 209 L. Ed. 2d 390 (2021).

id., 98. In connection with this incident, the defendant was convicted of numerous offenses (Wethersfield assault conviction) and received a total effective sentence of eighty-five years of imprisonment. Id., 95. In the present case, when the trial court resentenced the defendant, it ordered the total effective sentence of eighty years in the present case to run consecutively to the total effective sentence of eighty-five years that the defendant received as a result of the Wethersfield assault conviction.

Under the facts of these two cases, the defendant's parole eligibility is governed by General Statutes § 53a-38 (b) (2), read in conjunction with § 54-125a (f) (1). The question of how the defendant's parole eligibility date is calculated under those two statutes presents a question of statutory interpretation subject to plenary review. See, e.g., *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 380, 194 A.3d 759 (2018); *Barrett* v. *Montesano*, 269 Conn. 787, 792, 849 A.2d 839 (2004). In construing the relevant statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008).

We begin with the language of the statutes. Section 53a-38 (b) provides: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run; (2) if the sentences run consecutively, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term."

Pursuant to § 53a-38 (b) (2), therefore, the defendant's aggregate term is 165 years and the two consecutive, definite sentences are satisfied by the discharge of the 165 year aggregate term. Section 54-125a (f) (1), which is set forth in full in footnote 3 of this opinion, does not expressly provide that the aggregate term is used for purposes of calculating eligibility for parole when an incarcerated person is serving more than one definite sentence. It refers only to a "definite sentence" and provides that, if a person who falls within the ambit of the statute "is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years." General Statutes § 54-125a (f) (1) (B). The plain language of §§ 53a-38 (b) (2) and 54-125a (f) (1), accordingly, does not resolve whether the parole eligibility date of a prisoner serving more than one definite sentence should be calculated on the basis of the aggregate term or each definite sentence.

Interpreting §§ 53a-38 (b) (2) and 54-125a (f) (1) to require that parole eligibility be calculated on the basis of the defendant's definite sentences rather than the aggregate term, however, would be contrary to the legislative intent underlying § 54-125a (f) (1). As we have explained in this opinion, the legislative intent behind the parole eligibility guarantee in § 54-125a (f) (1) is to comply with the constitutional standards enunciated in the decisions of the United States Supreme Court in *Miller* and *Montgomery*, as well as in this court's decisions in *Riley* and *Casiano*. See *Miller* v. *Alabama*, supra, 567 U.S. 479 (holding that "the [e]ighth [a]mendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"); see also *Montgomery* v. *Louisiana*, supra, 577 U.S. 212 (holding that "[a] [s]tate may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"); *Casiano* v. *Commissioner of Correction*,

supra, 317 Conn. 54, 69 (holding that *Miller* announced watershed rule of criminal procedure, applicable retroactively); *State* v. *Riley*, supra, 315 Conn. 659–61 (applying *Miller* to state's sentencing scheme and holding that defendant's 100 year sentence violated *Miller* because sentencing court did not consider mitigating factors of youth in sentencing defendant, who was under eighteen years of age at time of offense, to functional equivalent of life).

Treating each definite sentence separately for purposes of parole eligibility would yield the result that the defendant's only opportunity for parole would be 30 years after he began serving the 80 year sentence in the present case, 115 years after he began serving the sentence for the Wethersfield assault conviction. He would die long before becoming eligible for parole, rendering the intended remedy of parole eligibility meaningless—his sentence would effectively be one without the opportunity for parole. That interpretation would flout every recent juvenile sentencing decision of both this court and the United States Supreme Court and, therefore, would also be inconsistent with the intent of the legislature in § 54-125a (f) (1). Accordingly, consistent with the legislative intent underlying § 54-125a (f) (1), we conclude that, when a defendant is serving more than one definite sentence, his parole eligibility date for purposes of § 54-125a (f) (1) is calculated on the basis of the aggregate term of the definite sentences.

Our conclusion is consistent with the board's interpretation of and current practice in applying §§ 53a-38 (b) (2) and 54-125a (f) (1). In an affidavit procured by the state in response to the second issue in this court's order for supplemental briefing regarding the defendant's parole eligibility, Sparaco, the executive director of the board, stated that, in circumstances such as those in the defendant's case, pursuant to §§ 53a-38 (b) (2)

and 54-125a (f) (1), the board uses the aggregate term to calculate a parole eligibility date. Accordingly, Sparaco stated that, because the defendant's 165 year aggregate sentence is more than 50 years, he will be eligible for parole after serving 30 years. On the basis of our interpretation of §§ 53a-38 (b) (2) and 54-125a (f) (1), we agree with Sparaco's conclusion that the defendant will be eligible for parole after serving 30 years of the 165 year aggregate term of the two definite sentences.

II

We next address the question of whether § 54-91g applies to the defendant. The defendant, whose case was not transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court but, rather, was charged under the then applicable law as an adult under the regular criminal docket; see General Statutes (Rev. to 1999) § 46b-120; claims that the provisions of § 54-91g nonetheless apply to him. We conclude that the plain language of the statute, which restricts its application to children whose cases are transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, makes clear that the statute does not apply to the defendant.

The applicability of § 54-91g to the defendant presents a question of statutory interpretation, subject to plenary review. See *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 232, 244 A.3d 908 (2020). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining

such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 694, 189 A.3d 79 (2018).

We begin with the language of the statute. Section 54-91g (a) provides: "If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall: (1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and (2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence."

Subsection (a) of § 54-91g sets forth two conditions that trigger the required sentencing considerations in subdivisions (1) and (2) of that subsection. First, the case of a child, as defined in General Statutes § 46b-120, must be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court pursuant to § 46b-127. Second, the child must be convicted of a class A or B felony pursuant to the transfer. Under the facts of the present case, neither of these two conditions has been met. Because the defendant was over the age of sixteen at the time that he committed his crimes, he was not a "child" under

the then applicable law. See General Statutes (Rev. to 1999) § 46b-120 (1).

In 1999, when the defendant committed his crimes, General Statutes (Rev. to 1999) § 46b-120 (1) defined a delinquent "child"[10] as "any person (A) under sixteen years of age . . . ."[11] The defendant, who was seventeen at the time he committed the crimes, was treated as an adult criminal. Accordingly, the defendant's case was never initiated as a juvenile matter in the docket of the Superior Court for juvenile matters. Instead, the defendant was charged as an adult, and the state's case against him was filed in the regular criminal docket. See General Statutes (Rev. to 1999) § 46b-127 (a). Of course, because the defendant's case was not transferred from the docket for juvenile matters to the regular criminal docket, the defendant was not convicted pursuant to any such transfer. See General Statutes § 54-91g (a). Thus, neither of the two conditions that would make § 54-91g (a) applicable was met.

This court's previous interpretation of § 54-91g confirms that the legislature did not intend the statute to apply retroactively to defendants who, although under the age of eighteen when they committed their offenses, were initially charged and tried as adults. Specifically,

[10] By contrast, under the current statute, a delinquent "child" includes "any person . . . who is . . . under eighteen years of age and has not been legally emancipated . . . ." General Statutes § 46b-120 (1) (A) (i) (I).

[11] General Statutes (Rev. to 1999) § 46b-120 (1) (B) provides that the term "child" applies to a person over sixteen years of age only if that person, "prior to attaining sixteen years of age, has violated any federal or state law or municipal or local ordinance, other than an ordinance regulating behavior of a child in a family with service needs, and, subsequent to attaining sixteen years of age, violates any order of the Superior Court or any condition of probation ordered by the Superior Court with respect to such delinquency proceeding . . . ." A child under sixteen years old charged as a delinquent in 1999 and made subject to a court order in that delinquency proceeding by the Superior Court for juvenile matters could, at any time after he turned sixteen or older, be subject to a juvenile prosecution for violating the court's order.

in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016), although the defendant did not expressly claim that § 54-91g applied to him retroactively, we considered and rejected that interpretation of the statute as part of our analysis of his claim that he was entitled to be resentenced. See id., 814. We explained: "There are ten sections in P.A. 15-84, four of which specify that they are '[e]ffective October 1, 2015, and applicable to any person convicted prior to, on or after said date.' . . . P.A. 15-84, §§ 6 through 9. In contrast, P.A. 15-84, § 2, provides [that] it is '[e]ffective October 1, 2015,' indicating that the legislature did not intend for this section to apply retroactively. Moreover, there is nothing in the text of . . . § 54-91g or the legislative history of P.A. 15-84 to suggest that the legislature intended that all [persons] convicted of a class A or B felony [committed when they were under the age of eighteen] who were sentenced without consideration of the age related mitigating factors identified in *Miller* would be resentenced. In sum, even if the defendant had alleged that his sentence was imposed in an illegal manner because the trial court failed to adhere to the requirements of [§ 54-91g], he would not be able to demonstrate that that [statute] applies to him." *State* v. *Delgado*, supra, 814. We added: "Although the text of [§ 54-91g] seems clear insofar as the retroactivity issue is concerned, to the extent that there is any ambiguity in the applicable statutory language, the pertinent legislative history clarifies that the legislature did not intend for this [statute] to apply retroactively. The limited discussion on this topic occurred before the Judiciary Committee. Attorney Robert Farr, a member of the working group of the Connecticut Sentencing Commission, which helped craft the proposed legislative language, discussed how the legislation would affect previously sentenced individuals. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., pp. 949, 955–56. He first mentioned this court's decision in *Riley*, in which the

defendant in that case had been sentenced to 100 years in prison and then resentenced, and noted that, under the proposed legislation, 'instead of having to worry about resentencing what would have happened is in 30 years, 21 years from now there will be a parole hearing and then that parole hearing would decide whether [the defendant in *Riley*] was going to be—get another parole hearing . . . . So it gave some resolution to this which was consistent we believe with the federal—with the [United States] Supreme Court cases.' Id., p. 956, remarks of Attorney Farr." *State* v. *Delgado*, supra, 814 n.9.[12]

Relying on both the statutory language and its legislative history, we concluded in *Delgado* that, even if the defendant in that case had claimed that the trial court had failed to adhere to the requirements of § 54-91g, his claim would fail because the statute's provisions did not apply to him. Id., 814. Our conclusion in *Delgado* that § 54-91g does not apply retroactively is consistent with the plain language of the statute, which, as we have explained, limits its application, effective October 1, 2015, to children convicted of a class A or B felony following transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court, and supports our conclusion that § 54-91g does not apply to the defendant.[13] Accordingly, because the trial court

[12] Neither of the parties addressed in their supplemental briefs the import of our conclusion in *Delgado* that § 54-91g does not apply retroactively. We observe, however, that, in light of that conclusion, even if the defendant had been transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court pursuant to § 46b-127, § 54-91g would not apply to him.

[13] We disagree with the defendant's conclusory statement in his supplemental brief that this construction renders § 54-91g unconstitutional because it violates his right to equal protection. Even if we agreed with the defendant's statement that he is similarly situated to a child sentenced after October 1, 2015, who is convicted of a class A or B felony following transfer to the regular criminal docket—which we do not—the differing treatment survives rational basis review. That is, the legislature rationally could provide one remedy for persons in the defendant's class and a different remedy to persons

incorrectly applied § 54-91g in considering adolescent mitigating factors in resentencing the defendant, he received more consideration than was required, resulting in a much reduced sentence with the possibility of parole after he serves thirty years. The state recognizes that the defendant received more consideration than that to which he was statutorily entitled but does not request that the defendant's case be remanded for resentencing and requests that this court affirm the Appellate Court's judgment.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

JOHN TILLMAN ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF SHELTON ET AL.
(SC 20549)

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

Syllabus

The plaintiffs, who own real property in the city of Shelton, appealed to the trial court from the decision of the defendant planning and zoning commission approving an application for a planned development district submitted by the defendant S Co. The trial court dismissed the plaintiffs' appeal from the commission's decision, and the plaintiffs appealed, claiming, inter alia, that this court's decision in *Campion* v. *Board of Alderman* (278 Conn. 500), in which the court concluded that a special act of the legislature authorizing zoning in the city of New Haven allowed for the creation of a planned development district, did not authorize municipalities, such as Shelton, that derive their authority to zone by statute (§ 8-2), rather than by a special act, to establish such districts. *Held*:

1. The plaintiffs could not prevail on their claim that the zoning authority conferred by § 8-2 did not support the creation of planned development districts: a comparison of the language in the special act at issue in *Campion*, the language of the enabling act at issue in *Sheridan* v.

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who meet the conditions under which the provisions of § 54-91g apply. This is the sole constitutional argument that the defendant raises in this appeal.

Planning Board (159 Conn. 1), and the language of § 8-2, which allowed the defendant commission to create and alter zones, led this court to conclude that § 8-2 permits the creation of planned development districts like the one at issue in the present case; moreover, the legislature's prior repeal of legislation that provided for a detailed procedure for the approval of planned developments did not evince a legislative intent to eliminate or severely limit the use of planned developments, as that legislation was repealed because its provisions were largely viewed as unnecessary and unduly burdensome, and the legislature's enactment of a statute (§ 8-2m) expressly allowing for the use of flexible zoning techniques was not intended to preclude the generalized application of § 8-2 or to restrict the zoning devices that it allows; furthermore, there was no indication that the development in the present case resulted from impermissible spot zoning, as previous claims of spot zoning had involved smaller areas than the area at issue in the present case, and there was little reason to disagree with the commission's determination that the proposal was consistent with Shelton's comprehensive plan for development, as the majority of the subject parcel had been located in an industrial zone for more than fifty years, and the applicable regulations identified the area at issue as an appropriate location for planned development districts.

2. There was no merit to the plaintiffs' claim that the use of planned development districts in Shelton, generally, and the creation of the planned development district proposed by S Co., in particular, violated the uniformity requirement of§ 8-2: the uniformity requirement did not require regulations governing adjacent zones to be consistent, and § 8-2 indicated that regulations in one district may differ from those in another district; moreover, the uniformity requirement does not prohibit the commission from permitting a combination of residential, commercial and professional uses, and the commission's decision created a new zone governed by a single set of regulations, including a specific, preapproved mixture of uses for the planned development district and a detailed set of standards applicable to the various classes and kinds of structures to be constructed therein.

3. The commission's decision, which delineated separate development areas, did not result in an unlawful subdivision: even though the various development areas were occasionally referred to in the record as parcels, there was no indication that the commission's approval of the planned development district caused the alteration of any previously existing property line, and the statement of uses and standards approved by the commission in granting S Co.'s application noted that any subdivision of the subject parcel would require separate approval.

Argued February 18—officially released October 20, 2021*

* October 20, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the named defendant approving the application of Shelter Ridge Associates, LLC, for a planned development district, brought to the Superior Court in the judicial district of Ansonia-Milford; thereafter, Shelter Ridge Associates, LLC, was permitted to intervene as a defendant; subsequently, the case was transferred to the land use litigation docket in the judicial district of Hartford, where the case was tried to the court, *Domnarski*, *J.*, who, exercising the powers of the Superior Court, rendered judgment dismissing the appeal, from which the plaintiffs appealed. *Affirmed*.

Joel Z. Green, with whom, on the brief, was *Linda Pesce Laske*, for the appellants (plaintiffs).

Francis A. Teodosio, for the appellee (named defendant).

Dominick J. Thomas, *Jr.*, with whom was *Ian A. Cole*, for the appellee (defendant Shelter Ridge Associates, LLC).

Opinion

KAHN, J. The principal question raised in this appeal is whether the zoning authority granted to municipalities by General Statutes § 8-2[1] permits the use of a zoning device known as a planned development district. The plaintiffs, John Tillman and Judith Tillman, appeal from the decision of the trial court dismissing their appeal from the decision of the named defendant, the Planning and Zoning Commission of the City of Shelton (commission), approving an application for such a dis-

[1] We note that the legislature has made several amendments to § 8-2 since the events underlying the present appeal. See, e.g., Public Acts 2018, No. 18-28, §§ 1–2; see also Public Acts 2021, No. 21-29, § 4. Those amendments, however, are not relevant to the issues presented in the present appeal. For the sake of simplicity, we refer to the current revision of the statute.

trict submitted by the defendant Shelter Ridge Associates, LLC (Shelter Ridge). On appeal, the plaintiffs claim that (1) this court's decision in *Campion* v. *Board of Aldermen*, 278 Conn. 500, 899 A.2d 542 (2006), which concluded that the special act authorizing zoning in the city of New Haven allows for the creation of a planned development district, is inapplicable to municipalities that derive their authority to zone from § 8-2, (2) the planned development district proposed by Shelter Ridge violates the uniformity requirement contained in § 8-2, and (3) the commission's decision resulted in an unlawful subdivision. For the reasons that follow, we reject each of these claims and, accordingly, affirm the judgment of the trial court.

We begin by briefly reviewing the municipal zoning regulations relevant to the present appeal. Chapter 3, § 34.1, of the Shelton Zoning Regulations (regulations) authorizes the creation of planned development districts in order to encourage "unique and desirable" developments that cannot be accommodated by conventional zoning. Those regulations provide that "[e]ach [planned development district] is [an] independent zoning district created to accomplish a specific purpose, complete with its unique and narrowly drawn permitted uses . . . ." Shelton Zoning Regs., c. 3, § 34.1. Such zones can be established in a set of specifically mapped "[s]pecial [d]evelopment [a]rea[s]" and may be used to incorporate those uses "appropriate" to a mixed-use development.[2] Id. In addition to the foregoing limitations, the regulations detail minimum lot sizes, the maximum percentage of lot coverage, applicable floor area ratios, restrictions with respect to building height, various requirements with respect to utility connections,

[2] The regulations expressly provide that a planned development district "is not allowed on any site or parcel that is entirely surrounded by single family residential zones" and "shall not be used when an alternative, conventional zoning district is available." Shelton Zoning Regs., c. 3, § 34.1.

and additional provisions with respect to both architecture and the preservation of natural features. See id., §§ 34.3.1 through 34.3.8.

Approval of a new planned development district zone proceeds in a series of distinct stages. First, the applicant engages in an informal review by the commission and its staff. Id., § 34.4. The applicant then submits a formal proposal that includes both a written statement "identifying the permitted uses and setting forth the specific area, location and bulk standards to be applicable to the district"; id., § 34.5.1; and an initial development concept plan including, inter alia, "property maps, [s]ite [p]lans, [a]rchitectural [p]lans and other drawings as relevant in sufficient detail to show the existing conditions and improvements proposed to be erected on the site . . . ."[3] Id., § 34.5.2. Following the receipt of an application, the commission can solicit comments from numerous municipal officials and authorize the preparation of any independent reports that it deems necessary for its consideration. Id., § 34.6. The commission is then required by regulation, as it would be for any application for an amendment to a zoning regulation, to hold a duly noticed public hearing. Id., § 34.7.

The commission may approve an initial development concept plan and adopt a planned development district only if it makes several specific factual findings. Id., §§ 34.8 and 34.9. Most notably for present purposes,

[3] In addition to mapping both existing and proposed buildings and uses, an applicant is also required to submit information relating to vehicular and pedestrian traffic, parking facilities, access roads, lighting, open areas, landscaping, utilities, floor plans, exterior elevations, drainage plans, soil and geology reports, a sedimentation and erosion control plan, and "[a]ny additional information which the [c]ommission may reasonably require . . . ." Shelton Zoning Regs., c. 3, § 34.5.2 (a) through (n). This last category of information may include marketability studies, economic impact analysis, perspective renderings, lists of proposed covenants or restrictions, maintenance schedules, and additional specifications relating to development phasing. Id., § 34.5.2 (n).

the commission must find that a proposal "will not have a significant adverse impact [on] surrounding properties or on property values in the area"; id., § 34.8 (f); that "[a]nother zoning district could not be appropriately established to accomplish such purposes"; id., § 34.9 (c); and that the proposal "will be consistent with any comprehensive plan of development . . . for the area in which it is located . . . ." Id., § 34.9 (d). If a planned development district is approved, the commission adopts a "[s]tatement of [u]ses and [s]tandards" as an amendment to its zoning regulations that "authorize[s] uses, building structures and site development in accordance with the approved [i]nitial [d]evelopment [c]oncept [p]lan," and updates its official zoning map to show the creation of a new zone. Id., § 34.13. An applicant then has a period of six months to submit detailed final site development plans to the commission. Id., § 34.10.

Although the Appellate Court once described planned development districts as "creature[s] not normally spotted in Connecticut's jurisprudential forests"; (internal quotation marks omitted) *Blakeman* v. *Planning & Zoning Commission*, 82 Conn. App. 632, 637 n.7, 846 A.2d 950, cert. denied, 270 Conn. 905, 853 A.2d 521 (2004); the trial court in the present case accurately noted that they have "thrived in the environs of Shelton." Specifically, the trial court observed that this flexible zoning technique has been used more than seventy-five times in the city of Shelton alone. Indeed, an inventory of planned development districts set forth in an appendix to the regulations indicates a more or less consistent use of that device in Shelton since the late 1970s.

The following undisputed facts and procedural history relating to the present case are relevant to our analysis. On March 16, 2016, Shelter Ridge filed an application with the commission seeking the creation of a planned development district on a parcel of real prop-

erty consisting of approximately 121 acres of land. That parcel, almost all of which had existed within a "[l]ight [i]ndustrial [p]ark" zone for more than fifty years,[4] is bounded by (1) a one-half mile stretch of Bridgeport Avenue[5] to the east, (2) approximately 1800 feet of frontage on Mill Street to the south, (3) the rear lot lines of several residential properties on Old Kings Highway, certain parcels maintained by Shelton as open space, and a short length of Buddington Road to the west, and (4) a mobile home park and a few office buildings to the north. The parcel slopes steeply up from Bridgeport Avenue and Mill Street to a ridgeline running generally north to south and has areas of exposed bedrock. The property is also bisected by a series of overhead power transmission lines and an underground gas transmission line. Several wetlands, including a vernal pool, are located on the western side of the parcel. Although Shelton's 2006 plan of conservation and development contemplated improvement of this land for either office space or industrial use, the parcel has remained vacant with the exception of one single-family home near Buddington Road.

Shelter Ridge submitted a proposed statement of uses and standards for this planned development district that contemplated the construction of buildings in five separate development areas. The two areas closest to Bridgeport Avenue were reserved for retail use. The other three development areas, which are located on the interior of the parcel, were slated for (1) a mixture of retail, offices and food services, (2) medical and professional offices, and (3) a multistory residential structure. The remaining land, which consisted of

[4] The record indicates that approximately one acre of the property fell within a residential zone.

[5] Bridgeport Avenue, also known as state route 714, is a major thoroughfare in Shelton. Certain areas adjacent to it, including the parcel at issue in this case, fell within a special development area and, thus, were available for improvement as a planned development district.

approximately twenty-four acres near the western edges of the parcel, would be traversed by a proposed hiking trail and would remain otherwise undeveloped as dedicated open space. Maps submitted with the proposal showed the size and location of, inter alia, proposed buildings, parking lots, and various internal access roads. A series of perspective renderings showed, in great detail, the visual impacts of the proposed development.

In 2016, the commission held six public hearings relating to this development over a period of several months. As the trial court noted, "the commission had before it some 65 exhibits, including a full engineering report . . . a 900 page traffic impact study . . . supplemented by a revision to address certain questions from the commission . . . a retail demand study . . . and the blowup of the rings and drive times related to the retail analysis . . . an environmental report . . . and a traffic peer review. . . . The applicant also presented numerous articles and data related to existing apartment developments, parking, school-age children, fire and safety, and downtown development. . . . All of the applicant's submissions were supplemented by the testimony of the authors of the reports." (Citations omitted.)

Public opposition to the development was substantial and focused on several significant concerns relating to traffic, effects on nearby residential areas, and various environmental impacts. As a result of those concerns, Shelter Ridge modified its initial proposal (1) to replace a proposed public entrance located on Buddington Road with a gated access limited to emergency personnel, (2) to reorganize certain parking facilities to increase dedicated open space, (3) to reduce the size of the residential structure from nine stories to no more than five stories, and (4) to abandon previous plans for an assisted living facility.

On March 7, 2017, the commission adopted a resolution approving both Shelter Ridge's application and a detailed statement of uses and standards containing a series of additional conditions and restrictions. In making its decision, the commission explicitly found that "[d]ifficult physical site features, coupled with marketing constraints, have precluded the ability to develop the site for light industrial and/or major office building development," that "[t]he subject property can be improved to accommodate the proposed mixed-use development in a manner that minimizes intrusion on neighboring areas," and that the proposal was "consistent with the comprehensive plan of zoning for the area . . . ."

The plaintiffs, the owners of a single family residence located on an adjacent parcel, subsequently appealed to the trial court pursuant to General Statutes § 8-8.[6] In that appeal, the plaintiffs argued, inter alia, that (1) municipalities deriving their authority to zone from § 8-2 lack the authority to create planned development districts, (2) the proposed planned development district violates the uniformity requirement contained in § 8-2, and (3) the commission's decision resulted in an unlawful subdivision under General Statutes § 8-18.

The trial court subsequently issued a detailed, thorough, and well reasoned memorandum of decision, disagreeing with each of these claims. The trial court reviewed *Sheridan* v. *Planning Board*, 159 Conn. 1, 266 A.2d 396 (1969), and *Campion* v. *Board of Aldermen*, supra, 278 Conn. 500, and concluded that those decisions implicitly supported "the conclusion that § 8-2 authorizes the creation of [planned development districts]." The trial court also concluded that the uniformity requirement set forth in § 8-2 mandates only "intradis-

[6] Although Shelter Ridge was not initially named as a party defendant, the trial court subsequently granted it permission to intervene.

trict uniformity" and that, because the present case involved the creation of an entirely new zone governed by a single set of regulations, the commission's actions did not violate that statutory mandate. (Emphasis omitted; internal quotation marks omitted.) Finally, the trial court rejected the plaintiffs' argument that the commission had created an unlawful subdivision because the mere discussion of separate "development areas" did not amount to a division of the larger parcel into smaller lots. As a result of these conclusions, the trial court dismissed the plaintiffs' appeal from the commission's decision. This appeal followed.[7]

In the present appeal, the plaintiffs renew their claims that (1) municipalities, like Shelton, that derive their zoning powers from § 8-2, rather than a special act, lack the authority to establish planned development districts; (2) the proposal at issue in this case violates the uniformity requirement contained in § 8-2, and (3) the commission's decision constituted an unlawful subdivision. We address each of these claims in turn.

I

The plaintiffs' principal claim is that the zoning authority conferred by § 8-2 does not support the creation of planned development districts. In support of this claim, the plaintiffs argue that this court's decision in *Campion* v. *Board of Aldermen*, supra, 278 Conn. 514–15, which concluded that the 1925 special act authorizing zoning in New Haven allowed for the creation of planned development districts, does not extend permission to other municipalities, acting under § 8-2, to create similar planned development districts. The defendants respond by arguing that both § 8-2 and the reasoning

[7] The Appellate Court granted certification for the plaintiffs to appeal from the judgment of the trial court pursuant to General Statutes § 8-9, and we subsequently transferred that appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

of *Campion* are not so limited. For the reasons that follow, we agree with the defendants.

Before turning to the specific question at issue, we begin by setting forth certain general principles of law relevant to our consideration of this appeal. In this state, it is well established that "zoning authorities can only exercise such power as has been validly conferred upon them by the General Assembly." (Internal quotation marks omitted.) *Eden* v. *Town Plan & Zoning Commission*, 139 Conn. 59, 63, 89 A.2d 746 (1952); see also *Capalbo* v. *Planning & Zoning Board of Appeals*, 208 Conn. 480, 490, 547 A.2d 528 (1988); *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App. 406, 426, 77 A.3d 904 (2013); *Keiser* v. *Zoning Commission*, 72 Conn. App. 721, 729, 806 A.2d 103, cert. denied, 262 Conn. 909, 810 A.2d 274 (2002). Indeed, "[n]o administrative or regulatory body can modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statute specifically grants it that power." (Internal quotation marks omitted.) *Finn* v. *Planning & Zoning Commission*, 156 Conn. 540, 546, 244 A.2d 391 (1968).

"Municipalities in Connecticut may exercise zoning power either by adopting the provisions of chapter 124 of the General Statutes . . . or by enacting a municipal charter authorized by a special act of the legislature. . . . In either case, the power of the local zoning authority to adopt regulations is limited by the terms of the statute or special act." (Internal quotation marks omitted.) *Campion* v. *Board of Aldermen*, supra, 278 Conn. 510–11. Whether the legislature has granted a particular power to a municipality presents a question of statutory interpretation and, thus, is subject to plenary review. Id., 509.

"In traditional zoning appeals, the scope of judicial review depends on whether the zoning commission has

acted in its legislative or administrative capacity. The discretion of a legislative body, because of its constituted role as formulator of public policy, is much broader than that of an administrative board, which serves a quasi-judicial function. . . . Acting in such legislative capacity, the local [zoning] board is free to amend [or to refuse to amend] its regulations whenever time, experience, and responsible planning for contemporary or future conditions reasonably indicate the need for [or the undesirability of] a change. . . . Zoning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation, and redevelopment. . . . The responsibility for meeting these demands rests, under our law, with the reasoned discretion of each municipality acting through its duly authorized zoning commission. . . . In contrast, when acting in an administrative capacity, a zoning commission's more limited function is to determine whether the applicant's proposed use is one which satisfies the standards set forth in the [existing] regulations and the statutes. . . . In fulfilling its administrative function, a zoning commission is less concerned with the development of public policy than with the correct application of law to facts in the particular case." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 150–51, 653 A.2d 798 (1995); see also *Campion* v. *Board of Aldermen*, supra, 278 Conn. 526–27.

There is no dispute that Shelton derives its authority to adopt zoning regulations from chapter 124 of the General Statutes. See T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) pp. 38–42. The provision of that chapter at issue in the present case, § 8-2, provides in relevant part: "The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories

and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . . Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception . . . . Such regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23. . . . Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. . . .'' General Statutes § 8-2 (a).

With this background in mind, we turn to the narrow question of whether the grant of zoning authority contained in § 8-2 permits a municipal zoning authority to create planned development districts when it acts in a legislative capacity. In answering this question, we do not write on a blank slate. As the trial court in the present case aptly noted, this court has examined the validity of modern flexible zoning techniques in both *Sheridan* v. *Planning Board*, supra, 159 Conn. 1, and

Campion v. *Board of Aldermen*, supra, 278 Conn. 500. A brief review of those two decisions is instructive.

Sheridan related to the use of a modern zoning technique referred to as a floating zone. See *Sheridan* v. *Planning Board*, supra, 159 Conn. 16. The most traditional and common form of zoning, called Euclidean zoning, is "a system . . . whereby a [municipality] is divided into areas in which specific uses of land are permitted." Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/legal/Euclidean%20zoning (last visited October 18, 2021); see also *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 1:1, p. 2. By contrast, a floating zone involves the initial creation of an unmapped zone that is later applied to a particular piece of property. As such, it "differs from the traditional [Euclidean] zone in that it has no defined boundaries and is said to 'float' over the entire area where it may eventually be established." 9 R. Fuller, supra, § 3.9, p. 42; see also T. Tondro, supra, pp. 70–72.

As in the present case, the plaintiffs in *Sheridan* claimed that the relevant enabling act did not permit the city of Stamford to use a floating zone device. *Sheridan* v. *Planning Board*, supra, 159 Conn. 15. Our rejection of that claim was straightforward. This court held that the relevant provisions of Stamford's enabling act,[8] which were similar to those in § 8-2, clearly allowed the municipal authority to both adopt and amend zoning

[8] The municipality in *Sheridan*, the city of Stamford, had enacted a charter authorized by a special act of the legislature, providing in relevant part: "The zoning board is authorized to regulate the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . ." (Internal quotation marks omitted.) *Sheridan* v. *Planning Board*, supra, 159 Conn. 17–18.

boundaries. See id., 18. We noted that the language of the enabling act, "just as that in . . . § 8-2, is sufficiently broad to permit the creation of floating zones. In creating a floating zone, and in applying it to a particular area, the . . . zoning board is regulating the location and use of buildings and land in a manner which clearly is permitted under the enabling act in question." Id. The fact that floating zones differed from more traditional, Euclidean means of zoning was irrelevant; the legislative function exercised by the municipal zoning authority in that case, we noted, had simply met an existing "need for flexibility in modern zoning ordinances . . . ." Id., 17.

Almost forty years later, a similar question arose with respect to the use of planned development districts in the city of New Haven. See *Campion* v. *Board of Aldermen*, supra, 278 Conn. 515. New Haven, like Stamford, also exercised its zoning authority pursuant to a special act. Id., 510–13. The relevant provisions of that legislation provided New Haven's Board of Aldermen with the authority to "divide the city of New Haven into districts of such number, shape and area as may best be suited to carry out the provisions of [the] act." (Internal quotation marks omitted.) Id., 514.

Relying on our reasoning in *Sheridan*, this court similary held that this language was "sufficiently broad to permit the creation of planned development districts . . . ." Id., 518. In the course of our analysis, we compared planned development districts to floating zones and noted that, notwithstanding certain procedural distinctions, both of those devices "[alter] the zone boundaries of [an] area by carving a new zone out of an existing one." (Internal quotation marks omitted.) Id., 518–19. The creation of planned development districts was, therefore, permissible in New Haven because its zoning enabling act, like Stamford's, "authorize[d] the city to create new zones, as well as to make alterations

to the zones previously created." Id., 515. Our holding, reduced to a single sentence, was simply that "[t]he approval of a planned development district is not different from the creation of any other new zoning district . . . ." Id., 514. In reaching this result, we expressly rejected the plaintiffs' claim that the creation of planned development districts "improperly breaks from the Euclidean zoning model," stating, in no uncertain terms, that "we never have held . . . that zoning ordinances must be judged by the standards of traditional Euclidean zoning." Id., 529–30.

A comparison of the language in the enabling acts in both *Sheridan* and *Campion* to the language contained in § 8-2 provides us with no principled basis to conclude that the legislature intended to allow for the use of modern, flexible zoning techniques in only a handful of municipalities. The special act cited in *Sheridan* permitted the city of Stamford to regulate "the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . ." (Internal quotation marks omitted.) *Sheridan* v. *Planning Board*, supra, 159 Conn. 17–18. That exact language appears in § 8-2. The special act at issue in *Campion* allowed the New Haven Board of Aldermen to "divide the city of New Haven into districts of such number, shape and area as may be best suited to carry out the provisions of [the] act." (Internal quotation marks omitted.) *Campion* v. *Board of Aldermen*, supra, 278 Conn. 514. Again, almost the exact same language can be found in § 8-2. As in those cases, the relevant question in the present case "is not whether the [enabling act] authorizes 'planned development districts' by name, but whether it authorizes the city to create new zones, as well as to make

alterations to the zones previously created." Id., 515. The plaintiffs readily admit that § 8-2 allows the commission to both create and alter zones. As a result, we conclude that the language of § 8-2 permits the creation of planned development districts like the one at issue in the present case.[9]

In urging us to reach the opposite conclusion, the plaintiffs point to two legislative actions that, they argue, evince the General Assembly's intent either to eliminate or to severely limit the use of planned developments. The first is the repeal of chapter 124a of the 1985 revision of the General Statutes. See Public Acts 1985, No. 85-409, § 7. The provisions in that chapter, which provided a detailed procedure for the approval of planned developments; see General Statutes (Rev. to 1985) § 8-13b et seq.; were, however, repealed because they were largely viewed as unnecessary and unduly burdensome. See D. Mandelker, "New Perspectives on Planned Unit Developments," 52 Real Prop. Tr. & Est. L. J. 229, 231 n.4 (2017); A. Martindale, "Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances," 20 Conn. L. Rev. 669, 698 n.153 (1988). The legislature was well aware of the fact that many municipalities had enacted regulations providing for the use of such devices pursuant to their general zoning enabling authority, and the debate attendant to the 1985 repeal contains no support for the

[9] Although this conclusion is in accord with the law of other jurisdictions; see 5 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning (4th Ed. 2011) § 88:2, p. 88-12; see also 3 P. Salkin, American Law of Zoning (5th Ed. 2011) § 24:18, p. 24-40; we recognize that a Connecticut land use treatise suggests that *Campion* "seems limited on its facts to the provisions of the New Haven special act and should not be construed as allowing [planned development districts] to municipalities acting under the general statutes, which do not contain similar zoning authorization." 9 R. Fuller, supra, § 4:5, p. 73. In light of the striking similarities between the language of the 1925 special act and § 8-2, we decline to conclude that the holding of *Campion* is so limited.

proposition that the legislature intended a wholesale elimination of similar devices. See 28 S. Proc., Pt. 7, 1985 Sess., p. 2218, remarks of Senator John F. Consoli ("[C]urrently about sixty municipalities have adopted zoning regulations covering [similar] development[s] . . . . None of these have relied on [chapter 124a] for their authority. Instead, they have all relied on general zoning authority which is far less detailed. This bill would repeal specific statutory standards and procedures governing municipal zoning for [planned unit developments] leaving the municipalities to regulate them under the general zoning statutes . . . ."); see also T. Tondro, supra, pp. 81–82 n.168.

The second legislative action cited by the plaintiffs is the enactment of General Statutes § 8-2m.[10] That statute expressly allows for the use of various flexible zoning techniques, including floating zones, overlay zones, and planned development districts, in an exceedingly narrow class of municipalities exercising zoning authority pursuant to a special act. Public Acts 2006, No. 06-128, § 2 (P.A. 06-128). The class is so narrowly drawn, in fact, that the parties in the present case agree that only the city of New Haven falls within its confines. The

[10] General Statutes § 8-2m provides: "The zoning authority of any municipality that (1) was incorporated in 1784, (2) has a mayor and board of alderman form of government, and (3) exercises zoning power pursuant to a special act, may provide for floating and overlay zones and flexible zoning districts, including, but not limited to, planned development districts, planned development units, special design districts and planned area developments. The regulations shall establish standards for such zones and districts. Flexible zoning districts established under such regulations shall be designed for the betterment of the municipality and the floating and overlay zones and neighborhood in which they are located and shall not establish in a residential zone a zone that is less restrictive with respect to uses than the underlying zone of the flexible zoning district. Such regulations shall not authorize the expansion of a pre-existing, nonconforming use. Notwithstanding the provisions of this section, no planned development district shall be approved which would permit a use or authorize the expansion of a pre-existing nonconforming use where the underlying zone is a residential zone."

plaintiffs invite us to infer from this express grant of authority that the legislature intended, by negative implication, to preclude the creation of planned development districts in every other municipality. We decline to accept this line of reasoning. The plaintiff's logic, if adopted, would compel the conclusion that New Haven is the only municipality with the authority to use other devices mentioned in § 8-2m, like floating zones, that are derived implicitly from generalized grants of zoning authority. Such an interpretation is not supported by either the text of § 8-2m or the legislative history preceding its enactment. See 49 S. Proc., Pt. 9, 2006 Sess., p. 2647, remarks of Senator Toni Nathaniel Harp (noting that bill was intended to "clarif[y] what the city of New Haven can do relative to planned development districts"); 49 H.R. Proc., Pt. 18, 2006 Sess., p. 5501, remarks of Representative Robert W. Megna (noting that bill "clarifies the use of overlay zones within the [c]ity of New Haven"). The better reading, we believe, is that § 8-2m constitutes a narrow legislative response to the Appellate Court's decision in *Campion*[11] that was not intended to preclude the generalized application of § 8-2 or to otherwise restrict the zoning devices that it allows. As noted previously; see footnote 1 of this opinion; the General Assembly has made several recent amendments to § 8-2. If, as the plaintiffs contend, the legislature intended the passage of § 8-2m to express a broader intent that the use of modern, flexible zoning techniques should be prohibited outside of New Haven,

[11] The bill giving rise to § 8-2m; see P.A. 06-128; was debated and passed shortly after the Appellate Court's decision in *Campion* was released, which had held that the city of New Haven lacked the authority to create planned development districts under the terms of its special act. *Campion* v. *Board of Alderman*, 85 Conn. App. 820, 822 n.3, 859 A.2d 586 (2004), rev'd, 278 Conn. 500, 899 A.2d 542 (2006). After P.A. 06-128 was enacted, but before it became effective, this court reversed the Appellate Court's conclusion. *Campion* v. *Board of Aldermen*, supra, 278 Conn. 502, 505. The following day, P.A. 06-128, § 2, was made effective retroactively to the date of its enactment. See Public Acts 2006, No. 06-196, § 290.

it has had multiple opportunities over the past fifteen years to address the continued use of such devices in other parts of the state. Its failure to do so provides further support for our interpretation of § 8-2m.

Finally, the plaintiffs contend, and we agree, that the developer driven, case-by-case approach inherent to modern zoning techniques such as planned development districts significantly heightens the risk of spot zoning and favoritism in the municipal land use process. See, e.g., *Blakeman* v. *Planning & Zoning Commission*, supra, 82 Conn. App. 637–38 n.7; cf. 9 R. Fuller, supra, § 3:9, pp. 43–44 (discussing same concerns in relation to floating zones). Even a cursory review of the appendix to the regulations demonstrates that an excessive use of that device in Shelton has led to the creation of dozens of entirely new, single owner zones that are as small as 0.3 acres. We take this opportunity to reiterate the fact that one of the essential goals of zoning is to encourage stability and predictability in land use. See, e.g., *Damick* v. *Planning & Zoning Commission*, 158 Conn. 78, 84, 256 A.2d 428 (1969). To that end, we emphasize that the traditional scope of judicial review applicable to claims of spot zoning remains unchanged in this context.

Nevertheless, we see no indication that the particular development at issue in the present case resulted from impermissible spot zoning. As this court has previously stated: "Two elements must be satisfied before spot zoning can be said to exist. First, the zone change must concern a small area of land. Second, the change must be out of harmony with the comprehensive plan for zoning adopted to serve the needs of the community as a whole." *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 483, 562 A.2d 1093 (1989). The proposed planned development district at issue in this case consists of approximately 121 acres. Previous claims of spot zoning have involved far smaller areas. *Campion*

v. *Board of Aldermen*, supra, 278 Conn. 506, 532 (4.04 acres); *Morningside Assn.* v. *Planning & Zoning Board*, 162 Conn. 154, 156, 161, 292 A.2d 893 (1972) (6.5 acres); *Kutcher* v. *Town Planning Commission*, 138 Conn. 705, 711, 88 A.2d 538 (1952) (2.5 acres) (*Brown*, *C. J.*, dissenting). There is also little reason to disagree with the commission's determination that the proposal at issue is consistent with Shelton's comprehensive plan for development. The majority of the subject parcel has been located in an industrial zone for more than fifty years, and the regulations specifically identify the area around Bridgeport Avenue as an appropriate location for planned development districts. In light of these facts, we do not believe that the commission's actions in the present case constituted impermissible spot zoning.

II

The plaintiffs' second claim is that the use of planned development districts in Shelton, generally, and the creation of this planned development district, in particular, violate the uniformity requirement contained in § 8-2. This claim is subject to plenary review. See, e.g., *MacKenzie* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 420. For the reasons that follow, we conclude that it lacks merit.

General Statutes § 8-2 (a) provides in relevant part: "All . . . regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district . . . ."

This statutory provision requires that zoning regulations "are sufficiently precise so as to apprise both the zoning commission and an applicant of what is required, as well as to provide guidance to the zoning commission in applying the regulation, and to ensure equal treatment to each applicant subject to the regulation." *Harris* v. *Zoning Commission*, 259 Conn. 402, 434–35, 788

A.2d 1239 (2002). "The obvious purpose of [this requirement] . . . is to assure property owners that there shall be no improper discrimination, all owners of the same class and in the same district being treated alike with provision for relief in cases of exceptional difficulty or unusual hardship by action of the zoning board of appeals." *Veseskis* v. *Zoning Commission*, 168 Conn. 358, 360, 362 A.2d 538 (1975); see also *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 147. Put simply, "[t]he thrust of the statutory requirement of uniformity is equal treatment." *Harris* v. *Zoning Commission*, supra, 431.

Cases in which courts have found a violation of the uniformity requirement have a singular, common element: they all involve a waiver or modification of a zoning regulation for some, but not all, parcels *within a particular zone*. For example, in *Langer* v. *Planning & Zoning Commission*, 163 Conn. 453, 313 A.2d 44 (1972), we concluded that a regulation permitting a municipal planning and zoning commission, rather than a board of zoning appeals, to "modify, vary, waive or accept other uses" on an "application-to-application basis" was invalid because it permitted the commission to treat some parcels in the district differently from others. (Internal quotation marks omitted.) Id., 457–58. Likewise, in *MacKenzie* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 406, the Appellate Court concluded that a municipal planning and zoning commission violated the uniformity rule by waiving minimum setback and landscaped buffer requirements that were otherwise applicable to all other properties in the same district.[12] See id., 420, 431–33; see also, e.g., *Harris*

[12] In *MacKenzie*, the Appellate Court contrasted the facts before it, which involved altering requirements imposed on a particular parcel in a manner that distinguished it from other properties in the same zone, with other devices, such as floating zones and planned development districts, which involve a *legislative* decision relating to the creation or alteration of the underlying zones themselves. See *MacKenzie* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 433–34. In so doing, the Appellate Court

v. *Zoning Commission*, supra, 259 Conn. 430–31 (there was no violation of uniformity requirement in case in which regulation excluding wetlands and slopes from minimum acreage was applied consistently throughout zone); *Veseskis* v. *Zoning Commission*, supra, 168 Conn. 360 ("[t]o require by zoning regulation a buffer strip between one zone of a particular classification and another zone of a different class in one specific instance and not in other instances when zones of these two zone classifications abut clearly violates the statutory uniformity requirement and is exactly the arbitrary and discriminatory use of the police power which the statute was designed to prevent"); *St. Joseph's High School, Inc.* v. *Planning & Zoning Commision*, 176 Conn. App. 570, 599, 170 A.3d 73 (2017) (granting special permit application that does not satisfy applicable regulatory standards "runs afoul of the uniformity requirement" (internal quotation marks omitted)).

Two particular points derived from these authorities warrant specific emphasis. First, the uniformity requirement does *not* require regulations governing adjacent zones to be consistent with one another. Indeed, the plain language of § 8-2 (a) indicates that "regulations in one district may differ from those in another district." See also, e.g., *Abel* v. *Planning & Zoning Commission*, 297 Conn. 414, 431, 998 A.2d 1149 (2010) ("[t]he statutory scheme assumes . . . uniformity within a zone"); *Simko* v. *Ervin*, 234 Conn. 498, 506, 661 A.2d 1018 (1995) ("[i]n accordance with § 8-2, a zoning regulation must be applied uniformly throughout each district"); *Pleasant Valley Neighborhood Assn.* v. *Planning & Zoning Commission*, 15 Conn. App. 110, 114, 543 A.2d 296 (1988) ("§ 8-2 . . . requires intradistrict uniformity, and not uniformity among all districts in a given town" (emphasis omitted)). As discussed previously in this opinion,

expressly noted that the devices named in the latter category "are recognized as legitimate land use tools" in this state. Id., 433.

the approval of a planned development district creates a new and independent zone. As a result, the plaintiffs' argument that the uniformity requirement contained in § 8-2 categorically prohibits the use of that device because the application-by-application process inherent in its nature results in inconsistences *with adjacent areas* must fail because that argument relates to interdistrict, rather than intradistrict, variations. See 9 R. Fuller, supra, § 4:5, p. 73 ("the [planned development district] only has to be uniform within itself regardless of the zoning of bordering districts"); T. Tondro, supra, p. 74 ("[a] zoning amendment carving a new zone out of a larger one, or which changes a zone's boundaries in any way, does not violate the uniformity rule because the rule only requires uniformity within a [particular] district, not between districts" (emphasis omitted)).

Second, the uniformity requirement in § 8-2 does not prohibit the commission from blending different types of uses within a particular planned development. Cf. 3 P. Salkin, American Law of Zoning (5th Ed. 2011) § 24:20, pp. 24–44 ("Planned unit development legislation has been challenged on the ground that it does not create districts but permits a mixture of uses in a single district. . . . Even in the states [that] lack specific planned unit development enabling statutes, the argument has been rejected."). The fact that the commission's decision contemplates a mixture of residential, commercial, and professional uses does not violate the uniformity requirement in § 8-2. Even a traditional approach to zoning does not mandate a complete monoculture of uses within a particular zone. See id.

The commission's decision in the present case created a new zone governed by a single set of regulations. Those regulations include both a specific, preapproved mixture of uses for the planned development district as a whole, and a detailed set of area, location, and bulk standards applicable to the various classes and

kinds of buildings and structures to be constructed therein. Cf. T. Tondro, supra, p. 75 ("Planned Area Developments (PAD[s]) specify different rules for properties within the PAD than for those outside, allowing the single owner of the PAD to create a district unique to his or her property. Since PADs are usually required to have a large minimum lot area, they are consistent with the uniformity rule because the PAD area can be viewed as the equivalent of a new zoning district . . . ."). We are not persuaded by the plaintiffs' claim that such regulations violate the intradistrict uniformity requirement in § 8-2.

III

The plaintiffs' final claim is that the delineation of separate "development areas" resulted in an unlawful subdivision. Only a brief analysis is necessary to reject this claim. "[I]n order to constitute a subdivision, the clear language of [§ 8-18] has two requirements: (1) [t]he division of a tract or parcel of land into three or more parts or lots, and (2) for the purpose, whether immediate or future, of sale or building development." (Internal quotation marks omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 510, 196 A.3d 315 (2018). The first prong of this test requires a division of land into three or more distinct "parts or lots . . . ." (Internal quotation marks omitted.) Id.; see also *500 North Avenue, LLC* v. *Planning Commission*, 199 Conn. App. 115, 131–32, 235 A.3d 526 (concluding that "the purpose of the inclusion of 'parts' is to elucidate the meaning of the word 'lots' " and that "the two words are meant to be read together"), cert. denied, 335 Conn. 959, 239 A.3d 320 (2020). We agree with the trial court's assessment that, notwithstanding the fact that the various "development areas" are occasionally referred to in the record as "parcels," there is no indication that the commission's approval of the proposed planned development district actually caused the alteration of

any previously existing property line. Cf. *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 411, 920 A.2d 1000 (2007) ("a division of the land must take place in order to trigger subdivision review"). In fact, the statement of uses and standards ultimately approved by the commission expressly notes that any subdivision of the subject parcel would require separate approval. The defendant's claim that the commission's decision resulted in an unlawful subdivision must, therefore, fail.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JEFFREY K. WARD (SC 20427)

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

Syllabus

The defendant, who had been convicted, on a plea of guilty, of manslaughter in the first degree and assault in the first degree, appealed from the trial court's dismissal of his motion to correct a sentence that was imposed in an illegal manner. The defendant had claimed in his motion that he was incompetent at the time of sentencing and that the sentencing court failed to order, sua sponte, a competency evaluation and hearing before imposing sentence. The defendant submitted with his motion to correct a police report, psychiatric evaluation and records from the Department of Correction that had become available after he was sentenced, all of which concerned his mental illness and psychiatric treatment prior to sentencing. The trial court dismissed the defendant's motion to correct for lack of subject matter jurisdiction, concluding that the motion challenged his competency at the time he pleaded guilty and, thus, constituted a collateral attack on his conviction. The Appellate Court upheld the trial court's dismissal of the defendant's motion, concluding that he had failed to raise a colorable claim that he was incompetent at the time of sentencing. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that the trial court lacked subject matter jurisdiction to correct his sentence on the ground that he had failed to allege a colorable claim within the scope of the rule of practice (§ 43-22)

authorizing a judicial authority to correct an illegal sentence or a sentence imposed in an illegal manner. *Held* that the Appellate Court improperly upheld the trial court's dismissal of the defendant's motion to correct, as the factual allegations and evidence the defendant presented in connection with his motion made clear that he raised a colorable challenge to the character of the procedure that led to the imposition of his sentence, rather than the underlying conviction, and, thus, his claim nominally fell within the scope of § 43-22: although the prosecutor and defense counsel during the sentencing proceeding had discussed the defendant's psychiatric background and diagnosis of schizophrenia, the factual allegations and evidence the defendant offered in support of his claim demonstrated a possibility that a factual basis necessary to establish jurisdiction existed, as the police report and psychiatric evaluation showed that he previously had suffered from hallucinations, had attempted to commit suicide, and had not received treatment for his mental health for many years, and the department records showed that he had refused to take his prescribed medication and had suffered from auditory hallucinations approximately nine months before sentencing; moreover, contrary to the state's assertion that the trial court decided the merits of the defendant's claim and determined that the sentencing procedure complied with all constitutional and statutory requirements, that court's decision was limited to the issue of jurisdiction, as the court never explicitly ruled on the merits of the defendant's claim or made findings as to whether the proffered evidence overcame the presumption of competency.

Argued March 25—officially released October 21, 2021*

Procedural History

Substitute information charging the defendant with the crimes of manslaughter in the first degree and assault in the first degree, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *Alvord*, *Sheldon* and *Moll*, *Js.*, which affirmed the trial court's decision, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

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

Temmy Ann Miller, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, was *Sharmese L. Walcott*, state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Jeffrey K. Ward, appeals from the judgment of the Appellate Court affirming the trial court's dismissal of his motion to correct a sentence imposed in an illegal manner. Specifically, he claims that the Appellate Court incorrectly concluded that the trial court lacked subject matter jurisdiction to correct his sentence because he failed to allege a colorable claim within the scope of Practice Book § 43-22.[1] We agree and, accordingly, reverse the judgment of the Appellate Court.

The following facts and procedural history are relevant to our resolution of this certified appeal. Pursuant to a plea agreement, the defendant pleaded guilty to manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) and assault in the first degree in violation of General Statutes § 53a-59 (a) (1). After canvassing the defendant, the trial court, *Alexander*, *J.*, accepted the defendant's guilty plea. Following a hearing, and consistent with the plea agreement, the trial court sentenced the defendant to a total effective term of twenty-five years of incarceration. The defendant did not appeal from his conviction.

Approximately four years after sentencing, the defendant filed a motion to correct, accompanied by a memorandum of law and attached documents. The defendant claimed that the sentencing court had imposed his sen-

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

tence in an illegal manner on the grounds that (1) he was incompetent at the time of sentencing and (2) the sentencing court had, before imposing sentence, failed to order, sua sponte, a competency evaluation and hearing pursuant to General Statutes § 54-56d.

According to the defendant's memorandum of law, at his sentencing hearing, both the prosecutor and defense counsel discussed his psychiatric background, including his diagnosis of paranoid schizophrenia. Although he conceded that, at the sentencing hearing, his attorney told the court that his symptoms had improved to the point that he was then "calm, rational, and understood and appreciated the seriousness of [the] situation," the defendant argued that, since the date of sentencing, substantial additional evidence had become available regarding his mental illness and psychiatric treatment prior to sentencing. This new information, he argued, demonstrated that he was not competent at his sentencing despite his counsel's reassurances to the contrary.

The defendant attached to his motion and supporting memorandum of law an extensive set of records and materials, including the transcript from the sentencing hearing, the police report regarding the underlying incident at issue, a psychiatric report, and clinical records from the Department of Correction (department). The record contains no evidence that the police report, psychiatric report, or clinical records had been provided to the sentencing judge, and, thus, the Appellate Court concluded that the sentencing judge "could not have relied on those documents to consider ordering" an evaluation and a hearing. *State* v. *Ward*, 193 Conn. App. 794, 812 n.10, 220 A.3d 68 (2019). Specifically, in his motion to correct, the defendant relied on the police report regarding the underlying crime, which indicated that, during an interview with the police, the defendant inserted a pencil approximately five to six inches into his right nostril and then attempted to stab himself in

the neck with the pencil, causing a minor laceration. Additionally, he relied on a psychiatric report dated approximately three and one-half months before sentencing, which stated that, even with continued treatment, the defendant had a significant risk of continuing to suffer symptoms of his schizophrenia.

Clinical records of the department dated before the defendant entered his guilty plea reported that he had missed several doses of his prescribed antipsychotic medication. These records also showed that, before sentencing, the defendant told department staff three different versions of the details of his plea deal: (1) he agreed to plead guilty to manslaughter in the first degree and assault in the first degree in exchange for a total effective sentence of twenty-five years of incarceration; (2) he agreed to plead guilty to murder in exchange for a twenty year sentence; and (3) he agreed to plead guilty to manslaughter in exchange for a twenty year sentence. The clinical records further showed that, after his guilty plea but before his sentencing, the defendant missed doses of his prescribed antipsychotic medication intermittently and at times reported experiencing auditory hallucinations. According to the clinical records, approximately one month after his sentencing, the defendant told department staff that he was confused about his sentence, stating that he was serving a thirty year sentence for manslaughter.

After oral argument on the defendant's motion to correct, the trial court reserved decision regarding its jurisdiction and heard the parties on the merits of the motion to correct. The court later issued a memorandum of decision dismissing the motion to correct for lack of subject matter jurisdiction on the ground that the motion challenged the defendant's competency at the time he pleaded guilty pursuant to the plea agreement and, thus, constituted a collateral attack on his conviction, not his sentence.

The defendant appealed to the Appellate Court, claiming that the trial court incorrectly had concluded that it lacked subject matter jurisdiction over his motion to correct.[2] The Appellate Court acknowledged that the trial court's analysis was flawed because it was clear from the pleadings that the defendant was challenging the sentencing proceedings and the legality of the manner in which his sentence was imposed. Id., 806. Nevertheless, after examining the pleadings and documents attached to the defendant's motion to correct, the Appellate Court concluded that the trial court properly dismissed the motion for lack of jurisdiction because the defendant failed to raise "a colorable claim" that he was incompetent at the time of his sentencing, or that the sentencing judge had information prior to sentencing that required her to order a competency evaluation and hearing. Id., 812–13 and n.10. The Appellate Court reasoned that nothing in the attached transcripts, police report, psychiatric report, or psychiatric records supported the conclusion that the defendant was incompetent at the time of sentencing. See id., 812–13.

Judge Sheldon issued a concurring and dissenting opinion. In his view, the defendant had pleaded sufficient facts to raise a colorable claim that he was incompetent at the time of his sentencing but not to raise a colorable claim that Judge Alexander should have sua sponte ordered a competency evaluation and hearing before sentencing. Id., 820 (*Sheldon*, *J.*, concurring in part and dissenting in part). Judge Sheldon contended that the majority improperly required the defendant to show that he was incompetent at the time of sentencing,

[2] The defendant also claimed that the trial court improperly adjudicated the motion to correct, rather than referring the motion to the sentencing court. The Appellate Court determined that this claim was unpreserved and failed under the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Ward*, supra, 193 Conn. App. 797–800. The defendant did not request certification to appeal with respect to this issue.

thereby requiring him to prove that he would succeed on the merits. Id., 821–22 (*Sheldon*, *J.*, concurring in part and dissenting in part). In Judge Sheldon's view, the colorability standard required the defendant "to present sufficient facts to establish that his claim of incompetence is a possibility, rather than a certainty . . . and is superficially well founded but may ultimately be deemed invalid." (Citation omitted; internal quotation marks omitted.) Id., 822 n.3 (*Sheldon*, *J.*, concurring in part and dissenting in part). Applying this standard, Judge Sheldon concluded that the "well documented facts presented to the trial court in the motion to correct concerning the defendant's failure to take his prescribed antipsychotic medication in the weeks before he was sentenced, his contemporaneous experiencing of auditory hallucinations and his confusion, before and after he was sentenced, about the terms of his plea bargain and the length of his sentence, both as agreed to and as imposed, raise at least a genuine possibility that when he was sentenced he was incompetent because he lacked a rational and factual understanding of the proceedings against him due to his ongoing mental illness." Id., 821 (*Sheldon*, *J.*, concurring in part and dissenting in part). Thus, Judge Sheldon argued that the case should be remanded to the trial court for a hearing on the merits of the defendant's motion. See id., 823 (*Sheldon*, *J.*, concurring in part and dissenting in part).

The defendant then petitioned for certification to appeal to this court on whether he had raised colorable claims that his sentence was imposed in an illegal manner because (1) the sentencing judge was obligated to order a competency examination but failed to do so, and (2) he was incompetent at the time he was sentenced. We granted certification, limited to the issue of whether "the Appellate Court correctly determine[d] that the trial court did not have jurisdiction over the

defendant's motion to correct an illegal sentence on the ground that the motion, on its face, did not raise a colorable claim that the defendant was incompetent at the time of his sentencing . . . ."[3] *State* v. *Ward*, 334 Conn. 911, 221 A.3d 448 (2020).

Whether the trial court had subject matter jurisdiction over the defendant's motion to correct an illegal sentence is a question of law, and our review is plenary. See, e.g., *State* v. *McCleese*, 333 Conn. 378, 386, 215 A.3d 1154 (2019). We consistently have held "that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . [But] the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence." (Internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 778, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). After this occurs, the trial court has jurisdiction to modify or vacate the criminal judgment if the legislature or the state constitution grants continuing jurisdiction. See id. Additionally, the trial court retains jurisdiction to modify or vacate a judgment to the extent provided at common law. See id. As one example, at common law, the trial court maintained jurisdiction to correct illegal sentences after the defendant has been committed to the custody of the Commissioner of Correction. See id., 778–79. Practice Book § 43-22 codifies this common-law exception. See id., 779. That section provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other

[3] We did not grant certification on the issue of whether the sentencing judge was obligated to sua sponte order a competency examination. Accordingly, on remand, the defendant is entitled to an evidentiary hearing only on the merits of his claim that he was incompetent at the time he was sentenced.

disposition made in an illegal manner." Practice Book § 43-22.

Because the scope of Practice Book § 43-22 is limited to the court's common-law jurisdiction to consider a defendant's claim, the claim must challenge the legality of a sentence and may not challenge "what transpired during the trial or on the underlying conviction." (Internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 779. "[F]or the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Emphasis omitted; internal quotation marks omitted.) Id.

In *State* v. *Parker*, 295 Conn. 825, 992 A.2d 1103 (2010), this court made clear that, because our rules of practice cannot expand the trial court's jurisdiction, and because Practice Book § 43-22 codifies common law, a trial court's authority to entertain a motion to correct either "an illegal sentence" or "a sentence imposed in an illegal manner" derives from the court's common-law authority to "substitute a valid sentence" for an "invalid sentence . . . ." Id., 835. In *Parker*, we "directly address[ed]" for the first time whether, in fact, the trial court had jurisdiction under our common law to entertain a defendant's motion to correct on the ground that "his sentence was imposed in an illegal manner." Id., 833. Our review of that issue, in light of a split among the lower courts, led us to clarify that the common law authorized the court to correct both illegal sentences and sentences imposed in an illegal manner. Id., 837. "Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on

accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . This . . . category reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Citation omitted; internal quotation marks omitted.) Id., 839.[4]

Because of the limited nature of the court's jurisdiction, we more recently have explained that the trial

[4] We noted in *Parker*, however, that the category of sentences imposed in an illegal manner does "not encompass rights or procedures subsequently recognized as mandated by federal due process . . . [or] procedures mandated by state law that are intended to ensure fundamental fairness in sentencing, which, if not followed, could render a sentence invalid." (Citations omitted.) *State* v. *Parker*, supra, 295 Conn. 839–40.

The state argues that we decided *Parker* incorrectly because the common law did not provide the trial court with jurisdiction to correct sentences imposed in an illegal manner after the defendant began serving his or her sentence, and, thus, the defendant's claim falls outside the scope of Practice Book § 43-22. Although the state does not explicitly ask us to overrule *Parker*, that is, in essence, its argument. "Our determination of whether we should overrule a prior decision is guided by the doctrine of stare decisis, which counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Bischoff*, 337 Conn. 739, 762, A.3d (2021). "While stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification. . . . Such justifications include the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Citation omitted; internal quotation marks omitted.) *Sepega* v. *DeLaura*, 326 Conn. 788, 798–99 n.5, 167 A.3d 916 (2017). Although we appreciate the state's comprehensive treatment of this question in its brief, because *Parker* is of relatively recent vintage, and because the state has not identified cogent reasons why permitting our trial courts, postsentencing, to entertain a defendant's claim that his sentence was imposed in an illegal manner will result in an unworkable scheme or one that will unduly prejudice the state, we decline the state's implicit request that we overrule this precedent.

court has jurisdiction over a motion to correct only if the defendant raises "a *colorable claim* within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence." (Emphasis added; internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 783. In deciding whether the trial court in the present case had jurisdiction to entertain the defendant's motion, it is useful to survey our case law regarding what constitutes a "colorable claim" as it concerns a challenge to the validity or legality of a sentence. The parties take different views.

The defendant argues that "the colorable claim" requirement can be interpreted in three ways, which he claims this court has applied inconsistently: (1) the claim plausibly challenges the sentence or sentencing proceedings but not the conviction; see id., 784; (2) the claim plausibly will be decided on the merits in the movant's favor; see *State* v. *McCleese*, supra, 333 Conn. 378; or (3) assuming the merits are reached and decided in the movant's favor, it is plausible that a sentence correction will be required. See *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016). The defendant contends that only the first interpretation is correct, requiring the court to consider only the legal claim alleged and not the factual allegations or evidence attached in support of the motion to correct. The state disagrees, arguing that, to determine whether a claim is colorable, a court must examine whether the defendant has alleged sufficient facts to create a possibility that a factual basis exists to establish the merits of the defendant's claim, not whether the defendant has merely raised a claim that possibly challenges the sentence.[5]

[5] Alternatively, the state argues that, because the current state of the law is " 'muddied,' " we should adopt a "novel" and stricter jurisdictional framework. Because a court has jurisdiction over a motion to correct only when a sentence is actually illegal, the state suggests that the motion itself must demonstrate the illegality of the sentence on the merits to invoke the

A review of this court's jurisprudence on this issue belies the defendant's contention that this court inconsistently has interpreted and applied this "colorable claim" requirement. Rather, our case law holds that to raise a colorable claim within the scope of Practice Book § 43-22, the legal claim and factual allegations must demonstrate a possibility that the defendant's claim challenges his or her sentence or sentencing proceedings, not the underlying conviction. The ultimate legal correctness of the claim is not relevant to our jurisdictional analysis. This is consistent with the well established rule that "[t]he jurisdictional and merits inquiries are separate . . . ." *State* v. *Evans*, supra, 329 Conn. 784.

It was our Appellate Court, in an en banc ruling, that first employed the phrase "colorable claim" to measure the boundaries of a trial court's jurisdiction to decide a motion to correct. In *State* v. *Taylor*, 91 Conn. App. 788, 882 A.2d 682, cert. denied, 276 Conn. 928, 889 A.2d 819 (2005), the court explained that "[t]he relief of sentence correction is warranted when, for example, (1) the defendant's claim either raises issues relating to the legality of the sentence itself or to the legality of the sentencing procedure and (2) the allegations of the claim are in fact substantiated on a review of the merits of the claim." Id., 793. The court in *Taylor* held that the "first requisite, namely, raising a *colorable claim* within the scope of Practice Book § 43-22, for the relief afforded by that section," had not been met, and, therefore, "jurisdiction [was] lacking." (Emphasis added.) Id. The court emphasized that "[w]hether jurisdiction

trial court's jurisdiction. Under the state's proposed standard, the motion would serve as an offer of proof. If the proffer is insufficient to establish illegality, the motion must be dismissed; but if the proffer is sufficient to show illegality, the movant then must support the proffer with evidence. If illegality is established, then the trial court must correct the sentence. Because, as explained, our prior case law can be harmonized, we decline to create such a new framework.

to review the merits of a claim exists is not defined by the odds of victory on the merits of a case." Id. After examining the legal claim raised and the allegations asserted in support of it, the court in *Taylor* held that the trial court lacked jurisdiction because the defendant had not raised any claim challenging his sentence but, instead, had sought a new or amended presentence investigation report for use in his postjudgment application to the sentence review division of the Superior Court. See id., 793–94. As a result, the Appellate Court did not proceed to the second requisite, which involves the merits of the claim raised. Thus, in determining jurisdiction, the court did not mention the plausibility of the claim's merits.

Although the Appellate Court in *Taylor* injected the phrase "colorable claim" into its jurisprudence in considering motions to correct, the phrase is common to other measures of a trial court's jurisdiction, albeit the analysis of whether a "colorable claim" exists is necessarily unique to each context.[6] Importantly, in the con-

[6] For example, we have held that, under General Statutes § 22a-16, "standing . . . is conferred only to protect the natural resources of the state from pollution or destruction. . . . Accordingly, all that is required to invoke the jurisdiction of the Superior Court under § 22a-16 is a colorable claim, by any person [or entity] against any person [or entity], of conduct resulting in harm to one or more of the natural resources of this state. . . . Although it is true, of course, that the plaintiff need not prove its case at this stage of the proceedings . . . the plaintiff nevertheless must articulate a colorable claim of unreasonable pollution, impairment or destruction of the environment." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 432, 829 A.2d 801 (2003). In *Fort Trumbull Conservancy, LLC*, this court held that the plaintiff failed to raise a colorable claim under § 22a-16 because, although the complaint expressly challenged both the legality of the process pursuant to which the defendants adopted the development plan and the necessity of the demolition component of the plan, there were no allegations that these errors likely caused unreasonable harm to the environment "because it [was] not evident how the defendants' failure to follow certain procedural requirements in adopting the development plan or to consider alternatives to the demolition of buildings in the Fort Trumbull area [was] likely to cause such harm. Nor [was] it apparent what the nature of any such harm might be." Id., 433. In so holding, we did not consider the merits

text of motions to correct an illegal sentence, the Appellate Court's analysis of a "colorable claim" in *Taylor* was in line with the standard this court previously had applied to this point in *Parker* and is consistent with our more recent holding in *Evans*, both of which did not consider the merits in determining the existence of a colorable claim. Specifically, in *Parker*, in determining whether the trial court retained jurisdiction over the defendant's motion to correct, we began with the premise that, "if a court imposes an invalid sentence, it retains jurisdiction to substitute a valid sentence." *State* v. *Parker*, supra, 295 Conn. 835. Although we did not clearly articulate a detailed standard to apply in determining jurisdiction, we considered both the motion's legal claim and its factual allegations. See id., 837, 840–41. We first looked to whether the defendant had raised a legal claim that fell within the scope of the common-law rule. In his motion to correct, the defendant in *Parker* claimed that his sentence had been imposed in an illegal manner because "he had been deprived of an opportunity to review his presentence report and to address inaccuracies therein; and [his attorney] had failed to review the presentence report with him or to bring any inaccuracies in the report to the court's attention." Id., 840. We recognized that "due process precludes a sentencing court from relying on

of the claim but only whether the plaintiff claimed that the challenged conduct likely resulted in harm to the environment. Id., 432–33; see *Wrotnowski* v. *Bysiewicz*, 289 Conn. 522, 528, 958 A.2d 709 (2008) (holding that plaintiff lacked standing under General Statutes § 9-323 when he did not challenge "any act or conduct by the [defendant] that . . . interprets some statute, regulation or other authoritative legal requirement, applicable to the election process . . . or . . . any mandatory statute that the defendant has failed to apply or follow," regardless of merits of that claim (citation omitted; internal quotation marks omitted)); see also *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, 197 Conn. 554, 557 n.1, 499 A.2d 797 (1985) ("We emphasize that the question of standing is not an inquiry into the merits. A plaintiff may have standing and nevertheless lose his suit. Standing requires no more than a colorable claim of injury; a plaintiff ordinarily establishes his standing by allegations of injury.").

materially untrue or unreliable information in imposing a sentence." Id., 843. Thus, at face value, the defendant's legal claim—that the presentence report included inaccurate information—appeared to fit within the scope of Practice Book § 43-22. See id., 837.

Our analysis did not end there, however. We then considered the defendant's factual allegations to ensure that he was in fact challenging the legality of his sentence. See id., 847–52. The defendant in *Parker* did not advance any factual allegations that any specific information contained in the presentence report was false or that the trial court relied on any false information in determining his sentence. Id., 850. The factual allegations showed that the defendant was not challenging the trial court's reliance on false information in determining the sentence but, instead, focused on his counsel's failure to review the presentence report with him. See id., 847–48. We explained that these factual allegations, challenging his counsel's conduct at sentencing, were akin to a claim of ineffective assistance of counsel, which falls outside the scope of Practice Book § 43-22. See id., 850–52. This holding was not premised on the merits of the defendant's claim but on whether it raised a challenge to the sentencing proceeding itself. Even though we did not use the phrase "colorable claim," the standard we applied in *Parker* is essentially the same as the standard the Appellate Court had applied previously in *Taylor*: Based on the legal claim itself and on the allegations supporting it, did the defendant challenge his or her sentence or the sentencing procedure, and not the underlying conviction?

It was therefore no accident that this court in *Delgado* used the phrase "colorable claim," citing to *Taylor*. *State* v. *Delgado*, supra, 323 Conn. 810. *Delgado* involved a motion to correct a sentence imposed in an illegal manner, and, for the first time, we articulated the jurisdictional standard as requiring "the defendant [to raise]

a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence." (Internal quotation marks omitted.) Id.

Not until *Evans* did we provide greater guidance on what constitutes a colorable claim within the scope of Practice Book § 43-22: "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail. . . . The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . We emphasize, however, that this general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases . . . is considered in light of the common-law rule that, once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Thus, the presumption in favor of jurisdiction does not itself broaden the nature of the postsentencing claims over which the court may exercise jurisdiction in criminal cases . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 784. We then clarified that our jurisdictional analysis focuses on "whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction . . . ." Id., 784–85. In doing so, "we consider the nature of the specific legal claim raised therein." Id., 785. Thus, it is not the possibility of success

on the merits of the claim raised that creates jurisdiction but the possibility that the claim challenges the sentence and not the underlying conviction.

Our application of these legal principles in *Evans* supports our interpretation of this case law. In *Evans*, the defendant claimed in his motion to correct that his sentence was imposed in an illegal manner because it exceeded the relevant statutory limits under General Statutes (Rev. to 2011) §§ 21a-278 (b) and 21a-277 (a),[7] and "the fact triggering the mandatory minimum [sentence] was not found by a proper [fact finder] or admitted by the defendant . . . ." (Internal quotation marks omitted.) Id., 775. Looking at the specific legal claim raised, including the allegations offered in support, this court determined that the defendant was not challenging his conviction under § 21a-278 (b) but, rather, was "seek[ing] resentencing, claiming that § 21a-278 (b) merely enhances the penalty available under § 21a-277 (a) . . . ." Id., 785. Although we noted that, given the lack of case law regarding these statutes, "the defendant's interpretation of the narcotics statutory scheme [was] sufficiently plausible to render it colorable for the purpose of jurisdiction over his motion," we concluded that "the fact that the defendant does not ask us to disturb his conviction under § 21a-278 (b), but merely seeks remand for resentencing, renders [the] case distinguishable from [cases challenging the conviction] . . . ." (Citation omitted.) Id., 786. "Because this claim [was] colorably directed to the validity of the sentence rather than the underlying conviction, we conclude[d] that the trial court properly exercised jurisdiction over the defendant's motion to correct." Id., 787–88. Thus, in *Evans*, our determination of colorability was based on the possibility that the defendant's claim fell within the scope of Practice Book § 43-22—in other words,

[7] Hereafter, all references to §§ 21a-277 and 21a-278 are to the 2011 revision of the General Statutes.

whether the claim possibly challenged the defendant's sentence or sentencing procedure. Contrary to the defendant's contention, in so concluding,[8] we examined the factual allegations to verify that the defendant in fact was challenging his sentence and not his conviction, consistent with our analysis in both *Parker* and *Taylor*. Although this court only recently began using the phrase "colorable claim," our use of that phrase in no way alters the applicable standard for determining jurisdiction on a motion to correct.

The state does not dispute our interpretation of *Evans*. Both parties, however, argue that *Evans* is inconsistent with *Delgado*, as well as with our more recent analysis

[8] In *Evans*, we acknowledged that the dissent in *State* v. *McGee*, 175 Conn. App. 566, 586, 168 A.3d 495 (*Bishop*, *J.*, dissenting), cert. denied, 327 Conn. 970, 173 A.3d 953 (2017), thoughtfully noted that our case law lacks clarity regarding when a motion to correct an illegal sentence challenges a sentence rather than a conviction, especially when the claim involves double jeopardy violations for multiple punishments. *State* v. *Evans*, supra, 329 Conn. 781 n.13. To address this lack of clarity, Judge Bishop "suggested revisions to the case law governing motions to correct, including the imposition of time limitation[s] and limiting vacation of convictions to cases in which 'it is obvious from the criminal information and verdict that convictions violate the protection against double jeopardy,' and 'that such remedial action can only be taken before a defendant has commenced serving his or her sentence.' " Id., quoting *State* v. *McGee*, supra, 595–98 (*Bishop*, *J.*, dissenting). In *Evans*, however, we decided to "leave the specific issues identified by Judge Bishop [for] another day . . . [but] acknowledge[d] that the demarcation between conviction and sentence may not always be crystal clear, particularly in cases presenting [double jeopardy] issues, and may invoke the presumption in favor of jurisdiction in cases in which the defendant has made a colorable—however doubtful—claim of illegality affecting the sentence, rather than the underlying conviction." (Emphasis omitted.) *State* v. *Evans*, supra, 781 n.13.

Both the defendant and the state in the present case rely on Judge Bishop's dissent in *McGee* to support their respective arguments that we should clarify or overhaul our case law regarding motions to correct. Judge Bishop's dissent, however, involved the blurred lines between sentencing proceedings and trial proceedings, especially in relation to double jeopardy issues. He did not identify any confusion regarding this court's analysis of whether a defendant has raised a colorable claim under Practice Book § 43-22. Thus, we need not address the specific issues Judge Bishop identified.

in *McCleese*. According to the defendant, our holding in *Delgado* conflicts with *Evans* because, although we did not analyze the effect of our adoption of the phrase "colorable claim" in *Delgado*, our analysis made clear that, to be colorable, the defendant had to show it was possible that his sentence would be corrected. In contrast, according to the state, *Delgado* conflicts with *Evans* because, in applying the "colorable claim" standard, this court considered not only whether the claim was challenging the legality of the sentence, and not the validity of the conviction, but also whether there was a possibility that the defendant could succeed on the merits of the claim. *Delgado* and *Evans*, however, can be harmonized.

In *Delgado*, the defendant filed a motion to correct, claiming that his sentence of sixty-five years of imprisonment without parole was illegal under the United States Supreme Court's juvenile sentencing cases; see *State* v. *Delgado*, supra, 323 Conn. 802–805; including *Miller* v. *Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which requires "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 806. In *Delgado*, the trial court dismissed the motion for lack of jurisdiction on the ground that "the defendant was not sentenced pursuant to a mandatory sentencing scheme . . . ." Id., 809 n.6. After the trial court's judgment, the legislature enacted Public Acts 2015, No. 15-84 (P.A. 15-84), codified as amended at General Statutes § 54-125a, which provided the defendant with the possibility of parole. Id., 807.

In *Delgado*, we explained that, at the time the trial court ruled on the defendant's motion to correct, the

trial court "incorrectly concluded that it lacked jurisdiction over the defendant's motion to correct at that time. The motion, at that point, raised a viable claim by alleging that a sentence of life imprisonment without parole had been imposed without consideration of youth related mitigating factors." Id., 809 n.6. Nevertheless, we ultimately upheld the trial court's dismissal of the motion to correct on the alternative ground that, because of the change in the law, the defendant's sentence no longer was illegal under *Miller*, and, thus, the claim fell outside the scope of Practice Book § 43-22. Id., 816.

Specifically, we explained: "Because [federal law does] not require a trial court to consider any particular mitigating factors associated with a juvenile's young age before imposing a sentence that includes an opportunity for parole, the defendant can no longer allege, after the passage of P.A. 15-84, that his sentence was imposed in an illegal manner on the ground that the trial court failed to take these factors into account. Such an allegation is an essential predicate to the trial court's jurisdiction to correct the sentence. An allegation that the court failed to consider youth related factors before imposing a sentence of life with parole is not sufficient to establish a jurisdictional basis for correcting a sentence. . . . We therefore conclude that the defendant has not raised a colorable claim of invalidity that, if decided in his favor, would require resentencing." (Citations omitted; emphasis omitted.) Id., 812–13. "In view of the . . . established rule that a sentencing court's jurisdiction to correct a sentence is limited to sentences that are invalid . . . we conclude that the trial court no longer possesses jurisdiction over the defendant's motion to correct." (Citations omitted.) Id., 813.

Subsequently, in *Evans*, we addressed our holding in *Delgado*: "[O]ur recent decision in [*Delgado*] appeared to analyze a motion to correct an illegal sentence in

jurisdictional terms when subsequent legal developments affected its merits. . . . We emphasize that *Delgado* does not stand for the proposition that the merits of a motion to correct . . . are inextricably intertwined with the court's jurisdiction over the motion. Rather, we understand *Delgado* to be, in essence, a mootness decision, insofar as the subsequent statutory changes afforded the defendant all of the relief to which he was entitled from his pending motion to correct." (Citations omitted.) *State* v. *Evans*, supra, 329 Conn. 787–88 n.16. Thus, in *Evans*, we explained that the statutory amendment at issue negated the defendant's challenge to the sentence, and, thus, the defendant was no longer challenging an illegal sentence. See *State* v. *McCleese*, supra, 333 Conn. 414. We explained that, if a change in the law renders an illegal sentence legal, then the jurisdictional prerequisite for correcting an illegal sentence—that the claim challenges the sentence, not the conviction—is missing, and, thus, the claim falls outside the scope of Practice Book § 43-22. See *State* v. *Boyd*, 323 Conn. 816, 820–21, 151 A.3d 355 (2016) (relying on *Delgado* to hold that court lacked jurisdiction because "the defendant [could] no longer allege, after the enactment of P.A. 15-84, that his sentence was imposed in an illegal manner on the ground that the trial court failed to take [the *Miller*] factors into account"). As a result, the defendant's claim in *Delgado* did not fall within the scope of § 43-22, rendering the *outcome* akin to mootness. We did not consider the possibility of success on the merits of the defendant's claim. Rather, we considered the specific legal claim and allegations and held that there no longer was a possibility that the defendant could challenge the legality or validity of his sentence. See *State* v. *Delgado*, supra, 323 Conn. 812.

Neither does our subsequent holding in *McCleese* conflict with *Evans* or *Delgado*. In *McCleese*, the defendant sought to overturn our holding in *Delgado* by raising

various constitutional challenges to P.A. 15-84 that, if successful, would have required this court to hold that P.A. 15-84 did not replace the defendant's illegal sentence with a legal sentence. See *State* v. *McCleese*, supra, 333 Conn. 387, 409. This would have created a possibility that the defendant could challenge the legality of his sentence. See id., 386–87. Because of the unique nature of the defendant's claim, we had to consider the merits of the defendant's constitutional challenges to P.A. 15-84 to determine whether a colorable claim falling under the scope of Practice Book § 43-22 existed. Because the claim raised in the present case is distinguishable from the unique claims raised in *McCleese*, we do not consider our analysis in *McCleese* to depart from the standard applied in *Evans*.

Our most recent case on this issue supports our conclusion that *Delgado* and *McCleese* do not alter or conflict with the test for colorability established in *Parker* and *Evans*. In *State* v. *Smith*, 338 Conn. 54, 256 A.3d 615 (2021), the defendant's motion to correct involved a claim regarding cumulative convictions that violate the double jeopardy clause, thereby arguably affecting the defendant's sentence. See id., 58. We held that, "under *Evans*, when cumulative convictions affect a sentence in any manner, the trial court has jurisdiction to entertain a motion to correct an illegal sentence."[9] (Emphasis omitted.) Id., 63. Relevant to the issue of colorability, we explained, in reaching this conclusion, that this court may rely on the presumption in favor of jurisdiction when "the defendant has made a colorable—*however doubtful*—claim of illegality affecting the sentence, rather than the underlying conviction." (Emphasis altered; internal quotation marks omitted.)

[9] In *Smith*, we questioned the validity of our holding in *Evans* that a challenge to cumulative convictions constitutes a challenge to the sentence, not the conviction, but we did not question the validity of the colorability test applied in *Evans*. See *State* v. *Smith*, supra, 338 Conn. 62–63.

Id., 62–63. The emphasized language demonstrates that jurisdiction is not based on the possibility of success on the merits of the defendant's claim; rather, what must be colorable is that the claim challenges the legality of the sentence, not the conviction. In *Smith*, however, the defendant sought only to modify his conviction, not his sentence. See id., 58. Specifically, he claimed that his sentence was illegal because the court merged his convictions of felony murder and manslaughter instead of vacating his conviction on the manslaughter charge. Id. Thus, we held that the trial court lacked jurisdiction. Id., 64.

Decisions of our Appellate Court consistently have applied this analysis. See *State* v. *Boyd*, 204 Conn. App. 446, 455, 253 A.3d 988 (considering both legal claim and factual allegations in determining that jurisdiction was lacking and holding that, although "the motion to correct an illegal sentence nominally challenges the sentencing proceedings," factual allegations showed that defendant was challenging his conviction), cert. denied, 336 Conn 951, 251 A.3d 617 (2021); *State* v. *Battle*, 192 Conn. App. 128, 134–35, 217 A.3d 637 (2019) (considering legal claim and factual allegations in concluding that defendant brought colorable claim challenging his sentence but not addressing possibility of success on merits), aff'd, 338 Conn. 523, A.3d (2021); *State* v. *Mukhtaar*, 189 Conn. App. 144, 149–51, 207 A.3d 29 (2019) (looking at factual allegations in holding that trial court lacked jurisdiction because defendant was challenging his conviction, not his sentence); *State* v. *Walker*, 187 Conn. App. 776, 788, 204 A.3d 38 (2019) ("[i]n determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein" (internal quotation marks omitted)), cert. denied, 331 Conn. 914, 204 A.3d 703 (2019); *State* v.

Antwon W., 179 Conn. App. 668, 675–76, 181 A.3d 144 (concluding, after looking at both legal claim and allegations, that "[t]he defendant's motion did not merely raise a collateral attack on the judgment of conviction but, on its face, attacked the manner in which his sentence was imposed"), cert. denied, 328 Conn. 924, 180 A.3d 965 (2018). Notwithstanding all of this recent authority, a majority of the Appellate Court panel in the present case relied on the older decision of *State* v. *Jason B.*, 176 Conn. App. 236, 244–45, 170 A.3d 139 (2017), in holding that, for a trial court to have jurisdiction, a defendant must establish the possibility that he could succeed on the merits of his claim. See *State* v. *Ward*, supra, 193 Conn. App. 807.

In *Jason B.*, the Appellate Court summarized our holding in *Delgado* as requiring that, "for the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a *colorable claim that his sentence, in fact, was imposed in an illegal manner*. A colorable claim is '[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law).' Black's Law Dictionary (10th Ed. 2014) p. 302. For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists . . . such as, in the present context, *that the sentencing court relied on inaccurate information or considerations that were outside of the record*." (Citation omitted; emphasis added.) *State* v. *Jason B.*, supra, 176 Conn. App. 244–45. In other words, the court in *Jason B.* required that the defendant establish the possibility that he could succeed on the merits of his claim, rather than the possibility that he was challenging his sentence or sentencing procedure.

Although the court in *Jason B.* was correct as to the definition of a colorable claim, as explained, our holding in *Delgado* does not require the defendant to show that he raised a claim that possibly could succeed on the merits. Rather, he must raise a claim that possibly falls within the scope of Practice Book § 43-22—that is, that it challenges the sentence or sentencing procedure, not the conviction. In determining if the defendant raised such a claim, we consider both the legal claim raised and the factual allegations, but, as Judge Sheldon indicated, the defendant is required to show only "that there is a possibility, rather than a certainty" that the defendant challenges the sentence or sentencing procedure. (Internal quotation marks omitted.) *State* v. *Ward*, supra, 193 Conn. App. 817 (*Sheldon*, *J.*, concurring in part and dissenting in part).

In the present case, the defendant claimed in his motion to correct that the trial court imposed his sentence in an illegal manner because he was incompetent at the time of sentencing. It is well established that the defendant had both a statutory and constitutional right to be tried and sentenced while he was competent. See, e.g., *State* v. *Ross*, 269 Conn. 213, 270, 849 A.2d 648 (2004); *State* v. *DeAngelis*, 200 Conn. 224, 242, 511 A.2d 310 (1986); see also General Statutes § 54-56d (a). A claim that he was incompetent at the time of sentencing clearly challenges "the character of the procedure which [led] to the imposition of [the] sentence," not his underlying criminal conviction. (Internal quotation marks omitted.) *State* v. *Parker*, supra, 295 Conn. 839. Thus, at least nominally, the defendant raised a claim that falls within the scope of Practice Book § 43-22. See *State* v. *Mukhtaar*, supra, 189 Conn. App. 150 n.6 ("[w]e note that a claim regarding a defendant's competency at the sentencing proceeding . . . would fall within the jurisdiction of the trial court for the purpose of a motion

to correct an illegal sentence filed pursuant to Practice Book § 43-22" (citations omitted)).

Additionally, the factual allegations and evidence the defendant attached in support of his motion make clear that his motion raised a colorable claim challenging his sentencing. At the time of sentencing, both the prosecutor and defense counsel referred to his psychiatric background, including his diagnosis of schizophrenia. The defendant alleged that the police report, psychiatric evaluation, and his records from the department, although not part of the record at sentencing,[10] established his lack of competence. The police report and psychiatric evaluation show that the defendant previously had suffered from hallucinations and had attempted suicide on multiple occasions. The report also stated that the defendant had not received treatment for his mental health for many years, contributing "to an increased likelihood of worse symptoms, more chronic symptoms and/or more frequent exacerbation of symptoms." The records from the department show that the defendant refused to take his medication and suffered from auditory hallucinations approximately nine months before sentencing. Once he started taking his medication again, he continued to report having paranoid thought processes and ideas. The defendant

[10] We note that, before the Appellate Court, the state argued that "the defendant's claim that he was incompetent when he was sentenced, as evidenced by information that was never before the sentencing court, does not fall within the purview of Practice Book § 43-22 because the claim does not relate to any alleged error on the part of the sentencing court. . . . [Specifically], the state argues that without evidence that the sentencing court knew of the information in the department's records at the time of sentencing, the defendant could not have been sentenced in an illegal manner." *State* v. *Ward*, supra, 193 Conn. App. 820 n.2 (*Sheldon*, *J.*, concurring in part and dissenting in part). The majority did not address this argument, and Judge Sheldon specifically rejected it. The state has not advanced this argument before this court. Additionally, this argument relates to the merits of the defendant's claim, not to the colorability of that claim. Thus, we do not address it.

again missed several doses of his medication in the two months leading up to his sentencing. Less than two weeks before his sentencing, the defendant alleged and the records show that he did not take his medication and was hearing voices. The records also show that the defendant misstated his sentence multiple times in various ways both before and after his sentencing.

Relying on these facts, the defendant argued in his motion to correct: "[T]he defendant's mental health history, his repeated failure to maintain his medication regimen, his continued auditory hallucinations and paranoia, and his mistaken belief regarding his actual sentence throughout the plea and sentencing processes [demonstrated] that he did not understand his plea or sentencing proceedings and was incompetent at both. The issue here, however, is his sentencing, and, given his incompetence at the time, it was imposed in an illegal manner."

Although the defendant alleged that he was incompetent at the plea proceedings and relied on records regarding his mental health from before the plea proceedings, the allegations and evidence make clear that the defendant was raising a challenge to the sentencing procedure, not his conviction. The defendant merely relied on his lengthy and ongoing mental health problems to support his claim that he was incompetent at the time of sentencing. He has provided evidence that he suffered from mental health problems in the weeks leading up to and following his sentencing. Whether such evidence is sufficient to establish the merits of the defendant's claim that he was incompetent at the time of sentencing is a different question and not relevant to our analysis. The factual allegations and evidence offered in support of the defendant's claim suffice to show a possibility that a factual basis necessary to establish jurisdiction exists—that he challenges the

legality of his sentence, not his conviction.[11] Accordingly, we conclude that the Appellate Court improperly affirmed the trial court's dismissal of the defendant's motion to correct.

Nevertheless, the state argues in the alternative that, even if the trial court had jurisdiction, we should affirm the Appellate Court's judgment because the trial court correctly determined the merits of the defendant's claim. Specifically, the state argues that the trial court decided the merits because it stated in its memorandum of decision that the "sentencing procedure . . . complied with all constitutional and statutory requirements," and that the defendant was presumed competent.

Contrary to the state's contention, the trial court never explicitly ruled on the merits of the defendant's claim and made no findings as to whether the proffered evidence overcame the presumption of competency. The trial court's memorandum of decision was limited to the issue of jurisdiction. Thus, we agree with Judge Sheldon that the defendant is entitled to a hearing on

[11] The Appellate Court majority concluded that the defendant did not establish a sufficient factual basis necessary to establish that jurisdiction exists because these facts did not raise the possibility that the defendant was incompetent at the time of sentencing. *State* v. *Ward*, supra, 193 Conn. App. 812. More specifically, the majority determined that the defendant did not allege sufficient facts to overcome the presumption of competency under § 54-56d, reasoning that the reports from the department were dated from before and after sentencing and, thus, did not show the defendant's mental state at the time of sentencing. See id., 812–13. Additionally, the majority determined that the defendant's misunderstanding of the details of his plea was not sufficient to overcome the presumption of competency. See id., 813. We need not address whether the alleged facts are sufficient to overcome the presumption of competency, which goes to the merits of the defendant's claim. For the same reason, we need not address the state's argument that the defendant failed to raise a colorable claim because he did not allege or establish that his failure to take medication could be linked to his competence at the time of sentencing. These are merits issues that, presumably, will be decided on remand.

the merits of his motion, and the case must be remanded for such a hearing. See *State* v. *Bozelko*, 154 Conn. App. 750, 765–66, 108 A.3d 262 (2015).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court with direction to conduct a hearing on the merits of the defendant's motion to correct.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DANIEL RICHARD STREIT
(SC 20336)

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

Syllabus

Convicted of manslaughter in the first degree in connection with the stabbing death of the victim, the defendant appealed, claiming that the trial court abused its discretion by precluding him from introducing evidence, in support of his self-defense claim, that the victim had searched a retail website for weapons in the days preceding the stabbing. The defendant and the victim had been involved in two fights the week before the stabbing, and, after each altercation, the victim threatened to kill the defendant. The stabbing at issue occurred a few days later, after the victim approached the defendant. The defendant filed a motion in limine, seeking to introduce into evidence a forensic analysis of data extracted from the victim's cell phone showing that the phone had been used to conduct certain online searches for weapons between the first fight and the stabbing. The court denied the motion in limine, concluding that, because there was no evidence that the victim had purchased any of the items he searched for or that the defendant was aware of the victim's search activity at the time of the stabbing, the search history was not relevant to prove the defendant's state of mind with respect to whether his fear of the victim was subjectively and objectively reasonable under the provisions (§ 4-4 (a) (2) and (b)) of the Connecticut Code of Evidence permitting an accused in a homicide case to introduce evidence of the victim's violent character under certain circumstances. The court further concluded that the search history was not admissible to prove that the victim was the initial aggressor because the victim's act of searching for weapons did not result in a criminal conviction. On the defendant's

appeal from the judgment of conviction, *held* that the trial court did not abuse its discretion in denying the defendant's motion seeking to introduce evidence of the victim's online searches for weapons: a defendant in a homicide case, after laying a proper foundation that he acted in self-defense, may introduce evidence of the victim's violent character to prove that the victim was the aggressor, regardless of whether such character evidence had been communicated to the accused prior to the homicide, and such violent character can be proven by opinion or reputation testimony, or evidence of the victim's conviction of violent crimes, but not by specific violent acts not resulting in a criminal conviction; in the present case, the defendant's lack of awareness of the victim's online searches rendered them irrelevant for purposes of establishing the defendant's state of mind because they could not have impacted the defendant's subjective belief that he needed to resort to deadly physical force, and the defendant did not claim that the searches themselves constituted violent crimes; moreover, the defendant could not prevail on his claim that the search history was admissible as a prior act of misconduct under the relevant provision (§ 4-5 (c)) of the Connecticut Code of Evidence, because, even if the searches were evidence of prior misconduct admissible to prove the victim's state of mind, § 4-5 (c) does not apply to evidence of the victim's violent character in homicide cases, which is specifically covered by § 4-4 (b), and § 4-4 trumps the more general rules set forth in § 4-5 regarding the admissibility of specific act evidence.

Argued April 29—officially released October 22, 2021*

Procedural History

Two part substitute information charging the defendant, in the first part, with manslaughter in the first degree and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of New Haven, where the first part of the information was tried to the jury before *Vitale*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Clifford*, *J.*, on a plea of guilty as to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Gary A. Mastronardi, for the appellant (defendant).

* October 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Karen Roberg*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. In this appeal, we consider whether evidence that the victim had conducted Internet searches for dangerous weapons in the days preceding the altercation at issue is admissible in support of a criminal defendant's claim of self-defense. The defendant, Daniel Richard Streit, appeals[1] from the judgment of conviction, rendered after a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). On appeal, the defendant claims that the trial court abused its discretion in determining that evidence that the victim had searched an Internet shopping site for weapons in the days leading up to the altercation in which the defendant fatally stabbed the victim was both irrelevant and not admissible as uncharged misconduct evidence under § 4-5 (c) of the Connecticut Code of Evidence.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. At all relevant times, the defendant lived in New Haven

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

[2] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) General rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

* * *

"(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. . . ."

with his girlfriend, Kathleen O'Dwyer. The defendant was also dating Kathryn Wallace, who was the "on-again, off-again" girlfriend of Keith Wylie, the victim. After the victim broke into Wallace's home in September, 2017, which resulted in the issuance of a protective order and second degree breach of peace charges against him, Wallace no longer felt safe at her home and moved in with O'Dwyer and the defendant.

On the morning of October 3, 2017, the defendant and the victim engaged in a fistfight near the APT Foundation (clinic), a methadone clinic on Congress Avenue in New Haven where Wallace was participating in a treatment program. After the fight was broken up, the victim threatened to kill the defendant. The defendant and Wallace, who was also involved in the fight, returned to their residence, where O'Dwyer photographed their injuries—the defendant had cuts and scrapes, and Wallace had a black eye. Several days later, the victim and the defendant fought again in front of the clinic. After this second fight was broken up, the victim, who had a reputation among the participants in the treatment program as a violent and aggressive person, once again threatened to kill the defendant. The defendant previously had expressed animosity toward and a desire to "get" the victim, or to "kick his ass," because of the victim's physically abusive behavior toward Wallace when they were dating.

Several days later, on Saturday, October 7, 2017, the defendant and Wallace walked to the clinic. While Wallace went inside, the defendant, who was wearing latex gloves on both hands and carrying a Smith & Wesson "special ops" knife, waited in front of the clinic. The victim arrived approximately thirty minutes later, parked his car, exited his vehicle, and walked directly toward the defendant. According to the defendant's statement to the police, the victim told him that they were " 'going to finish this right now.' " The defendant

then lunged at the victim, and a fight ensued between them on the sidewalk in front of the clinic; during the fight, there was a struggle over the knife, and the defendant stabbed the victim seventeen times, causing nine significant wounds to the victim's neck, torso, and right arm that resulted in his death. During the altercation, the defendant was yelling for someone to pull the victim off of him. Once the defendant was able to, he and Wallace ran from the scene, with the defendant ripping off his gloves and the blood-stained Spiderman sweatshirt that he had been wearing and discarding them while running. A few minutes later, New Haven police officers responded to a call about the fight and apprehended the defendant and Wallace nearby on York Street. The police arrested the defendant, who had visible facial and hand injuries at that time. When arrested, the defendant stated that he had no regret for what had happened and that the victim "got what he deserved."

Subsequently, the state charged the defendant with manslaughter in the first degree, to which he pleaded not guilty, and the case was tried to a jury. At trial, the defendant sought to establish that he had acted in self-defense.[3] In support of his claim of self-defense, the defendant filed a motion in limine seeking permission to offer into evidence an "[e]xtraction [r]eport," generated using forensic software called Cellebrite, that a forensic examiner had used to examine the victim's cell phone, which had been seized by the police. The extraction report indicated that, between October 3 and the fatal altercation on October 7, the victim's cell phone had been used to search a shopping website, eBay, for weapons, including stun guns, mace guns, and brass knuckle gloves. The defendant argued that these searches, conducted after the victim had threatened to kill the defen-

[3] At trial, the state's theory of the case was that the defendant had "a bruised ego" from losing the fights earlier in the week that had led him to "attack" the victim.

dant on October 3, were relevant to his claim of self-defense—even though he was not personally aware of them—as evidence (1) of the state of mind of both the victim and the defendant with respect to the subjective and objective reasonableness of the defendant's fear of the victim, and (2) that the victim was the initial aggressor.[4] As a basis for admitting the extraction report, the defendant cited §§ 4-1, 4-2 and 4-4 (a) (2) of the Connecticut Code of Evidence[5] and the Massa-

[4] The defendant argued that, although he had not been aware of the victim's Internet search for weapons, the evidence could be "highly relevant in helping the jury to determine whether the defendant's story of self-defense [was] truthful. The jury's knowledge that [the victim] was conducting searches for various types of weapons adds significant credence to the claim that his escalating and focused hostility toward the defendant culminated in his aggressive conduct on [October 7, 2017]." The defendant also argued that, not only was the search evidence relevant to the victim's intent and state of mind, but it would also corroborate the testimony of a defense witness, who was anticipated to—and did—reveal that the victim had threatened to kill the defendant.

[5] Section 4-4 of the Connecticut Code of Evidence provides in relevant part: "(a) Character evidence generally. Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

* * *

"(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

* * *

"(b) Methods of proof. In all cases in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion. *In cases in which the accused in a homicide or criminal assault case may introduce evidence of the violent character of the victim, the victim's character may also be proved by evidence of the victim's conviction of a crime of violence.*

"(c) Specific instances of conduct on cross-examination of a character witness. A character witness may be asked, in good faith, on cross-examination about specific instances of conduct relevant to the trait of character to which the witness testified to test the basis of the witness' opinion." (Emphasis added.)

chusetts Supreme Judicial Court's decision in *Commonwealth* v. *Carey*, 463 Mass. 378, 974 N.E.2d 624 (2012). The defendant also sought an "extension" of this court's decision in *State* v. *Miranda*, 176 Conn. 107, 405 A.2d 622 (1978). He further relied on his federal and state constitutional rights to present a defense. The state objected to the defendant's motion in limine.

After a hearing, the trial court agreed with the state's objection and denied the defendant's motion in limine. Considering the defendant's claims of relevance in the context of the well established subjective-objective standard that governs claims of self-defense under General Statutes § 53a-19 (a);[6] see, e.g., *State* v. *O'Bryan*, 318 Conn. 621, 632–33, 123 A.3d 398 (2015); the trial court concluded that the proffered evidence was outside the "parameters specific to issues regarding self-defense and the defense of others with regard to past conduct related to the complainant or decedent, vis-à-vis the defendant in such a case." Assuming the authenticity of the searches and that the victim was the person who had conducted them, the trial court first observed that there was no evidence "that indicated anything was actually purchased" as a result of the Internet searches. Emphasizing that there was no evidence that the defendant was aware of the Internet searches or that any of the weapons he searched for were found on the victim's

[6] When a defendant raises a claim of self-defense, § 53a-19 (a) requires the state to disprove beyond a reasonable doubt that the defendant "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. . . . We repeatedly have indicated that the test a jury must apply in analyzing the second requirement, i.e., that the defendant reasonably believed that deadly force, as opposed to some lesser degree of force, was necessary to repel the victim's alleged attack, is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *O'Bryan*, 318 Conn. 621, 632, 123 A.3d 398 (2015).

person or at the crime scene, the court reasoned that the evidence of the searches had a "clear" prejudicial effect insofar as they were not relevant to the defendant's state of mind for purposes of admissibility under § 4-4 (b) of the Connecticut Code of Evidence. The trial court further determined that the searches were not admissible to prove that the victim was the initial aggressor because, under the line of cases following *State* v. *Miranda*, supra, 176 Conn. 107, such as *State* v. *Whitford*, 260 Conn. 610, 799 A.2d 1034 (2002), evidence of specific acts of violence not resulting in a criminal conviction may not be used to establish a victim's violent character.[7] Ultimately, the trial court determined that the "jury ha[d] . . . ample evidence to consider as to the nature of the relationship between the defendant and [the victim] sufficient to [allow the defendant to] make the argument with regard to his subjective state of mind and his fear of [the victim]. The court conclude[d] that [the Internet search evidence was] not admissible or relevant or material to any issue the jury must decide, and, even if [the evidence had] some slight relevancy, it ha[d] the potential to confuse or arouse the jury [such] that any probative value [was] outweighed by its prejudicial effect."[8]

Thereafter, the jury returned a guilty verdict on the manslaughter charge; the defendant subsequently pleaded guilty to part B of the information seeking an enhanced penalty pursuant to General Statutes § 53a-40 (a) on the ground that he was a persistent dangerous felony

[7] Citing the Appellate Court's decision in *State* v. *Byrd*, 136 Conn. App. 391, 397, 44 A.3d 897, cert. denied, 306 Conn. 906, 52 A.3d 732 (2012), which held that a victim's conviction of criminal possession of a firearm by itself is not a crime of violence, the trial court further stated: "It's hard to say, under these circumstances, [that] a search on eBay, [which is] not even a conviction, would be relevant to the [victim's] state of mind when the defendant was not even aware of it."

[8] The trial court subsequently denied the defendant's motion to reconsider the denial of the motion in limine.

offender.[9] After denying the defendant's motions for a new trial and a judgment of acquittal notwithstanding the verdict, the trial court rendered judgment of conviction in accordance with the verdict and plea and sentenced the defendant to a total effective sentence of thirty-eight years' imprisonment. This appeal followed.

On appeal, the defendant claims that the trial court improperly denied his motion in limine because the victim's Internet searches were relevant to prove the state of mind of both the victim and the defendant under the principles discussed in *State* v. *Miranda*, supra, 176 Conn. 107, and were not, contrary to the trial court's conclusion, offered to establish the victim's violent character. The defendant renews his reliance on *Commonwealth* v. *Carey*, supra, 463 Mass. 379–80, 392, in which the court upheld the admission of a criminal defendant's Internet searches about strangulation as probative evidence of his intent in a sexual assault and attempted murder case, in support of his argument that the victim's repeated Internet searches for weapons, made within the week before the fatal altercation and after their fights, " 'corroborat[e] and validat[e]' " the legitimacy of the victim's threat to the defendant, along with the defendant's fear of the victim. The defendant also contends that the trial court abused its discretion in declining to admit evidence of the searches as evidence of prior misconduct under § 4-5 (c) of the Connecticut Code of Evidence. The defendant argues that the timing and voluminous nature of the searches establish the victim's intent to arm and prepare himself for a confrontation with the defendant. The defendant further contends that these improper evidentiary rulings require reversal because they substantially swayed the jury's verdict.

[9] We note the trial court, *Clifford, J.*, accepted the defendant's guilty plea to part B of the information. All other references in this opinion to the trial court are to Judge Vitale, who presided over the defendant's trial and sentencing, and made the evidentiary ruling at issue in this appeal.

In response, the state contends that the trial court properly exercised its discretion to exclude the evidence because the victim's Internet searches were not admissible evidence of his violent character for either of the two purposes permitted by § 4-4 (a) (2) of the Connecticut Code of Evidence, namely, to establish (1) the defendant's state of mind or apprehensions about the victim's violent character, or (2) that the victim was the initial aggressor. Specifically, the state contends that the evidence was not admissible for the first purpose because the defendant was not aware of the searches at the time of the altercation, which renders *Commonwealth* v. *Carey*, supra, 463 Mass. 378, distinguishable, and it was not admissible for the second purpose because our precedent allows only the admission of specific violent acts that result in criminal convictions. See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 14, 6 A.3d 790 (2010). Citing *State* v. *Byrd*, 136 Conn. App. 391, 397, 44 A.3d 897, cert. denied, 306 Conn. 906, 52 A.3d 732 (2012), which held that a conviction for criminal possession of a firearm was not a crime of violence admissible to show a murder victim's violent character, the state posits, "a fortiori, that a mere search for weapons on eBay could not have had any meaningful bearing on the victim's state of mind at the time of the fatal altercation, let alone the reasonableness of the defendant's fear of the victim when the defendant, who was ignorant of the victim's Internet activity, approached him." (Emphasis omitted.) The state also argues that, even if the evidence were relevant, including as uncharged misconduct under § 4-5 (c) of the Connecticut Code of Evidence, the trial court reasonably determined that any probative value was outweighed by the danger of unfair prejudice. We agree with the state and conclude that the trial court did not abuse its discretion in declining to admit evidence of the victim's Internet searches for weapons.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 317–18, 253 A.3d 458 (2020); see Conn. Code Evid. § 4-1. This discretion extends to the trial court's application of §§ 4-4 and 4-5 of the Connecticut Code of Evidence. See, e.g., *State* v. *Jordan*, 329 Conn. 272, 279–80, 186 A.3d 1 (2018); *State* v. *Osimanti*, supra, 299 Conn. 13; see also *State* v. *Saucier*, 283 Conn. 207, 218–20, 926 A.2d 633 (2007) (considering function of trial court's discretion and contrasting standards of review applicable to interpreting and applying Code of Evidence).

We begin with the defendant's reliance on the Massachusetts' Supreme Judicial Court's decision in *Commonwealth* v. *Carey*, supra, 463 Mass. 378, in support of his argument that the trial court improperly cabined its analysis to the strictures of § 4-4 (a) of the Connecticut Code of Evidence as they pertain to proving a victim's violent character, rather than focusing on the relevance of the Internet search histories to proving the victim's state of mind at the time of the fatal altercation. In *Carey*, the Massachusetts court held that, despite "scant evidence establishing a temporal connection between the defendant's consumption of these materials and the incident at issue," photographs and videos of strangulations, as well as search histories of strangulation murders, found on the defendant's computer were "highly probative of his intent and motive, as well as the victim's alleged consent" in an attempted murder case in which the defendant's specific intent to

kill was "the principal issue at trial" when he "alleged that he . . . strangled the victim [only] as a means toward sexual gratification and without any intent to do her harm."[10] Id., 388. The defendant contends that the search history evidence at issue in this case is even more probative than that in *Carey*, given its temporal relationship to the altercations at issue. We disagree.

The defendant's reliance on *Carey* is an attempt to thread the eye of a needle created by well established principles of Connecticut case law, particularly our leading decision in *State* v. *Miranda*, supra, 176 Conn. 109–11, which are now embodied in § 4-4 (a) (2) and (b) of the Connecticut Code of Evidence. "In a homicide or criminal assault case, an accused may introduce evidence of the violent, dangerous or turbulent character of the victim to show that the accused had reason to fear serious harm, after laying a proper foundation by adducing evidence that he acted in self-defense and that he was aware of the victim's violent character.[11]

[10] Our research has revealed other decisions, consistent with *Carey*, holding that Internet search histories may furnish relevant circumstantial evidence of an actor's state of mind. See, e.g., *Commonwealth* v. *Keown*, 478 Mass. 232, 245–47, 84 N.E.3d 820 (2017) (concluding that trial court properly admitted searches on defendant's computer for information about poison and antifreeze, as well as victim's Internet history, including research about her kidney illness and doll-making hobby and her e-mails to friends and acquaintances, to show her "positive outlook" on her health in week prior her final hospitalization, as relevant to disprove defendant's theory at murder trial that victim had committed suicide), cert. denied, U.S. , 138 S. Ct. 1038, 200 L. Ed. 2d 292 (2018); *Julio Garcia* v. *State*, 300 So. 3d 945, 974 (Miss. 2020) (Internet searches on defendant's video game console for sexually explicit and violent phrases, some of which pertained to young females, conducted "just days" before sexual battery and murder of young child were relevant to show motive, opportunity, or intent and were not unduly prejudicial in case involving sexual battery and murder of young child), cert. denied, U.S. , 141 S. Ct. 2706, 210 L. Ed. 2d 874 (2021).

[11] Case law from other jurisdictions highlights that the key to the introduction of evidence of the specific bad acts of a victim in a self-defense case is the defendant's knowledge of those acts. See, e.g., *Richardson* v. *United States*, 98 A.3d 178, 187–89 (D.C. 2014) (trial court improperly excluded evidence of defendant's belief that drug dealer victim knew that defendant had talked to police, which resulted in raid of victim's apartment, because

. . . [W]e joined a majority of courts when we expanded this rule to allow the accused to introduce evidence of the victim's violent character to prove that the victim was the aggressor, regardless of whether such character evidence had been communicated to the accused prior to the homicide. . . . In *Miranda*, we determined that the victim's violent character could be proved by reputation testimony, by opinion testimony, or by evidence of the [victim's] convictions for crimes of violence, irrespective of whether the accused knew of the [victim's] violent character or of the particular evidence adduced at the time of the death-dealing encounter. . . . This court has not, however, departed from [its] precedent that specific violent acts not resulting in a criminal conviction may not be introduced to prove the victim's violent character. . . . This is because the admission of such evidence, other than convictions, has the potential to surprise, to arouse prejudice, to multiply the issues and confuse the jury, and to prolong the trial."[12] (Citations omitted; footnote

evidence was relevant to claim of self-defense and to prove that victim was first aggressor); *State* v. *Williams*, 303 Kan. 585, 595, 363 P.3d 1101 (2016) (evidence that victim had attempted to rape woman was not relevant to defendant's claim at murder trial that he killed victim in defense of his wife because there was no evidence that defendant knew of that attempted rape, meaning "the record lack[ed] any evidence establishing a nexus between the alleged prior bad act of the victim . . . and the defendant's state of mind at the time the defendant claims to have acted in self-defense or defense of another").

[12] In *Miranda*, this court rejected the approach taken in its earlier decision in *State* v. *Padula*, 106 Conn. 454, 138 A. 456 (1927), which did not permit the admission of character evidence to prove that the decedent was the aggressor on the ground that "the result of an unlimited application of such a rule would be to interject the character of the deceased with the resulting temptation 'to measure the guilt of the accused by the deserts of the victim' into all such cases." Id., 459; see *State* v. *Miranda*, supra, 176 Conn. 110. While acknowledging in *Miranda* that "[t]here is always the risk that the jury may be unduly diverted and confused by collateral matters such as character," the court observed that "the sound discretion of the court is relied [on] to focus the jury's attention on the material issues in the trial." *State* v. *Miranda*, supra, 110–11.

added; footnotes omitted; internal quotation marks omitted.) *State* v. *Osimanti*, supra, 299 Conn. 13–14; see *State* v. *Jordan*, supra, 329 Conn. 283 (trial court has discretion to admit convictions arising from "a subsequent act that is close in time and highly similar to the charged incident" to prove that victim was initial aggressor but not to prove defendant's state of mind); *State* v. *Whitford*, supra, 260 Conn. 636–40 (trial court properly declined to admit testimony that victim, when intoxicated, had attempted to strangle two people but properly admitted reputation testimony that victim was violent person when intoxicated); *State* v. *Carter*, 228 Conn. 412, 425–26, 636 A.2d 821 (1994) (trial court abused its discretion in not permitting defendant to reopen evidence to introduce evidence that victim had assault and narcotics trafficking convictions "close in time to the deadly encounter between the victim and the defendant" because they "would have provided objective corroboration of the defendant's claim that the victim was a person of violent character who had acted as the initial aggressor"); *State* v. *Smith*, 222 Conn. 1, 19–20, 608 A.2d 63 (The trial court properly declined to admit evidence of the information or arrest warrant charging the deceased victim with assault because "[a] conviction is indisputable evidence of the commission of a violent crime. On the contrary, a charging document is a mere accusation, not a settled disposition, and, as such, would invite dispute over collateral issues at trial."), cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); *State* v. *Collins*, 68 Conn. App. 828, 838, 793 A.2d 1160 ("in the case of self-defense, eyewitness testimony of prior specific acts of violence perpetrated on a defendant by his or her victim is admissible to show the state of mind of the defendant at the time of the killing"), cert. denied, 260 Conn. 941, 835 A.2d 58 (2002); *State* v. *Carter*, 48 Conn. App. 755, 762–64, 713 A.2d 255 (trial court properly precluded defen-

dant's mother from testifying about whether she had seen victim selling drugs outside her home or with weapon, while permitting defendant to testify about violent acts that victim had committed against him personally but not against others), cert. denied, 247 Conn. 901, 719 A.2d 905 (1998); *State* v. *Knighton*, 7 Conn. App. 223, 228–29, 508 A.2d 772 (1986) (following *Miranda* and concluding that police officer or defendant could not testify about specific acts of violence allegedly committed by victim "to show the victim's propensity for violence, and [the defendant's] own testimony should have been admitted to show his state of mind when he confronted [the victim]").

"[N]otwithstanding this general rule of admissibility," under § 4-4 (b) of the Connecticut Code of Evidence, "we have held that the defendant is not authorized to introduce any and all convictions of crimes involving violence, no matter how petty, how remote in time, or how dissimilar in their nature to the facts of the alleged aggression. In each case the probative value of the evidence of certain convictions rests in the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *Osimanti*, supra, 299 Conn. 15; see *State* v. *Byrd*, supra, 136 Conn. App. 397 (trial court did not abuse its discretion in excluding evidence of victim's conviction for criminal possession of firearm because it showed that "the victim possessed the gun solely as collateral [for a loan of money] and . . . did not intend to use the gun in a violent manner").

Although the defendant contends that he did not offer the Internet search evidence to establish the victim's character pursuant to § 4-4 of the Connecticut Code of Evidence, the case law embodied in that provision nevertheless continues to inform the extent to which that evidence is admissible under the more general principles of relevance relied on by the defendant. These cases reflect a "narrow" exception to the rule followed

by the "vast majority" of jurisdictions and the Federal Rules of Evidence, which "prohibit the use of specific acts to prove character in this context. . . . Courts have cited the same concerns about inquiry into potentially confusing collateral matters . . . unfair surprise to the party against whom the evidence is offered . . . and prejudice to the prosecution if the deceased is shown to have been a detestable person . . . ." (Citations omitted.) *State* v. *Smith*, supra, 222 Conn. 18–19. This is particularly so given that the Connecticut Code of Evidence is, in essence, a codification of the common-law standards that "was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication . . . ." *State* v. *DeJesus*, 288 Conn. 418, 455, 953 A.2d 45 (2008); see T. Bishop, "Evidence Rulemaking: Balancing the Separation of Powers," 43 Conn. L. Rev. 265, 298–301 (2010). Put differently, the overall relevance determination remains the same, regardless of a party's claim that it is not attempting to shoehorn evidence into or beyond the strictures of a particular rule of evidence, such as the restrictions embodied in § 4-4 (b) of the Connecticut Code of Evidence. Cf. *State* v. *Whitford*, supra, 260 Conn. 640 (rejecting argument that would admit victim's prior bad acts under § 4-5 (c) of Connecticut Code of Evidence in manner that would "nullify" or evade "limitation" of § 4-4 (b), which "reflects a conscious choice by the code's drafters to exclude specific acts evidence as permissible proof, consonant with [Connecticut] case law").

Accordingly, we agree with the trial court's determination in the present case that the defendant's lack of awareness of the victim's Internet searches for weapons rendered them irrelevant for purposes of establishing the defendant's state of mind during the encounter. This is because the well established subjective-objective standard that governs self-defense involving the use of

deadly physical force under § 53a-19 (a) requires the jury to consider the reasonableness of the force used while "view[ing] the situation from the perspective of the defendant." (Internal quotation marks omitted.) *State* v. *O'Bryan*, supra, 318 Conn. 632; see footnote 6 of this opinion. The searches are rendered even less relevant, given that the defendant does not claim that they, in and of themselves, amounted to a crime of violence for purposes of § 4-4 (a).

The defendant argues further that the Internet searches constituted a prior act of misconduct relevant to establish the victim's state of mind under § 4-5 (c)[13] of the Connecticut Code of Evidence.[14] We disagree. Even if

[13] "We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence]. . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling. . . .

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 562, 254 A.3d 874 (2020); see footnote 2 of this opinion (text of § 4-5 of Connecticut Code of Evidence).

[14] The state argues that the defendant did not preserve his claim that the victim's Internet searches were not acts of prior misconduct relevant to prove the victim's state of mind for purposes of § 4-5 of the Connecticut Code of Evidence. In response, the defendant contends in his reply brief that he properly preserved his uncharged misconduct claim, despite the lack of an "express" citation to § 4-5 (a) in his motion in limine, given his citations therein to common-law uncharged misconduct case law, such as *State* v. *Mooney*, 218 Conn. 85, 126–27, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). The defendant emphasizes that

we assume, without deciding, that the victim's otherwise legal Internet searches were themselves evidence of prior misconduct admissible to prove his state of mind pursuant to § 4-5 (c), this court's decision in *State* v. *Whitford*, supra, 260 Conn. 610, squarely forecloses the defendant's efforts to use prior misconduct evidence under § 4-5 (c) to evade the strictures of § 4-4 and the well established case law that it embodies. In *Whitford*, the defendant invoked § 4-5 (c) and "sought to introduce the testimony of three witnesses that the victim, when drunk, had violently attacked and attempted to strangle them" in support of his claim of self-defense, as "relevant to his assertion that the victim was the aggressor in their altercation because it would tend to prove both the victim's character for violence and his specific habit of strangling people while he was intoxicated." Id., 635. The trial court declined to admit evidence of the specific acts and limited the testimony to only "knowledge and opinion of the victim's violent character." Id. After reviewing the body of case law governing the admission of evidence of victims' violent acts in self-defense cases; see id., 636–37; this court concluded in *Whitford* that the "defendant's assertion that the proffered testimony was admissible pursuant to § 4-5 (c) . . . fail[ed] because it effectively would read § 4-4 (b) out of the code. . . . [Section] 4-4 (b) specifically limits the methods of proving the victim's

the record demonstrates that the prosecutor, in responding to the motion, understood that the defendant was advancing a claim that the searches were admissible as uncharged misconduct, rather than "pigeonholing" it as a character claim under § 4-4.

Although the defendant did not specifically cite § 4-5 of the Connecticut Code of Evidence before the trial court, our review of the record indicates that the defendant's arguments repeatedly emphasized the use of the searches to prove the victim's state of mind in juxtaposition with the limitations imposed by existing case law reflected in § 4-4. We conclude, therefore, that these arguments "functionally preserved" this uncharged misconduct claim for purposes of appeal, eliminating any concerns that the trial court was not on notice of the argument. *State* v. *Best*, supra, 337 Conn. 317 n.1.

character in a homicide or criminal assault prosecution to reputation or opinion testimony, or evidence of prior convictions for violent crimes. This limitation reflects a conscious choice by the code's drafters to exclude specific acts evidence as permissible proof, consonant with our case law. Were we to adopt the defendant's argument and read § 4-5 (c) to permit what § 4-4 (b) forbids, we would nullify this intentional exclusion of specific acts evidence . . . ."[15] Id., 640. The court emphasized in *Whitford* that § 4-4 embodies our case law on this point, notably *State* v. *Miranda*, supra, 176 Conn. 107. See *State* v. *Whitford*, supra, 638–39. Accordingly, the court determined that, "[b]ecause § 4-4 of the

[15] This court also observed in *Whitford* that the defendant's claim that the specific acts evidence was admissible pursuant to § 4-5 (c) of the Connecticut Code of Evidence "ignores that portion of § 1-2 of the code and its commentary . . . [that] indicates that the code was intended only to codify the common law. If, as the defendant suggests, we were to read § 4-5 (c) as permitting introduction of evidence regarding a victim's specific violent acts, we would be interpreting the code in a manner that would effectuate a substantive change in the law. Because such a result would be contrary to the express intention of the code's drafters, we reject it." *State* v. *Whitford*, supra, 260 Conn. 639–40. We note that this limited understanding of this court's authority vis-à-vis the code was later overruled in *State* v. *DeJesus*, supra, 288 Conn. 418, in which we concluded that the Connecticut Code of Evidence "was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community." Id., 455; see id. ("the judges of the Superior Court did not intend for the [Code of Evidence Oversight] [C]ommittee to recommend substantive changes to the common-law evidentiary rules codified in the code, but, rather, intended for the committee simply to recommend revisions reflecting common-law developments in evidentiary law, clarifications of the code to resolve ambiguities and additions to the code in the absence of governing common-law rules"); see also id., 460 ("[T]he evidentiary rules articulated [in the code] are subject to change, modification, alteration or amendment by this court in the exercise of its constitutional and common-law adjudicative authority. To reiterate, we conclude that the code neither is, nor was intended to be, anything more than a concise, authoritative and, as the commentary to § 1-2 (a) of the code describes it, 'readily accessible body of rules to which the legal profession conveniently may refer.' " (Footnote omitted.)).

code explicitly provides for the admissibility of evidence concerning the victim's violent character under certain specified circumstances, it trumps the more general rules set forth in § 4-5 regarding the admissibility of specific acts. Thus, § 4-5 (c) does not apply to evidence of the victim's violent character in homicide or criminal assault cases, which is specifically covered by § 4-4, but rather applies to evidence admitted to prove the issues enumerated in § 4-5 (b)." Id., 641; see id., 642–43 (rejecting defendant's claim that specific acts preclusion does not apply to habit evidence offered pursuant to § 4-6 of Connecticut Code of Evidence). We therefore conclude that the trial court did not abuse its discretion in declining to admit into evidence the victim's Internet searches for weapons.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 210

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

GABRIELLE DITULLIO *v.* LM GENERAL INSURANCE COMPANY
(AC 44114)

Alvord, Suarez and Clark, Js.

Syllabus

The plaintiff sought to confirm an arbitration award against the defendant arising out of a separate action in which she sought to recover damages from the insurer L for underinsured motorist benefits. The plaintiff previously had received a $20,000 settlement from a tortfeasor in connection with injuries she sustained in a motor vehicle collision. In bringing the underinsured motorist action against L, the plaintiff alleged that the $20,000 settlement was insufficient to fully compensate her and that

L was legally responsible for damages in excess of the underinsured motorist's coverage. The plaintiff, the defendant and L ultimately agreed to settle the case by means of binding arbitration and entered into a written arbitration agreement. Thereafter, an arbitrator issued an award in the amount of $33,807.50. The arbitrator made no findings regarding collateral sources, which were to be deducted from the total damages pursuant to the parties' arbitration agreement. The parties subsequently agreed with each other as to the amounts of collateral sources, but disagreed as to whether the $20,000 settlement should be deducted from the award. The defendant filed an objection to the plaintiff's application to confirm the award, in which it argued, inter alia, that it was legally responsible only for damages exceeding the $20,000 settlement that the plaintiff already had received from the tortfeasor. The defendant did not otherwise file a motion to modify or to correct the award. Thereafter, upon the parties' request, the arbitrator issued an articulation stating that the award of $33,807.50 was a full value award, which did not take into account any collateral sources or offsets, or the $20,000 settlement. Subsequently, the trial court rendered judgment confirming the award with deductions of $1020.02 in collateral sources and $20,000 to offset the prior settlement, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly deducted $20,000 from the arbitration award to offset the settlement that the plaintiff had received from the tortfeasor: although the plaintiff claimed that the court lacked statutory and common-law authority to modify the award, this court concluded that the trial court did not modify the award but, instead, merely conformed the award to the parties' arbitration agreement; moreover, in light of the agreement's reference to the plaintiff's underinsured motorist lawsuit and the nature of her underlying claim, the only reasonable interpretation of the agreement was that the parties initially contemplated and agreed that the arbitrator's gross award would be the sum of the plaintiff's total economic and noneconomic damages, less the $20,000 she had received from the tortfeasor; furthermore, although the arbitration agreement provided that the arbitrator would calculate the gross award and then deduct damages determined to be collateral sources, the arbitrator made clear in his decision and in his articulation that his award was for the full value of the plaintiff's damages, without considering the issues of collateral sources or offsets, demonstrating that the parties subsequently modified their written agreement and submitted to the arbitrator only the question of the plaintiff's total economic and noneconomic damages and preserving the written agreement's provisions limiting the defendant's liability only to those damages in excess of the $20,000 settlement and any collateral sources.
2. This court concluded that, although the trial court properly deducted the $20,000 settlement from the arbitration award, it miscalculated the amount of the judgment: subtracting the collateral sources and the

settlement from the arbitrator's full value award yielded the sum of $12,787.48, not the amount of $12,500 that the trial court had calculated.

Argued May 11, 2021—officially released February 1, 2022

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Danbury, and tried to the court, *Brazzel-Massaro, J.*; judgment confirming and clarifying the award, from which the plaintiff appealed to this court. *Affirmed in part; reversed in part; judgment directed.*

James M. Harrington, with whom, on the brief, was *Joseph T. Coppola II*, for the appellant (plaintiff).

Matthias J. DeAngelo, with whom, on the brief, was *Evan Tegtmeier*, for the appellee (defendant).

Opinion

CLARK, J. This appeal concerns an arbitration award (award) that arose out of an underinsured motorist cause of action. The plaintiff, Gabrielle DiTullio, appeals from the judgment of the trial court "confirming the arbitration award with a deduction for the $20,000 offset to clarify the amount to be awarded is $12,500 *in accordance with the law*." (Emphasis added.) On appeal, the plaintiff claims that the court improperly deducted $20,000 from the award because the court (1) lacked statutory authority to do so, as the defendant, LM General Insurance Company, failed to file a motion to modify, correct, or vacate the award pursuant to General Statutes § 52-407tt, § 52-407xx, or § 52-407ww, and also (2) lacked common-law authority to do so.[1]

[1] The plaintiff also claims that the court's improper deduction of $20,000 from the award (1) violates the public policy favoring arbitration as an alternative to litigation and (2) permits parties to arbitration agreements to seek judicial intervention when they are dissatisfied with the arbitrator's award, which will have a chilling effect on arbitration. Because we conclude that the court properly confirmed the arbitration award, we need not reach these claims.

We conclude that the deduction was proper, but on different grounds than those relied upon by the court.[2] The court had authority to deduct the $20,000 settlement from the tortfeasor from the full value arbitration award to conform the award to the parties' written agreement. The court, however, miscalculated the amount of the judgment, and thus, we affirm in part and reverse in part the judgment of the trial court.

The record reveals the following undisputed facts. The plaintiff was injured on March 30, 2015, when her motor vehicle was struck in Bethel by a vehicle operated by Tracie Fabri-Lino (tortfeasor). At the time of the collision, the plaintiff's vehicle was insured by Liberty Mutual Insurance Company (Liberty Mutual).[3] The plaintiff settled her claims against the tortfeasor for $20,000. Thereafter, in January, 2018, the plaintiff commenced an underinsured motorist action (UIM case) against Liberty Mutual,[4] alleging that she had sustained

[2] The parties entered into the arbitration agreement on May 31, 2019. In the trial court, the parties litigated, and the trial court adjudicated, the issues pursuant to General Statutes § 53-408 et seq. The parties also cited § 53-408 et seq. in their appellate briefs. Pursuant to No. 18-94 of the 2018 Public Acts, the legislature adopted the Revised Uniform Arbitration Act (revised act), General Statutes § 52-407aa et seq. General Statutes § 52-407cc provides in relevant part that "[s]ections 52-407aa to 52-407eee, inclusive, govern an agreement to arbitrate made on or after October 1, 2018 . . . ."

Following oral argument before us, we ordered the parties to file simultaneous supplemental briefs "addressing whether the [revised act] governs the arbitration at issue in this case, and if so, whether that has any effect on the present appeal." In their supplemental briefs, the parties agree that the revised act applies to the present appeal, and they each assert that the revised act does not alter their respective positions regarding the issues on appeal. In this opinion, we refer to statutes in the revised act when relevant.

[3] In the confirmation proceeding and on appeal, the defendant was identified as the insurer of the vehicle.

[4] See *DiTullio* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Danbury, Docket No. CV-18-6024859-S (withdrawn). The plaintiff withdrew the UIM case on May 31, 2019, the date that the parties signed the written agreement. She, however, moved to restore the UIM case on July 19, 2019, following receipt of the arbitrator's decision. On September 26, 2019, the plaintiff filed a motion to stay the restored UIM case pending a resolution of the arbitration. In response to the motion for stay, the trial

injuries, damages, and other losses as a direct result of the tortfeasor's negligence. She also alleged that she had settled her claim against the tortfeasor for $20,000, the limit of the tortfeasor's liability policy. Significantly with respect to the present appeal, the plaintiff alleged that the settlement was "insufficient to fully compensate [her] for her damages and losses. . . . Wherefore [Liberty Mutual] . . . is legally responsible for all damages *in excess* of the underinsured driver's coverage." (Emphasis added.)

A pretrial settlement conference in the UIM case was held in May, 2019, at which time the parties were unable to agree on a sum to resolve the litigation. They agreed, however, to settle the UIM case by means of binding arbitration and that the UIM case would be withdrawn. On May 31, 2019, the plaintiff, Liberty Mutual, and the defendant signed an arbitration agreement (written agreement) that provides in relevant part: "[The parties] have agreed to *arbitrate the UM/UIM Plaintiff's claim* against the [defendant and Liberty Mutual] regarding a motor vehicle accident which occurred on March 30, 2015 . . . . [T]he [p]arties hereby agree to the following:

"1. The *issues in the Lawsuit shall be resolved by means of binding arbitration*, and the Lawsuit shall be resolved by way of release and withdrawal of action. . . .

"2. The Arbitrator shall be mutually agreed upon . . . . All issues of *liability*, *causation*, *and damages* shall be decided by the Arbitrator.

court issued an order stating in part: "Counsel appeared at short calendar and addressed the issue of whether the arbitrator will rule on the impact if any for the $20,000 payment to the plaintiff as damages for the accident and whether such insurance proceeds were considered by the arbitrator in entering an award for $32,500." The plaintiff again withdrew the UIM case on October 30, 2019, when the case was called for jury selection.

* * *

"6. Following the arbitration hearing in connection with this matter, the Arbitrator will render a decision containing a 'Gross Award.'

"7. After determining the Gross Award, the Arbitrator is to deduct from total damages, all economic damages determined to be collateral sources.

"8. After the agreed deductions from the Gross Award per Paragraph 7, the resulting sum shall be the 'Net Award.'

"9. The parameters of the arbitration shall be subject to a confidential high/low agreement wherein the Net Award to the Plaintiff, per Paragraph 8, will be no higher than thirty-two thousand five hundred dollars ($32,500) and no lower than two thousand five hundred dollars ($2,500).

"10. In the event that the Net Award is $32,500 or greater, then the sum due . . . shall be $32,500. In the event the Net Award is $2,500 or less, then the Sum Due shall be $2,500.

"11. None of the parties will disclose the high and low figures of this Agreement to the Arbitrator. . . ."[5] (Emphasis added.)

On July 9, 2019, Attorney Christopher P. Kriesen (arbitrator) held an arbitration hearing, and on July 12, 2019, he issued a written decision. In his decision, the arbitrator found that the tortfeasor's negligence proximately caused the plaintiff's injuries. He also found that the plaintiff had received treatment from several medical providers, but was able to complete training at the police academy and become a patrol officer. The

[5] The agreement referred to the underlying UIM case, but did not otherwise make any express reference to the $20,000 settlement that the plaintiff had received from the tortfeasor.

arbitrator found that the plaintiff's economic damages were $13,807.50, her noneconomic damages were $20,000, and the award was $33,807.50. The arbitrator further stated that he made "no finding on collateral sources. If the parties are unable to agree on the issue, they may submit the issue to me."[6] Neither the plaintiff nor the defendant and Liberty Mutual filed with the arbitrator a motion to modify or correct the award pursuant to § 52-407tt.[7]

Thereafter, counsel for the plaintiff informed counsel for the defendant and Liberty Mutual that the collateral source payments totaled $1020.02. Counsel subtracted the collateral source amount from the arbitrator's economic award, added the remainder to the arbitrator's $20,000 noneconomic award, and stated that the net award was $32,787.48, which should be reduced to $32,500 in accordance with the "high/low" provision set forth in paragraphs 9 and 10 of the written agreement. Counsel for the defendant and Liberty Mutual agreed with respect to the amount of collateral source payments, but countered that the $20,000 settlement that the plaintiff had received from the tortfeasor also had to be subtracted from the award, resulting in a net award of $12,787.48. Counsel for the plaintiff disagreed, contending that the agreement was for "new money" and that the written agreement did not include a provision regarding the $20,000 tortfeasor settlement. Counsel were unable to resolve their disagreement, and on

[6] See paragraphs 7 and 8 of the written agreement previously set forth in this opinion.

[7] General Statutes § 52-407tt provides in relevant part: "(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

"(1) Upon a ground stated in subdivision (1) or (3) of subsection (a) of section 52-407xx . . . ."

General Statutes § 52-407xx (a) provides in relevant part: "(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award . . . (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted."

July 19, 2019, the plaintiff moved to restore the UIM case. See footnote 4 of this opinion.

On September 27, 2019, the plaintiff commenced the present proceeding to confirm the award; she also filed a motion to stay the UIM case. In her application to confirm the award, the plaintiff asked the court to "order that the defendant comply with the terms of the arbitration agreement and that the plaintiff be paid $32,500 pursuant to that agreement and the arbitrator's award." In her application, the plaintiff argued that the court must confirm the award unless it finds grounds to vacate, modify, or correct the award as permitted by statute. She also argued that the agreement was clear and unambiguous, made no mention of the $20,000 settlement and provided that only collateral sources, which pursuant to General Statutes § 52-225b[8] do not include amounts received as a settlement, were to be deducted from the gross award.

On October 11, 2019, the defendant filed an objection to the plaintiff's application to confirm the award on the ground that it was frivolous given that there was a prior lawsuit pending before the court. It also argued that the plaintiff was asking the court to confirm "an arbitration award without taking into account the nature of the claim. This claim is, and always was, a

[8] General Statutes § 52-225b defines collateral sources for purposes of General Statutes §§ 52-225a through 52-225c, inclusive. It provides in relevant part: " 'Collateral sources' means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. 'Collateral sources' do not include amounts received by a claimant as a settlement." General Statutes § 52-225b. As the court noted, however, the written agreement did not define "collateral sources" or make reference to § 52-225b.

contractual claim for underinsured motorist benefits." The defendant argued, as well, that the complaint in the plaintiff's underlying UIM case alleged that the defendant and Liberty Mutual are "legally responsible for *all damages in excess* of the [underinsured] driver's coverage." (Emphasis altered.) The defendant also argued that "it is well established that a plaintiff is not [to] be compensated twice for the same damages." The defendant suggested that the parties return to the arbitrator for clarification of the award, noting that the arbitrator had not made a finding with regard to collateral sources and that the arbitrator had invited the parties to return if they were unable to agree with respect to collateral sources.

The parties returned to the arbitrator on October 30, 2019, and requested that he articulate his July 12, 2019 award. On the same date, the arbitrator issued an articulation, stating that "the award of *$33,807.50 is a 'full value' award*, taking into account only the facts and basis set forth in the decision. . . . The award *does not take into account any collateral sources or offsets. . . . The award does not take into account in any way the $20,000 payment apparently made by the alleged tortfeasor*. This amount was disclosed to the arbitrator in a position statement (which was not evidence) by the plaintiff and in a deposition transcript submitted by the defendant (*but which was not considered since it was irrelevant to the arbitrator's determination of the award and was therefore not deemed a fact by the arbitrator*). . . . *The arbitrator will consider any issues of collateral sources and/or offsets if the parties have agreed, or do agree, to have these issues considered by the arbitrator*." (Emphasis added.)

On March 9, 2020, the parties appeared before the court for a hearing on the plaintiff's application to confirm the award. The court issued a memorandum of decision on May 19, 2020, in which it noted that the

plaintiff had moved to confirm the award, and that, under Connecticut law, a court must confirm an award unless a motion to vacate, modify or correct the award is filed and granted in accordance with the statutes governing such motions.[9] The plaintiff argued that because no motion to vacate, modify or correct had been filed, the court's review was limited to determining whether the arbitrator decided only matters the parties submitted to arbitration, as defined by the written agreement. She also argued that the written agreement is clear and unambiguous and only permits deductions for collateral sources, which, according to her, do not include prior settlements.

The court also noted the defendant's objection, in which the defendant argued that the application to confirm was frivolous when filed because the UIM case had been restored to the docket and remained pending at that time. The defendant noted that the plaintiff was asking the court to confirm the award without taking into account the nature of the underlying contractual claim for underinsured motorist benefits or the plaintiff's UIM lawsuit, which were incorporated into the written agreement by reference, and the defendant alleged that it was legally responsible only for damages exceeding the $20,000 settlement that the plaintiff already had received from the tortfeasor.

In addition, during the March 9, 2020 hearing on the plaintiff's application to confirm, "the defendant also alleged that the parties agreed to an offset and stated in front of the arbitrator that he did not need to take that into consideration because the parties had agreed to the offset." The plaintiff denied that there had been

[9] General Statutes § 52-407vv provides: "After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 52-407tt or 52-407xx or is vacated pursuant to section 52-407ww."

any conversation with the arbitrator about an offset and the court ultimately concluded that it was "not necessary . . . to address any disagreement between the parties about the subject of discussing the offset with the arbitrator, as the arbitrator explained that the award was a full value award, and though he was aware of the offset, he did not consider it because it was irrelevant in determining the award."

Turning to the merits of the plaintiff's application to confirm, the court found that the plaintiff's underlying claim was a contractual one for underinsured motorist benefits. It also found that the written agreement was clear and unambiguous, but that it did not mention offsets for prior settlements. In addition, neither party took issue with the decision rendered by the arbitrator. Instead, they disagreed about whether an offset should be subtracted from the arbitrator's full value award.

Even though the defendant had not filed with the court a motion to vacate, modify, or correct the award pursuant to the statutory provisions authorizing such filings, the court nevertheless considered the defendant's objection and reviewed the law governing underinsured motorist coverage. In considering the plaintiff's application to confirm, the court stated that it was "necessary to also apply to the present case the fundamental principle of the purpose of underinsured motorist insurance recognized by [Connecticut courts], which is to place the insured in the same, but not better, position as the insured would have been if the underinsured tortfeasor had been fully insured, and the requirement regarding automobile liability policies in [General Statutes] § 38a-335 (c) that no one is entitled to receive duplicate payments for the same element of loss," citing *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 27, 699 A.2d 964 (1997) (public policy established by underinsured motorist statute is that every insured entitled to recover for damages he or she would have been

able to recover if underinsured motorist had maintained adequate policy of liability insurance), and *Fahey* v. *Safeco Ins. Co. of America*, 49 Conn. App. 306, 309–10, 714 A.2d 686 (1998) (purpose of underinsured motorist coverage is to protect named insured and additional insured from suffering inadequately compensated injury caused by accident with inadequately insured automobile; in no event shall any person be entitled to duplicate payments for same element of loss).

In ruling on the plaintiff's motion to confirm, the court noted the articulation that the award is a "*full value award* has significance in deciphering the award as no more than $32,500, which would not [have been] so if the court awarded the entire sum in addition to the settlement amount of $20,000." (Emphasis in original.) Therefore, pursuant to General Statutes § 52-407vv, the court confirmed the award, but also ordered that "in confirming the award, the $20,000 offset must be deducted to clarify the amount to be awarded" to the plaintiff is "$12,500 *in accordance with the law*." (Emphasis added.) The plaintiff appealed.

On appeal, the plaintiff's principal claim is that the court lacked statutory and common-law authority to modify the award. We agree that it would have been improper for the court to modify the arbitrator's award.

It is well settled that courts generally lack the authority to review unrestricted arbitration awards for errors of law, particularly in the absence of a motion to vacate. *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005); id., 81 (motion to vacate should be granted when arbitrator exceeded powers or so imperfectly executed them that mutual, final, definite award not made). "Judicial review of arbitral decisions is narrowly confined." (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 265 Conn. 771, 777,

830 A.2d 729 (2003). "[T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes." (Citation omitted; internal quotation marks omitted.) *Rocky Hill Teachers' Assn.* v. *Board of Education*, 72 Conn. App. 274, 278, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002). "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus courts will not review the evidence considered by the arbitrators nor will they review the award *for errors of law* or fact. . . ." (Emphasis added; internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 80.[10]

We, however, conclude that the court did not modify the arbitrator's award, but, in confirming the award as it did, merely effectuated the parties' written agreement. As it did at trial, the defendant claims that the trial court's decision to deduct $20,000 from the award was proper because making that deduction conformed the arbitrator's award to the parties' agreement. For the reasons that follow, we agree.

"Arbitration agreements are contracts and their meaning is to be determined . . . under accepted rules of [state] contract law . . . ." (Internal quotation marks omitted.) *Levine* v. *Advest, Inc.*, 244 Conn. 732,

[10] We agree with the parties that the submission in the present case was unrestricted.

745, 714 A.2d 649 (1998). "When a party asserts a claim that challenges the . . . construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . Where the language of a contract is clear and unambiguous, the contract is to be given effect according to its terms." (Citation omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, 286 Conn. 732, 743–44, 945 A.2d 936 (2008).

The parties' written agreement in this case provides, in relevant part, that "[the plaintiff] and [the defendant and Liberty Mutual] . . . have agreed to arbitrate *the UM/UIM Plaintiff's claim* against the [defendant and Liberty Mutual] regarding a motor vehicle accident . . . . The issues in *the [l]awsuit* shall be resolved by means of binding arbitration . . . ." (Emphasis added.) The circumstances surrounding the making of the written agreement were the parties' inability to settle the UIM case. The parties, therefore, entered into the agreement to resolve the plaintiff's UIM lawsuit. The plaintiff's complaint in that lawsuit specifically alleged that the tortfeasor's $20,000 settlement with the plaintiff was insufficient to fully compensate her for her damages and losses and that Liberty Mutual was legally responsible for all damages *in excess of the tortfeasor's coverage*.

The written agreement further provides that the arbitrator would render a "Gross Award." After determining the "Gross Award," the written agreement stated that the arbitrator would "deduct from total damages, all economic damages determined to be collateral sources." The resulting sum would constitute the "Net

Award." The "Sum Due" would be the "Net Award," subject to the agreement's "high/low" provision.[11] In light of the written agreement's reference to the plaintiff's lawsuit and the nature of her underlying claim, the only reasonable interpretation of the agreement is that the parties initially contemplated and agreed that the arbitrator's "Gross Award" would be the sum of the plaintiff's total economic and noneconomic damages, less the $20,000 she had received from the tortfeasor. The "Net Award," in turn, would be that sum less "all economic damages determined to be collateral sources." The arbitrator's decision and articulation make clear, however, that the parties ultimately submitted a different question to him.

In his decision, the arbitrator found that the tortfeasor caused the plaintiff's injuries and that the plaintiff sustained $20,000 in noneconomic damages and $13,807.50 in economic damages. He issued an "Award" in the amount of $33,807.50. He made no mention of a "Gross Award" or "Net Award" and made no findings regarding "collateral sources." Instead, he informed the parties that if they were "unable to agree on the issue, *they may submit the issue to me*." (Emphasis added.)

The parties subsequently agreed to return to the arbitrator for a clarification of his award. The arbitrator articulated that the award was a " 'full value' award, taking into account only the facts and basis set forth in the decision." The arbitrator also stated in his articulation that "[t]he award does not take into account any collateral sources or offsets. . . . *The award does not take into account in any way the $20,000 payment apparently made by the alleged tortfeasor. This amount was disclosed to the arbitrator in a position statement (which was not evidence) by the plaintiff*

[11] The written agreement prohibited the parties from disclosing to the arbitrator the "high/low" provision of the agreement.

and in a deposition transcript submitted by the defendant (but which was not considered since it was irrelevant to the arbitrator's determination of the award and was therefore not deemed a fact by the arbitrator)." (Emphasis added.) Last, the arbitrator stated that he would "consider any issues of collateral sources and/or offsets *if the parties have agreed, or do agree, to have these issues considered by the arbitrator.*" (Emphasis added.)

The arbitrator's decision and articulation, therefore, make clear that, although the written agreement between the parties was to have the arbitrator decide "[a]ll issues of liability, causation, and damages" and issue a "Gross Award" that accounted for the plaintiff's $20,000 settlement with the tortfeasor, the parties subsequently agreed to submit to him only the question of the plaintiff's total economic and noneconomic damages as result of the motor vehicle accident. That is precisely the question that the arbitrator answered in his articulation, and, in doing so, he made clear that his award was for the full value of the plaintiff's damages.

There is nothing in the record to support a claim that, when they modified their written agreement about what to submit to the arbitrator, the parties also agreed to alter that agreement to limit the extent of the defendant's liability to the amount it allegedly owed the plaintiff under the underinsured motorist policy. Concluding otherwise would require us to infer that the defendant agreed to change the written agreement in a way that would make it liable to the plaintiff for amounts that the plaintiff had never sought in the underlying lawsuit and was not entitled to under the laws governing underinsured motorist coverage in our state. See General Statutes § 38a-335 (c); see also *Haynes* v. *Yale-New Haven Hospital*, supra, 243 Conn. 27; *Fahey* v. *Safeco Ins. Co. of America*, supra, 49 Conn. App. 309–10. Nothing in the record supports such an inference.

On the basis of our review of the entire record, including the written agreement, the plaintiff's UIM complaint, the arbitrator's decision, the parties' agreement to return to the arbitrator, and the articulation, we conclude that the parties agreed to submit to the arbitrator only the question of the plaintiff's total economic and noneconomic damages as a result of the underlying automobile collision, but also preserved the written agreement's provisions limiting the defendant's liability to only those damages in excess of the $20,000 settlement and any "collateral sources," up to a maximum of $32,500. For this reason, the court properly confirmed the award, and effectuated the parties' written agreement, by deducting from the arbitrator's "full value" award the plaintiff's $20,000 settlement with the tortfeasor, plus the amounts the parties agreed represent "collateral sources."

There is, however, another issue for us to consider. In its brief, the defendant has identified an error in the court's calculation of the amount of the judgment, i.e., $12,500. We agree with the defendant. The amount due to the plaintiff is the arbitrator's full value award less collateral sources and the $20,000 settlement with the tortfeasor. Subtracting from the arbitrator's gross award of $33,807.50 the undisputed amount of $1020.02 in collateral sources and the $20,000 settlement amount yields the sum of $12,787.48. Therefore, the net award due to the plaintiff is $12,787.48.

The judgment is reversed only as to the amount of the award, and the case is remanded with direction to render judgment in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CHARLES ILL *v.* ELLEN MANZO-ILL
(AC 42735)

Prescott, Alexander and Suarez, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgments of the trial court finding him in contempt and awarding the defendant attorney's fees. On appeal, the plaintiff claimed, inter alia, that the court improperly found him to be in contempt, awarded the defendant attorney's fees, and improperly limited his defense at the contempt hearing and at the attorney's fees hearing. *Held* that the trial court abused its discretion in limiting the plaintiff's defense at the contempt hearing: the defendant was afforded the opportunity to establish her prima facie case over a period of four days, whereas the plaintiff was allowed, as a consequence of the court's scheduling order, only one day to call witnesses on his behalf, his defense was largely limited to the introduction of exhibits, and, given the lengthy postjudgment procedural history of the case related to the court's property distribution orders and the complexity of the issues before the court, affording the plaintiff one day to present his defense resulted in an unfair hearing in deprivation of the plaintiff's due process rights; moreover, the court's scheduling order appeared to be arbitrary and not based on the complexity of the issues before it or on the reasonable needs of the parties to present their case, the court, over repeated objections by the plaintiff's counsel, having limited the plaintiff's case before he had an opportunity to present any evidence, indicating that the cout's scheduling order could not have been based on a determination that some or all of the plaintiff's evidence was not relevant or inadmissible on some other grounds; accordingly, the judgments on both the motion for contempt and the award of attorney's fees were reversed and a new contempt hearing was ordered.

Argued May 13, 2021—officially released February 1, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the the court, *Shay, J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted in part the defendant's motion for contempt, and the plaintiff appealed to this court and the defendant filed a cross appeal;

thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, awarded the defendant attorney's fees and costs, and the plaintiff amended his appeal; subsequently, the defendant withdrew her cross appeal. *Reversed*; *further proceedings*.

Norman A. Roberts II, with whom, on the brief, was *Anthony L. Cenatiempo*, for the appellant (plaintiff).

Kenneth J. Bartschi, with whom were *Brendon P. Levesque*, *James H. Lee*, and, on the brief, *Maria McKeon*, for the appellee (defendant).

Opinion

SUAREZ, J. In this postdissolution matter, the plaintiff, Charles Ill, appeals from the judgment of the trial court finding him in contempt and subsequently awarding interest and attorney's fees to the defendant, Ellen Manzo-Ill. On appeal, the plaintiff claims that the court improperly (1) found him to be in contempt, (2) ordered him to pay the defendant the value of certain shares of a private corporation, (3) awarded the defendant postjudgment interest, (4) awarded the defendant attorney's fees, and (5) by virtue of its scheduling order, limited his defense at the contempt hearing and the attorney's fees hearing. We agree with the plaintiff's fifth claim and reverse the judgments of the court and remand the case for a new contempt hearing.

The following undisputed facts and procedural history are relevant to this appeal. On August 19, 2008, following a trial that took place over the course of five days, the court, *Shay*, *J.*, dissolved the marriage of the parties and entered orders related to alimony and the division of the parties' marital property. These orders, which were clarified by the court on October 3, 2008, provided in relevant part that "[t]he following investment accounts, whether in sole or joint names shall be divided as follows: Within two . . . weeks from the

date of this order, the parties shall divide the stocks, bonds, and cash in the Glenmede CLI account (standing in the sole name of the [plaintiff], less that portion attributed to the inherited IRA in the approximate amount of $72,000); Glenmede CLI/EMI account (joint); Wachovia Securities account ([standing in the sole name of the plaintiff]); Avaya/Sierra Holdings ([plaintiff]/sole); Gabelli CLI/EMI account (joint); Assets Plus Investment account; and Deutsche Bank Alex Brown (joint BEA stock) on a pro-rata basis 60 [percent] to the [defendant] and 40 [percent] to the [plaintiff]. Any fractional shares shall be sold and the net proceeds divided in the same proportion." (Emphasis omitted.) The court further ordered that "[t]he parties shall cooperate in the preparation and filing of the 2007 state and federal income tax returns. Any tax due, including interest and penalties for late filing, shall be paid from joint funds, and any refunds shall be divided equally." (Emphasis omitted.)

Neither party was satisfied with the terms of the dissolution judgment. This led to extensive postjudgment litigation. Much of this litigation was detailed in an earlier appeal, *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 142 A.3d 1176 (2016). For example, on October 23, 2008, the plaintiff filed a direct appeal from the judgment of dissolution, which later was withdrawn on June 8, 2010. Id., 813. On September 19, 2008, the defendant filed a motion to open the judgment of dissolution, which the court denied on April 20, 2010. Id. The defendant filed a motion to reargue the court's denial of her motion to open the judgment, which the court denied on May 24, 2010. Id. On June 14, 2010, the defendant filed a motion for extension of time to file an appeal from the court's denial of her motion to the open the judgment of dissolution, but she subsequently withdrew the motion on June 24, 2010, and did not bring an appeal from the court's denial of that motion. Id.

On April 6, 2010, while her motion to open the judgment was pending, the defendant filed a motion for modification of alimony on the basis of a substantial change in the parties' circumstances. Id., 813–14. Specifically, the defendant alleged that, "[s]ince the date of the [judgment of dissolution], the circumstances concerning this case have changed substantially in that the plaintiff is currently employed and earning an income, while the defendant is not currently employed, and that a substantial amount of time has elapsed since the judgment was entered and that as a result of the plaintiff's appeal of the judgment, the defendant has been denied access to the funds necessary to support herself." (Internal quotation marks omitted.) Id., 814.

Following a protracted course of litigation with respect to the motion for modification, on May 14, 2014, the trial court, *Heller*, *J.*, granted the plaintiff's second motion to dismiss the motion for modification, noting that "[t]he defendant has failed to show good cause for her delay in prosecuting [the motion] . . . . Under Practice Book § 25-34 [(f)], the defendant's motion for modification is stale, it has not been diligently prosecuted, and it will not be considered by the court." (Internal quotation marks omitted.) Id., 819. Following an appeal by the defendant, this court rejected her claim that the trial court lacked the authority to dismiss the motion for modification. Id., 825. This court also rejected the defendant's claim that the trial court incorrectly determined that she failed to show good cause to avoid dismissal and that she had failed to prosecute her motion with reasonable diligence. Id., 828–30.

Against this backdrop of postdissolution litigation between the parties, we turn to the litigation underlying this appeal. On December 2, 2017, the defendant filed an amended motion for contempt requesting "that the court enter an order finding the plaintiff in contempt for his refusal to transfer assets to the defendant in

violation of a court order . . . .'' The defendant claimed that ''[t]he plaintiff did not pay to the defendant her 60 [percent] share of the Glenmede CLI account (standing in the sole name of the plaintiff, less that portion attributed to the inherited IRA in the approximate amount of $72,000) until July 30, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 60 [percent] share of the Glenmede joint account and thus prevented distribution to her until July 30, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 60 [percent] share of the Deutsche Bank Alex Brown joint account and thus prevented distribution to her until October 20, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 50 [percent] share of the 2007 federal and state income tax refunds until July 30, 2015 . . . [and] [t]he plaintiff did not cooperate in the sale of the marital home causing the defendant a significant loss of value.''

The defendant further claimed that, ''[a]s of the date of this motion, the plaintiff has failed and/or refused to transfer to the defendant the following funds/assets . . . [the] defendant's full 60 [percent] of the plaintiff's sole Wachovia accounts . . . [i]ncome generated by the defendant's 60 [percent] of the plaintiff's sole Wachovia accounts from the date of the dissolution through the entry of judgment through the date of partial distribution and the present . . . [i]ncome generated by the defendant's 60 [percent] of the plaintiff's sole Glenmede account . . . from the entry of judgment to July 30, 2015 (the date of distribution to [the] defendant) . . . [i]ncome generated by the defendant's 60 [percent] of the parties joint Glenmede account . . . from the entry of judgment to July 30, 2015 (the date of distribution to [the] defendant) . . . [i]ncome generated by the defendant's 60 [percent] of the parties' joint Gabelli account from the entry of judgment to July 30,

2015 (the date of distribution to [the] defendant) . . . [t]he defendant's 60 [percent] of the Avaya/Sierra Holdings shares . . . [and] [i]ncome generated by the defendant's 60 [percent] of the Avaya/Sierra Holdings shares from the entry of judgment to the present."

The plaintiff argued in his written objection that "the defendant is not credible," and addressed her claims with respect to each account or asset at issue. With regard to the Avaya/Sierra Holdings shares, the plaintiff argued that "the defendant's claim . . . must fail because (1) the defendant is mostly at fault for the failure of the transfer to occur . . . (2) there is no evidence of even a theoretical transaction that could have taken place, and the assertion that there was a transaction available is pure, unsupportable speculation that is contrary to all admitted evidence . . . and (3) there is no evidence of the fair market value of the shares." (Footnotes omitted.) With regard to the Glenmede, Gabelli, and Deutsche Bank accounts, the plaintiff argued that because these accounts "were jointly held by the parties . . . [i]t was always . . . within the defendant's power to effectuate the judgment related to these accounts . . . ." The plaintiff went on to state that "[o]ver [eight] years ago, the plaintiff attempted to get the defendant to sign authorizations to transfer the amounts due from these accounts. He did so on multiple occasions . . . ." With regard to the Wachovia account, the plaintiff argued that he "was precluded by a court order . . . from distributing the Wachovia funds earlier than he did," that "the amount [he] paid [to the defendant] was in excess of the amount due," and that no interest should be awarded to the defendant because she "was to a great extent responsible for the delay in implementing the orders . . . ." With regard to the sale of the marital home, the plaintiff argued that the defendant "offered no real evidence in support of this claim," and that she failed to make a

prima facie case. Finally, the plaintiff argued that "[t]he defendant was unresponsive to seemingly anything involving the implementation of the property orders in the judgment."

The plaintiff then concluded by stating that, "[b]ecause of the defendant's refusal to participate in a meaningful way, the implementation of some of the property orders contained in the judgment was delayed." According to the plaintiff, he "did everything he was supposed to do," and "[t]he defendant's motions seek to retroactively place [him] in an impossible situation—on the one hand, he would have had to circumvent or otherwise compensate for the defendant's lack of participation . . . and implement the judgment on his own; or on the other hand, face claims of contempt and interest." It was the plaintiff's position that the defendant's motion should be denied because he "is not at fault for any delays in implementation of the judgment, but the defendant is."

The court held an evidentiary hearing on the defendant's motion for contempt over five nonconsecutive days beginning on December 14, 2017, and continuing on December 15, 2017, and August 1, 2, and 3, 2018. On March 8, 2019, the court issued a memorandum of decision in which it granted in part the defendant's motion for contempt. In its memorandum of decision, the court found by clear and convincing evidence that the judgment of dissolution clearly "provided for, among other things, the division of marital property including bank accounts, investment accounts, and stock . . . as well as tax refunds and the proceeds from the sale of the marital residence." The court found that the plaintiff failed to comply in a timely manner with the division of the Wachovia, Deutsche Bank, Glenmede, and Gabelli accounts, and that the plaintiff's failure to comply was "[wilful] and without good cause . . . ." The court further found that there was a "clear

and unequivocal order of the court that the [tax] refunds be divided 50 [percent] to the [defendant] and 50 [percent] to the [plaintiff]; that the [plaintiff] has failed to comply therewith in a timely manner; that under all the facts and circumstances, the [plaintiff's] failure to comply was [wilful] and without good cause . . . ." The court ordered the plaintiff to pay the defendant $1,620,271, which included $1,088,380 in interest.[1] Additionally, the court ordered that the plaintiff "shall be responsible for his own attorney's fees and costs incurred in connection with this action; and further, on or before March 28, 2019, the [defendant] shall file with the court, with a copy to counsel, an affidavit of fees in the proper format. Counsel for the [plaintiff] shall have a reasonable opportunity to review same, and to notify opposing counsel and the court of his intention to challenge the reasonableness of the fees and costs claimed, after which the court will schedule a hearing." The plaintiff filed this appeal on March 26, 2019.

On October 24, 2019, the court held a hearing on the reasonableness of the defendant's claimed attorney's fees. The hearing continued on October 29, 2019, and December 18, 2019. On February 19, 2020, the court issued a memorandum of decision in which it concluded that, "having found the [plaintiff] in contempt as to the Wachovia accounts, Deutsche Bank-Alex Brown account,Glenmede accounts, Gabelli account, and the 2007 state and federal income tax refunds, it is equitable and appropriate to award [the defendant] attorney's

[1] The court ordered the plaintiff to pay the award as follows: "On or before June 7, 2019, the sum of $850,000, without interest if paid in full in a timely fashion, otherwise said sum shall bear simple interest at the rate of 5 [percent] per annum from the date of this memorandum of decision to and including the date of payment. The balance due in the amount of $770,271 shall be paid by the [plaintiff] in full on or before January 7, 2020, together with simple interest at the rate of 5 [percent] per annum thereon from the date of this memorandum of decision to and including the date of payment in full." (Emphasis omitted.)

fees . . . .” The court further concluded that, although it “did not make a finding of contempt as to the [plaintiff's] actions concerning the transfer of the Avaya Stock, it did find him in breach of the court order . . . that it was equitable and appropriate to take into account the [plaintiff's] behavior and the resulting economic loss to the [defendant] . . . [and that] under all the circumstances, including the [plaintiff's] demonstrably dilatory behavior in complying with the court's orders, it would be manifestly unjust to require the [defendant] to pay all of the attorney's fees and costs incurred by her during the protracted litigation, and that it is equitable and appropriate to award her fees . . . .” Thereafter, the court ordered that the plaintiff “shall pay . . . the sum of $1,206,825.10, as and for the legal fees and costs of suit incurred by [the defendant] in connection with this case.”

The plaintiff filed an amended appeal from the court's judgment on the motion for contempt and its judgment awarding attorney's fees.[2] Additional facts and procedural history will be set forth as necessary.

We begin our analysis by considering the plaintiff's claim that, by means of its scheduling order, the court improperly limited his defense at the contempt hearing.[3]

[2] The defendant filed a cross appeal from the court's judgment on her contempt motion. The defendant later withdrew the cross appeal.

[3] As we stated previously in this opinion, the plaintiff also claims that the court improperly limited his defense at the attorney's fees hearing. Because we conclude that the court improperly limited the plaintiff's defense at the contempt hearing and that the plaintiff is entitled to a new hearing, the court's award of attorney's fees, which flowed from its finding of contempt, also must be vacated. We need not consider the claim related to the attorney's fees hearing, or the remaining claims in this appeal, as the issues raised therein are not likely to arise during the proceedings on remand. See *Zheng* v. *Xia*, 204 Conn. App. 302, 308 n.10, 253 A.3d 69 (2021) (reviewing court need not reach remaining claims if it is not persuaded that issues raised therein are likely to arise during proceedings on remand).

Although we do not reach the merits of the plaintiff's claim that the court improperly awarded attorney's fees to the defendant, we note that it appears on the face of the court's award that the award of fees does not arise solely

Our resolution of this claim is dispositive of the appeal. The plaintiff couches the present claim in terms of the trial court having abused its discretion by terminating the hearing before he had a fair opportunity to present his defense. The plaintiff argues that the consequence of the court's abuse of its discretion was that he was deprived of his right to present his defense. We are persuaded that the plaintiff adequately preserved the present claim by means of repeated objections to the court's order by the plaintiff's counsel. We also conclude that the court's discretionary rulings were harmful and that a new contempt hearing is warranted.

Specifically, the plaintiff argues that, "[a]s a result of the trial court's [scheduling] order [that limited the contempt hearing to five days], [he] was forced to condense his case into less than one day after the [defendant] tried her case over four days. The [defendant] had unfettered discretion to craft her presentation in a manner she saw fit to best support her claims. [He] was not afforded the same opportunity." According to the plaintiff, "[g]iven the heightened evidentiary standards and rigorous due process requirements for indirect civil contempt proceedings . . . the trial court's limitation of the [plaintiff's] case constitutes reversible error." (Citation omitted; internal quotation marks omitted.) The plaintiff also argues that the court (1) "erred

from the motion for contempt that is the subject of this appeal; rather, the court stated that its award encompassed "all of the attorney's fees and costs incurred by [the defendant] during this protracted litigation . . . ." Because the trial court may be asked to award attorney's fees during the proceedings on remand, we emphasize that the court has the discretion to award attorney's fees to the prevailing party in a contempt proceeding and that "[a]n abuse of discretion in granting . . . counsel fees will be found only if this court determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 184, 138 A.3d 1069 (2016). When contempt is established, "the concomitant award of attorney's fees properly is awarded pursuant to [General Statutes] § 46b-87 and is *restricted to efforts related to the contempt action*." (Emphasis added; internal quotation marks omitted.) Id.

in limiting [his] presentation of his defense at the contempt hearing," (2) "erred when it prohibited [him] from cross-examining witnesses and otherwise limited [him] from presenting his case and perfecting the record," and (3) that, "in the aggregate, the . . . court's procedural irregularities and rulings constitute an impermissible departure from the . . . court's proper role as a neutral arbiter of disputes raised by the parties."

We next set forth the applicable standard of review and the relevant legal principles that govern our resolution of this claim. It is well settled that "[m]atters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Connecticut trial judges have inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Citation omitted; internal quotation marks omitted.) *Sowell* v. *DiCara*, 161 Conn. App. 102, 132, 127 A.3d 356, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015). "The [trial] court has wide latitude in docket control and is responsible for the efficient and orderly movement of cases." *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 574, 512 A.2d 893 (1986). The trial court has "inherent authority to control the proceedings before it to ensure that there [is] no prejudice or inordinate delay." *Gianquitti* v. *Sheppard*, 53 Conn. App. 72, 76, 728 A.2d 1133 (1999). "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *Sowell* v. *DiCara*, supra, 132.

In reviewing the court's exercise of its discretion, we are mindful that "[d]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to

impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16, 776 A.2d 1115 (2001).

In order to put the court's ruling in the present case in necessary context, we note the nature of the contempt matter that was before the court and the burden that shifted to the plaintiff once the defendant proved her prima facie case. Mindful that the plaintiff argues that the court's exercise of discretion resulted in a violation of his due process right to present a defense, we also set forth some basic principles related to the due process rights of the plaintiff to his day in court. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . .

"[C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is *particularly harsh* . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . .

"To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. . . .

"It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence,

both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . If the moving party establishes this twofold prima facie case, the burden of production shifts to the alleged contemnor to provide evidence in support of the defense of an inability to comply with the court order. . . .

"In the absence of an admission of contempt, indirect contempt must be proven by clear and convincing evidence. . . . A judgment of contempt cannot be based on representations of counsel in a motion, but must be supported by evidence produced in court at a proper proceeding. . . .

"[D]ue process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a *chance to testify and call other witnesses* [*o*]*n his behalf, either by way of defense or explanation*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Puff* v. *Puff*, 334 Conn. 341, 364–67, 222 A.3d 493 (2020).

"A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful

manner. . . . Whe[n] a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Citations omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241–42, 674 A.2d 1384 (1996). Accordingly, a court does "not have the right to terminate [a] hearing before [the parties have] had a fair opportunity to present evidence on the contested issues." Id., 242.

In the present case, as we will explain in greater detail, the defendant was provided an opportunity to establish her prima facie case over a period of four days. When the burden of production thereafter shifted to the plaintiff to provide evidence of an inability to comply with the court orders that were the subject of the defendant's motion, however, he was allowed, as a consequence of the court's scheduling order, only one day to call witnesses on his behalf, and his defense was largely limited to the introduction of exhibits. Given the lengthy postjudgment procedural history of this case related to the court's property distribution orders, and the complexity of the issues before the court, we conclude that affording the plaintiff only one day to present his defense was an abuse of the court's discretion that resulted in a hearing that was unfair to the plaintiff, depriving him of his due process rights.

The following facts are relevant to our analysis. The hearing on the defendant's motion for contempt originally was scheduled for four days. On the first day of evidence, the plaintiff's counsel, Norman Roberts, expressed his reservations over the time limitations given the lengthy postjudgment history of the case. He repeatedly asserted that he would not have sufficient time to present the plaintiff's defense to the defendant's allegations. As early as the morning of the first day of evidence, Roberts argued to the court that "it does

appear we're going to need more dates . . . . I didn't think that we would be halfway through the first day and be where we are." Later during the first day of evidence, Roberts renewed his concern that "[w]e're going to need more time," and again expressed his apprehensions that a hearing lasting only four days was not going to be sufficient. The court responded to Roberts' concerns by saying, "maybe like a stone rolling down a hill it'll pick up speed . . . . " The court expressed its reluctance to allow additional time because it was concerned that "[t]he work [would expand] to fill the time allotted for its completion." It maintained that, "if we stay focused . . . we'll get this done and I'll get a clear, cogent picture of why the Avaya shares are still not transferred."

At the end of the second day of evidence, Roberts again argued that the plaintiff would not be able to have a meaningful hearing without additional time: "[G]iven that we're two days in and we're still on . . . witness number one, can we get extra dates . . . because we're not going to finish. . . . I mean, there's just no possible way we're going to finish this." The court reassured the parties that they would be afforded "plenty of time . . . ."

Like Roberts, the court also expressed its concerns with the pace of the defendant's case-in-chief. On the second day of evidence, the court admonished the defendant's counsel on her prosecution of the motion. It stated: "[A]nd now we've got a problem. All right. On something that should have taken a very short time, probably thirty minutes on one side, thirty on another, if that, and done. And now we're doing it here, it's 10:30 in the morning, we haven't called our first witness, we're in the middle of a witness." Once again, on the morning of the last scheduled day, the court began by expressing its expectation that the defendant would finish her case-in-chief that day, despite noting that "this is our fourth

day," as well as that "[w]e have just a limited number of days assigned." The court conveyed its frustration by noting: "[O]ne of the things that I've experienced in this job for almost nineteen years now, is that oftentimes one party basically sucks all the oxygen out of the case. And there is no time for the opposing counsel to defend their client . . . . One of the functions that a trial judge has is to take charge of the case, balance the interest of the parties, and get the case done as expeditiously as possible. So we plowed the same row for a while yesterday. And that just can't happen. So, we need to be more economical with our presentations, and focus on what is really important. And then we'll have this case, basically, wrapped up tomorrow." The court further stated: "I just want people to understand that this is a system that is under extreme stress. And I expect counsel to focus on what is important, and what is relevant, and what is going to get us from point A to point B. Particularly the judge—you know—educating me in terms of the facts."

At the conclusion of the fourth day, after the defendant rested her case-in-chief, the court allowed for an additional day in which the plaintiff could present his defense. The court, however, preemptively placed restrictions on the plaintiff's ability to present his case. Specifically, after Roberts stated that he intended to call four witnesses in presenting the plaintiff's defense, the court responded by saying: "So, I think that—you know—a lean, spare examination, so that we're not plowing that same old furrow again there. You know—just let's—you know—you've got tonight to think about it. You know—sit down with [co-counsel], and just figure out what is important to you." Roberts expressed his frustration with the court's decision to limit the plaintiff's case-in-chief to one day, arguing that "I don't see the possibility of closing evidence tomorrow. I

really, really don't." The court admonished the plaintiff's counsel by saying: "This case has gone on way too long. A ten year old case is—you know—it's reached its shelf life, folks. It's expired. All right? So, for everybody's sake—for the system—the least of our worries, but the system, and for these two people whose lives have been on hold all this time, we've got to get some resolution. So, that's the dose of reality . . . . You're a good lawyer. You're—you know—you're a creative lawyer. You need to sit down with all your associates, and figure out how it is that you get your case in, and finish it tomorrow."

Alternatively, in light of the plaintiff's objections to the truncated scheduling order, the court threatened to declare a mistrial. Specifically, the court said: "So, one of the options that I have is—and I—I could—I've probably done it twice in my career, is to [mistry this proceeding], because this is not going to go—I am not carrying this case over to October." Thereafter, in compliance with the court's scheduling order, the plaintiff limited the presentation of his defense by introducing exhibits and limiting the testimony of witnesses to one day.[4]

In his appellate brief, the plaintiff asserts that he was prejudiced by the restrictions that the court placed on him because he "was required to submit numerous documents as exhibits without the benefit of testimony to explain and illuminate the salient portions . . .

[4] The defendant argues that, because the plaintiff did not "accept" what it mistakenly characterizes as the court's "offer" to declare a mistrial, and proceeded to present his case, the plaintiff should not now be permitted to seek reversal on the ground that the court did not afford him a fair hearing. "[A] party cannot take a path at trial and change tactics on appeal." (Internal quotation marks omitted.) *State* v. *Martone*, 160 Conn. App. 315, 327, 125 A.3d 590, cert. denied, 320 Conn. 904, 127 A.3d 187 (2015). In light of the repeated objections by the plaintiff's counsel to the court's scheduling order, we are not persuaded that this claim is a departure from any tactical decision made by the plaintiff's counsel at the hearing or that the plaintiff induced the alleged error at issue in this claim.

[and] to limit the number of his witnesses, and limit their testimony." Furthermore, the plaintiff's counsel asserted at oral argument before this court that the plaintiff was prejudiced by the restrictions placed on his defense because he was forced to reformulate his entire presentation in order to attempt to get all of his exhibits admitted into evidence, he was forced to focus on putting documents into evidence to support his trial brief instead of using witnesses to explain or to give context to the evidence for the benefit of the court, and because his ability to call and to examine witnesses was severely circumscribed.

The court's scheduling order does not appear to have been based on the complexity of the issues before the court in ruling on the defendant's motion or the reasonable needs of the parties to present their case. Indeed, the record reflects that, over the repeated objections of the plaintiff's counsel, the court limited the plaintiff's case-in-chief before he even had an opportunity to present any evidence. Thus, the court's scheduling order could not have been based on a determination that some or all of the plaintiff's evidence was not relevant or that it was inadmissible on some other ground, such as its being cumulative in nature or likely to waste time. See, e.g., Conn. Code Evid. § 4-3. Rather, the court's scheduling order appeared to be arbitrary, and its limitation on the plaintiff's case-in-chief seemingly was the result of the court's frustration that the parties' dispute had been long-standing.

Although the court appears to have been frustrated with the pace of the defendant's presentation of her case, it did not use the tools at its disposal to confine her case-in-chief to relevant matters and to prevent her from presenting what it believed to be cumulative evidence. Instead, in an effort to bring the hearing to a conclusion, it truncated the plaintiff's presentation of

his defense. The court's dissatisfaction with the presentation of the defendant's case-in-chief, however, was not a valid basis on which to infringe the plaintiff's right to be heard and to present a defense. The court may limit the time allowed for an evidentiary hearing but its limitation must be reasonable in light of the needs of the parties to present their case. See, e.g., *Dicker* v. *Dicker*, 189 Conn. App. 247, 265, 207 A.3d 525 (2019) ("we previously have determined that the court reasonably may limit the time allowed for an evidentiary hearing" (internal quotation marks omitted)). Nothing in the record suggests that the plaintiff agreed with the court's scheduling order or that he willingly accepted the limitations imposed on him by the court. In fact, the record clearly shows the opposite; as discussed previously, Roberts consistently and repeatedly expressed concern that he would not have enough time to present the plaintiff's case in full. Furthermore, as we discussed previously, the plaintiff specifically has claimed before this court that the trial court's restrictions severely circumscribed his ability to present his defense because they hampered his ability to provide necessary context for other evidence in the case.

We are persuaded that the court effectively terminated the hearing at the end of the fifth day and "before the plaintiff had a fair opportunity to present evidence on the contested issues." *Szot* v. *Szot*, supra, 41 Conn. App. 242. Although the court did allow for the parties to file briefs after the conclusion of the hearing, it is worth noting that the court also expressed its dissatisfaction with lengthy briefs, stating early in the proceedings that "[a] blizzard of paper is not going to be helpful." Moreover, allowing for the filing of a posthearing brief is not a substitute for an effective presentation of evidence, during which the court is able to assess the credibility of witnesses, particularly in a case involving

numerous and complex issues that occurred over several years, and when the opposing party was nearly unfettered in her ability to present her case.

All of these factors, considered together, make clear that the court's scheduling order reflected an abuse of its discretion, the plaintiff was not afforded a fair opportunity to present evidence on the contested issues, and the hearing was fundamentally unfair. Therefore, it is reasonable to conclude, as the plaintiff argues, that he was hampered in his ability to present testimony and to refute the defendant's evidence generally. The record is abundantly clear that the plaintiff's counsel went to great lengths to express his concern to the court that, as a result of its arbitrary decision to limit his presentation of evidence, the plaintiff would not have sufficient time to adequately present his defense and explain to the court why he could not comply with its orders. Under these facts and circumstances, the proper remedy is to reverse the judgments of the trial court and remand the case for a new hearing.

The judgments are reversed and the case is remanded for a new hearing.

In this opinion the other judges concurred.

NUTMEG STATE CREMATORIUM, LLC, ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION ET AL.

(AC 43834)

Elgo, Suarez and Sullivan, Js.

Syllabus

The plaintiffs appealed to this court from the judgment of the trial court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection denying their applications for two new source air permits. The plaintiffs sought the required permits from the defendant Department of Energy and Environmental Protection in order to install and operate two cremation machines at the site of their proposed crematorium. After a hearing, a department hearing officer issued a decision recommending that the plaintiffs' permit applications be denied on the basis that the plaintiffs' cremation system exceeded the maximum allowable stack concentration (MASC) for emissions of mercury pursuant to the applicable regulation (§ 22a-174-29). The commissioner adopted the hearing officer's decision and issued a final decision affirming the denial of the permit applications. *Held*:

1. The plaintiffs could not prevail on their claim that § 22a-174-29 (b) (2) should be interpreted to require mercury to be measured at the property line, at which point the mercury would be in its particulate form and calculating the MASC would be unnecessary, as it was clearly contrary to what a plain reading of the regulation provided; this court, like the commissioner and the trial court, interpreted § 22a-174-29 (b) (2) to require the calculation of the MASC for emissions of mercury in its vapor form at the discharge point from the crematorium stacks.
2. The plaintiffs could not prevail on their claim that the trial court erred by interpreting improperly the term ambient air: the trial court properly interpreted § 22a-174-29 (b) (2), and, in light of this court's review of the record and the considerable discretion afforded to the commissioner on questions of facts, the trial court properly applied that regulation to the facts of the present case when it concluded that the commissioner's decision to deny the plaintiffs' applications was not unreasonable, arbitrary, capricious, illegal or an abuse of discretion, as the data presented to the commissioner demonstrated that the concentration of mercury vapor at the discharge point would exceed the MASC for mercury.
3. The plaintiffs' contention that the trial court went beyond the pleadings and improperly adjudicated issues not raised on appeal was unfounded:

because the plaintiffs claimed that the commissioner misinterpreted and misapplied § 22a-174-29, it was clearly necessary for the court to consider the interpretation of that regulation, along with how it should be applied to the facts of the present case, in order to resolve the plaintiffs' appeal.

4. The plaintiffs could not prevail on their claim that the trial court erred by violating binding legal precedent and the applicable statute (§ 4-183 (j)): although the plaintiffs argued that the commissioner's decision was made upon unlawful procedure on the basis that he improperly admitted a certain letter from department staff into evidence without providing the plaintiffs the opportunity to respond or to cross-examine the staff, the commissioner made clear that the letter was not evidence and, therefore, there was no requirement to afford the plaintiffs the opportunity for cross-examination; moreover, the department's regulations did not prohibit such a letter, and the plaintiffs were able to respond to the letter by filing their objection; furthermore, the plaintiffs' claim that the court misunderstood the evidence and eschewed the expert opinions was simply unsupported by the record and, as this court already concluded, the court properly interpreted the regulations and properly applied the substantial evidence standard in its review of the commissioner's decision.

Argued October 21, 2021—officially released February 1, 2022

Procedural History

Appeal from the decision of the named defendant denying certain permit applications submitted by the plaintiffs, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Matthew S. Carlone, for the appellants (plaintiffs).

Benjamin W. Cheney, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Matthew I. Levine*, assistant attorney general, for the appellee (named defendant).

Jesse A. Langer, for the appellee (defendant Coles Brook Commerce Park Owners Association, Inc.).

Opinion

SULLIVAN, J. The plaintiffs, Luke DiMaria and Nutmeg State Crematorium, LLC,[1] appeal from the judgment of the Superior Court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection (commissioner), denying the plaintiffs' applications for two new source review air permits (air permits), which had been submitted by the plaintiffs to the defendant Department of Energy and Environmental Protection (department).[2] On appeal, the plaintiffs claim that the trial court erred by (1) concluding that the plaintiffs' cremation system exceeded the maximum allowable stack concentration (MASC) for mercury, (2) interpreting improperly the term "ambient air" to mean all atmosphere external to buildings, (3) adjudicating issues not raised in the administrative appeal, and (4) violating binding legal precedent and General Statutes § 4-183 (j).[3] We affirm the judgment of the court dismissing the plaintiffs' appeal.

[1] DiMaria is the sole member of Nutmeg State Crematorium, LLC. For efficiency, we collectively refer to both as the plaintiffs throughout this opinion.

[2] The other defendants in the underlying appeal to the Superior Court were Coles Brook Commerce Park Owners Association, Inc. (Coles Brook), Prime Locations of CT, LLC, Hasson Holdings, LLC, SMS Realty, LLC, C& G Holdings, LLC, and C&G Holdings II, LLC. Of those defendants, only Coles Brook is participating in this appeal. Coles Brook did not file its own brief but, rather, adopted the department's brief in full.

[3] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

The following facts and procedural history are relevant to our resolution of this appeal. On October 15, 2014, the plaintiffs submitted to the department their applications for two new air permits, pursuant to § 22a-174-3a (a) (1) of the Regulations of Connecticut State Agencies,[4] to install and operate two cremation machines necessary for cremating human remains at the site of their proposed crematorium located at 35 Commerce Drive in Cromwell. On January 2, 2015, the department issued a notice of sufficiency indicating that the applications were complete. Following the issuance of the notice of sufficiency, the department began to conduct a technical review of the applications. During this review period, department staff performed MASC calculations for various pollutants and compared them to emissions from the proposed crematorium. No MASC calculation was performed for mercury, however, because department staff decided to consider mercury in its particulate form, rather than in its vapor form.[5]

On August 31, 2016, the department issued its tentative determination to recommend approval of the air permits. In response, several business entities filed a request with the department to obtain intervenor status, which was granted on October 27, 2016. Evidentiary hearings were held on February 28, and on March 1

[4] Section 22a-174-3a (a) (1) of the Regulations of Connecticut State Agencies provides in relevant part: "Prior to beginning actual construction of any stationary source or modification not otherwise exempted . . . the owner or operator shall apply for and obtain a permit to construct and operate under this section for any . . . (G) [i]ncinerator for which construction commenced on or after June 1, 2009 . . . ."

[5] The trial court made the following findings regarding mercury. "Mercury in various forms is a hazardous air pollutant . . . regulated under § 22a-174-29 of the Regulations of Connecticut State Agencies. There is evidence in the record that exposure to mercury can harm the brain, heart, kidneys, lungs, and immune system of people of all ages as well as cause death, reduced reproduction, slower growth and development, and abnormal behavior in animals. There is agreement amongst the parties that operation of the proposed cremation machines will emit mercury."

and 2, 2017. At the evidentiary hearings, the intervening parties argued to the department that the plaintiffs were responsible for showing compliance with the MASC for mercury in its vapor form because § 22a-174-29 (b) (2) of the regulations[6] requires that the MASC be calculated for the phase of mercury that it will be in at the discharge point from the crematorium stacks, which is in its vapor form. To support their contention, the intervening parties presented expert evidence from Eric Epner, an engineer with expertise in air permitting and air pollution control. Epner performed a MASC calculation for mercury in its vapor form and concluded that the emissions from the proposed crematorium stacks would not satisfy the MASC for mercury pursuant to § 22a-174-29 (b) (2).

The hearing officer credited the evidence presented by the intervening parties and concluded that, on the basis of a plain reading of § 22a-174-29 of the regulations, the plaintiffs were responsible for showing compliance with the MASC for mercury in its vapor form, rather than in its particulate form. On August 11, 2017, the hearing officer issued his proposed final decision, which recommended that the commissioner deny the plaintiffs' applications. Subsequent to the hearing officer's proposed final decision, the Bureau of Air Management (bureau) at the department submitted a posthearing staff response stating that it would not file an exception to the proposed final decision and that it agreed with the conclusion of the hearing officer. Specifically, this response stated that the bureau agreed

[6] Section 22a-174-29 (b) (2) of the Regulations of Connecticut State Agencies provides in relevant part: "No person, who is required to maintain compliance with a permit under section 22a-174-3a of the Regulations of Connecticut State Agencies shall cause or permit the emission of any hazardous air pollutant listed in Table 29-1, 29-2 or 29-3 of this section from any stationary source or modification at a *concentration at the discharge point* in excess of the maximum allowable stack concentration unless such source is in compliance with the provisions of subsection (d) (3) of this section. . . ." (Emphasis added.)

with the following conclusions of the hearing officer: (1) "[m]ercury vapor will in fact be emitted at the discharge point from the crematories," (2) "[t]he applicant[s] must demonstrate that emissions of mercury vapor from the crematories will comply with the [MASC] for mercury vapor, as calculated based on the hazard limiting value . . . for mercury vapor," and (3) "[t]he applicant[s] ha[ve] not demonstrated, through the permit application and hearing process that the emissions of mercury vapor from the crematories will comply with the [MASC] for mercury vapor, as calculated based on the hazard limiting value . . . for mercury vapor."

On August 28, 2017, the plaintiffs filed an objection to the bureau's response, seeking to strike it from the evidentiary record. The plaintiffs argued that the bureau's response was an improper posthearing submission and that § 22a-3a-6 (y) (3) (A) of the regulations[7] "only provides that a party may submit an exception to the proposed final decision of the hearing officer." On October 24, 2017, the commissioner issued his ruling on the plaintiffs' objection and motion to strike, concluding that "[t]here is nothing in the language of the rule, nor [have] the applicant[s] provided any other authority to support [their] claim that [§] 22a-3a-6 (y) (3) (A) or the related provision in Connecticut's Uniform Administrative Procedure Act . . . prohibits staff [of the department] from filing, or me from considering, [the] staff's [proposed final decision] response. . . . The applicant[s'] motion sought to have [the] staff's [proposed final decision] response stricken from the evidentiary record. . . . However, [the] staff's [proposed final decision] response is not evidence. . . . Since it is not evidence, [the] staff's [proposed final

[7] Section 22a-3a-6 (y) (3) (A) of the Regulations of Connecticut State Agencies provides in relevant part: "[W]ithin [fifteen] days after personal delivery or mailing of the proposed final decision any party or intervenor may file with the Commissioner exceptions thereto. . . ."

decision] response will not be included in the evidentiary record in this matter." (Emphasis omitted.)

On January 8, 2018, the commissioner issued his final ruling denying the plaintiffs' applications for new air permits. The plaintiffs subsequently appealed to the Superior Court, arguing that (1) "their constitutional right to due process was violated when . . . [the department] submitted evidence directly contradicting the evidence it proffered at trial and [in] its posttrial brief" and (2) the . . . commissioner misconstrued the [department's] regulations in justifying an arbitrary and capricious denial of the plaintiffs' applications." (Emphasis omitted.) The trial court rejected the plaintiffs' claims. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal to this court, the plaintiffs first argue that the trial court erred by concluding that their cremation system exceeded the MASC for mercury. Specifically, the plaintiffs argue that § 22a-174-29 of the regulations does not require them to demonstrate that the mercury vapor emitted from the discharge point at the crematorium stacks complies with the regulation. Rather, the plaintiffs contend that the proper reading of the regulation requires the measure of mercury at the property line, at which point the mercury would be in its particulate form and calculating the MASC would be unnecessary. We disagree.

We begin our analysis by setting forth the appropriate standard of review. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 264, A.3d (2021).

"Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law. . . . These principles apply equally to regulations as well as to statutes." (Internal quotation marks omitted.) *Cockerham* v. *Zoning Board of Appeals*, 146 Conn. App. 355, 364–65, 77 A.3d 204 (2013), cert. denied, 311 Conn. 919, 85 A.3d 653 (2014), and cert. denied, 311 Conn. 919, 85 A.3d 654 (2014).

With the foregoing principles in mind, we begin with the language of the regulation at issue in the present

case. Section 22a-174-29 (b) (2) of the regulations provides in relevant part: "No person, who is required to maintain compliance with a permit under section 22a-174-3a of the Regulations of Connecticut State Agencies shall cause or permit the emission of any hazardous air pollutant listed in Table 29-1, 29-2 or 29-3 of this section from any stationary source or modification at a *concentration at the discharge point* in excess of the maximum allowable stack concentration unless such source is in compliance with the provisions of subsection (d) (3) of this section. . . ." (Emphasis added.) Several definitions of the terms used in the relevant regulation are pertinent to our resolution of this appeal. The term "discharge point" is defined as "any stack or area from which a hazardous air pollutant is released into the ambient air." Regs., Conn. State Agencies § 22a-174-1 (35). The term "stack" is defined as "any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct . . . ." 40 C.F.R. § 51.100 (ff); see Regs., Conn. State Agencies § 22a-174-1 (109) (referring to definition set forth in 40 C.F.R. § 51.100 (ff) but providing "that stack shall also include a flare"). MASC is defined as "the maximum allowable concentration of a hazardous air pollutant in the exhaust gas stream at the discharge point of a stationary source under actual operating conditions." Regs., Conn. State Agencies § 22a-174-1 (68). A MASC calculation is performed using a formula specified in § 22a-174-29 (c) (1) of the regulations. Table 29-3 lists mercury particulate as a hazardous air pollutant but provides no numerical value for the MASC equation. Regs., Conn. State Agencies § 22a-174-29. The table, however, does provide a hazard limiting value for mercury in vapor form. Id., § 22a-174-29, Table 29-3.

The plaintiffs rely on the fact that there is no hazard limiting value for mercury in its particulate form listed in Table 29-3, and, as a result, they contend that there

is no way to calculate the MASC for mercury at the property line. The clear and unambiguous language of § 22a-174-29 (b) (2) of the regulations, however, requires that no hazardous air pollutant be emitted from the *discharge point* in excess of the MASC. It is undisputed that mercury will be in its vapor form at the discharge point at the stacks and that there *is* a hazard limiting value for mercury vapor.

Despite the plain and unambiguous language of § 22a-174-29 (b) (2) of the regulations, the plaintiffs nevertheless contend that this regulation should be interpreted to mean that no hazardous air pollutant found at the *property line* should exceed the MASC. Specifically, the plaintiffs argue that it is unnecessary to perform a MASC calculation as to mercury, using the hazard limiting value for mercury vapor, because mercury vapor will not exist at the property line. Contrary to the plaintiffs' argument, there is nothing in the regulation that provides that a MASC need not be calculated based on the existence or nonexistence of mercury vapor at the property line. Rather, the regulation clearly identifies the relevant point at which to measure the MASC as the *discharge point*. Here, it is undisputed that mercury vapor will be present at the discharge point—the relevant place of measurement per the plain reading of the regulation—not at the property line. The plaintiffs' interpretation is clearly contrary to what a plain reading of the regulation provides.

Although our review is plenary, we agree with the commissioner's and the trial court's interpretation of the regulation. The commissioner determined that § 22a-174-29 (b) (2) of the regulations requires the calculation of the MASC for mercury emissions in its vapor form. Likewise, the trial court concluded that "to determine whether this emission can be permitted, a MASC for mercury vapor in this particular situation must be

calculated and compared to the actual expected emission." On the basis of the plain meaning of the regulation, we conclude that calculating the MASC for mercury vapor is required under § 22a-174-29 (b) (2).

II

The plaintiffs next argue that the trial court erred by interpreting improperly the term "ambient air" to mean all atmosphere external to buildings. Specifically, the plaintiffs contend that "[t]he record unequivocally establishes that the term '[a]mbient [a]ir' must be interpreted as commensurate with the applicant's property line . . . . [T]he MASC formula in [§ 22a-174-29 (b) of the regulations] . . . . is a differential equation constructed to calculate the MASC at the discharge point so that the concentration of only those [hazardous air pollutants] present at the applicant's property line may be calculated . . . ." (Emphasis omitted.) The department contends that "[t]he terms used to define MASC make it clear that MASC is intended to regulate [hazardous air pollutants] emitted from the stack." It further contends that "[t]he hearing officer credited . . . Epner's testimony and that testimony is more than sufficient evidence to show that the plaintiffs' proposed crematorium stacks would not comply with the MASC for mercury." We agree with the department.

In part I of this opinion, we determined the proper interpretation of § 22a-174-29 of the regulations. We now turn to the department's application of that regulation to the facts in the present case. This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 739, 261 A.3d 1182, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021). "[R]eview of an administrative

agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . ." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, 205 Conn. App. 368, 371, 257 A.3d 978, cert. denied, 338 Conn. 910, 258 A.3d 1279 (2021).

Our review of the record persuades us that the judgment of the court should be affirmed. In addressing the plaintiffs' claims on appeal, the court concluded that the commissioner's decision to deny the plaintiffs' applications for two new permits was not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. The court observed that "this decision turns, not on the factual evidence submitted, but, instead, on the legal interpretation of the applicable regulations. Once the regulations are construed, their application to the evidence in this matter becomes uneventful." The court concluded that, "[i]f the regulations require a MASC analysis at the stack, the permits must be denied

because *the uncontroverted record evidence revealed that the MASC for mercury vapor, as calculated and entered into evidence by the intervening parties, was exceeded at the stack* and no emission exceeding the MASC can be allowed." (Emphasis added.) We agree with the court's analysis.

"[T]his court . . . may [not] retry [a] case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, supra, 205 Conn. App. 375. The commissioner had the evidence of the bureau staff, as well as the testimony of Epner and the entire administrative record before him when making his final decision. This evidence included the MASC, performed by Epner, of mercury in its vapor form at the end of the stack. The data presented to the commissioner demonstrated that the concentration of mercury vapor at the discharge point would exceed the MASC for mercury. In light of the record and the considerable discretion concerning findings of fact afforded to the commissioner, we reject the plaintiffs' claim and conclude that the trial court properly interpreted the regulations and properly applied the facts in the present case.

III

The plaintiffs next argue that the court erred by adjudicating issues not raised on appeal. Specifically, the plaintiffs contend that the court adjudicated three particular issues that were not raised on appeal: (1) whether the mercury emissions should be considered in deciding whether the proposed discharge meets the regulatory requirements for an air permit, (2) how § 22a-174-29 of the regulations regarding mercury emissions and the MASC should be applied, and (3) whether the plaintiffs failed to satisfy § 22a-174-29 because they did

not calculate a MASC for mercury vapor as required by the regulation. The plaintiffs further contend that "[i]t is clear and unequivocal that the court ruled upon issues outside the scope of the pleadings, which is grounds for automatic reversal."

We begin our analysis with the standard of review. "Any argument that the court acted outside the scope of the pleadings implicates its authority to act, which presents a question of law over which our review is plenary. . . . Furthermore, [t]he interpretation of pleadings is always a question of law for the court . . . ." (Citation omitted; internal quotation marks omitted.) *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 732, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020).

In their appeal to the Superior Court, the plaintiffs asked the court to vacate and reverse the department's final order denying their air permit applications. Specifically, the plaintiffs alleged, among other things, that, "[i]n denying the plaintiffs' applications the [department] acted arbitrarily, capriciously and illegally by requiring the plaintiffs [to] use the [hazard limiting value] for mercury vapor, rather than mercury particulate, in connection with the plaintiffs' MASC calculations for mercury emissions, in order to demonstrate [that] the proposed cremation systems comply with [§ 22a-174-29 of the regulations]. . . . [T]here are no facts contained in the record which could form a proper legal basis for the [department] to reach its conclusions that [§ 22a-174-29] require[s] the plaintiff[s] to demonstrate compliance with the MASC using the [hazard limiting value] for mercury vapor rather than mercury particulate . . . ."

The plaintiffs' contention that the court went beyond the pleadings is unfounded. The plaintiffs pleaded that the commissioner misinterpreted and misapplied § 22a-174-29 of the regulations; thus, it was clearly necessary for the court to consider the interpretation of that regulation, along with how it should be applied to the facts of the case at bar, in order to resolve the administrative appeal. The interpretation of § 22a-174-29 is clearly a legal question for the court to review, and, accordingly, the court was well within its discretion to adjudicate the appeal in the manner that it did.

IV

The plaintiffs' final claim on appeal is that the court erred by violating binding legal precedent and § 4-183 (j). Specifically, the plaintiffs contend that "[t]he trial court cannot substitute its judgment as to the credibility of witnesses or findings of fact so long as there is a rational basis for the factual findings in the record. . . . The trial court's decision . . . substitutes the court's own judgment in its place without regard to fundamental scientific and mathematical concepts." (Citations omitted.) The plaintiffs further contend that "[i]t is clear from the decision that the court fundamentally misunderstood all of the fundamental scientific and mathematical underpinning[s] central to this case." We disagree.

We previously concluded in parts I and II of this opinion that the court properly interpreted the regulations. This claim is another recitation of the arguments already addressed in this opinion. The court properly applied the substantial evidence standard in its review of the commissioner's decision. The plaintiffs claim that the court substituted its own judgment by "eschewing the expert opinions of every engineer that testified in this case"; however, that assertion is simply unsupported by the record.

Finally, the plaintiffs rely on *Godaire* v. *Dept. of Social Services*, 174 Conn. App. 385, 165 A.3d 1257 (2017), in which this court reversed the trial court's ruling on the ground that the administrative decision was made upon unlawful procedure pursuant to § 4-183 (j) (3) because "the plaintiff did not have a meaningful opportunity to respond to the corrected evidence presented by the department . . . ." (Internal quotation marks omitted.) Id., 399. The plaintiffs assert that *Godaire* should inform our decision in the present case because the commissioner's decision was made upon unlawful procedure. Specifically, the plaintiffs contend that "[the department] submitted an unsworn document into the record, which was never scrutinized under cross-examination, and the gravamen of said document contradicts every representation made by the [department] in the preceeding two years . . . . [The letter was submitted] during a time period wherein the department['s rules of practice prohibit the admission of new evidence . . . ."

Contrary to the plaintiffs' assertion, the commissioner made clear that the response letter submitted by the bureau staff was not evidence. The commissioner stated in his ruling on the plaintiffs' objection and motion to strike the response letter that "[t]here is nothing in the language of the rule, nor [have] the applicant[s] provided any other authority to support [their] claim that [§] 22a-3a-6 (y) (3) (A) [of the regulations] or the related provision in [the UAPA] . . . prohibits [the] staff from filing, or me from considering, [the] staff's [proposed final decision] response. . . . The applicant[s'] motion sought to have [the] staff's [proposed final decision] response stricken from the evidentiary record. . . . However, [the] *staff's* [*proposed final decision*] *response is not evidence*. . . . Since it is not evidence, [the] staff's [proposed final decision] response will not be included in the evidentiary record

in this matter." (Emphasis altered.) We agree with the commissioner. The response letter did not constitute evidence; rather, the document outlined the bureau staff's opinion and was properly included in the administrative record.[8] Nor do any of the department's regulations prohibit such a letter. In fact, the regulations explicitly provide for an opportunity to submit exceptions to the commissioner.[9] Moreover, the plaintiffs did respond to this letter through an objection. The commissioner considered and denied their objection, concluding that the bureau staff's response was properly filed and was not evidence, and that, as such, there was no requirement to afford the plaintiffs the opportunity to cross-examine the bureau staff.

In summary, the plaintiffs have failed to show that § 22a-174-29 of the regulations does not require a MASC calculation for mercury at the discharge point or that the commissioner's decision was not based on substantial evidence in the record.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] Section 22a-3a-6 (v) of the Regulations of Connecticut State Agencies provides in relevant part: "(1) . . . [F]or the purposes of a Department proceeding the record shall include: (A) any briefs or exceptions filed before or after issuance of the proposed final decision and (B) any correspondence between the hearing officer or Commissioner and any party, intervenor, or other person concerning the proceeding. (2) The evidentiary record shall be maintained separately from the rest of the record. The evidentiary record shall consist, in addition to the recording of the hearing, of all documents offered into evidence (exhibits), regardless whether they are admitted. Exhibits which are not admitted shall be marked for identification." (Internal quotation marks omitted.)

[9] Section 22a-3a-6 (y) (3) (A) of the Regulations of Connecticut State Agencies provides in relevant part: "Unless otherwise specified by the Commissioner, within [fifteen] days . . . of the proposed final decision any party . . . may file with the Commissioner exceptions thereto."

HALINA OSTAPOWICZ *v.* JERZY WISNIEWSKI
(AC 43944)

Alexander, Clark and Sheldon, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court dissolving her marriage to the defendant. She claimed that the court lacked subject matter jurisdiction to enforce the parties' premarital agreement, erred in finding that certain property constituted the defendant's separate property under that agreement and abused its discretion in assigning to her the debt on the parties' home equity line of credit. *Held*:

1. The plaintiff could not prevail on her claim that the trial court lacked subject matter jurisdiction to enforce the parties' premarital agreement: although the defendant did not comply with the specific pleading requirements of the rule of practice (§ 25-2A), as he did not file a demand for enforcement of the agreement in his prayer for relief, the court, noting that § 25-2A permits the court to exercise its discretion with respect to the time to demand enforcement of an agreement, found that the defendant's filing of a notice containing the agreement constituted a demand for the enforcement of the agreement; moreover, the court had statutory (§ 46b-1) jurisdiction over the dissolution of the parties' marriage, including the premarital agreement, and the rules of practice do not implicate a court's subject matter jurisdiction.
2. The trial court did not abuse its discretion in classifying and assigning the defendant's separate property interests pursuant to the parties' premarital agreement: the plaintiff did not challenge the court's findings that the defendant had complied with the provisions of the agreement related to record keeping and that the plaintiff had removed certain of the defendant's financial records from the marital home, making it difficult for the defendant to trace his property interests in detail; moreover, the court credited the testimony of witnesses that the defendant's family business was an informal venture, and it made detailed findings concerning the value of the family business assets at the time of the parties' marriage and at trial; furthermore, the court did not assign to either party the other party's interest in the family business, thus, the court did not err in not placing a total value on the defendant's interest in the family business pursuant to statute (§ 46b-81 (c)).
3. The trial court abused its discretion in assigning to the plaintiff the entire outstanding debt on the parties' home equity line of credit; the court found that the defendant borrowed $10,000 under this line of credit to pay his attorney's fees in the dissolution proceeding, thus, its order assigning the plaintiff to pay the entire outstanding debt was irreconcilable with its order that the parties were solely responsible for the payment of their respective attorney's fees.

Argued October 7, 2021—officially released February 1, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Caron, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' premarital agreement, from which the plaintiff appealed to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Keith Yagaloff, for the appellant (plaintiff).

Kevin B. F. Emerson, for the appellee (defendant).

Opinion

CLARK, J. The plaintiff, Halina Ostapowicz, appeals from the judgment of the trial court dissolving her marriage to the defendant, Jerzy Wisniewski. On appeal, the plaintiff claims that the court (1) lacked subject matter jurisdiction to enforce the parties' premarital agreement, (2) erroneously found that certain property constituted the defendant's separate property under the premarital agreement and failed to assign a specific value to that property, and (3) abused its discretion in assigning to her the debt on the parties' home equity line of credit. We agree with the plaintiff's third claim and, therefore, affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the plaintiff's appeal. The parties were married on August 21, 2006. Prior to their wedding, they both signed a premarital agreement (agreement). The plaintiff commenced the present action for dissolution of the marriage on October 20, 2017, alleging that the marriage had broken down irretrievably. On May 14, 2018, the defendant simultaneously filed an answer in which he alleged that the marriage should be annulled on the basis of fraud,

a cross complaint,[1] and a "notice" to which he attached the agreement. The court tried the case on several days between April 16 and July 19, 2019. The parties and the defendant's daughter, Alice Vautour, and his sister, Barbara Szczypinski, testified at trial.

Following the presentation of evidence and submission of posttrial briefs, the court issued a lengthy and comprehensive memorandum of decision on December 30, 2019. The court found that the plaintiff was fifty-two years old, in good health, and the mother of two adult children. She was born in Poland and came to the United States in 2004 on a tourist visa, but later secured a student visa and attended Central Connecticut State University. When she arrived in the United States, she worked as a private duty nurse. At the time of trial, she was working as a certified nurse's aide at the University of Connecticut Health Center. The plaintiff attained permanent resident status when she married the defendant; she became a United States citizen in 2014.

The defendant was seventy years old and in poor health. He, too, had been born in Poland and came to the United States with his parents when he was fourteen years old. He earned a bachelor's degree in mechanical engineering in 1974. He and his brother owned a machine shop that they sold in 1987. He later was employed by two other businesses. In 2013 and 2014, the defendant had quadruple bypass surgery and two venous thrombectomies. He has difficulty walking and takes a dozen medications daily for his multiple health problems.

[1] The cross complaint alleged that the marriage should be annulled on the grounds of fraud and misrepresentation because the plaintiff allegedly entered the marriage with the sole intent of using the defendant's citizenship to gain permanent residency and citizenship for herself, her children and her son-in-law.

The court also found that, beginning fifty years ago with his parents, continuing with his brother and sister, and now with his children, the defendant and his family have pooled their money, resources, and labor to buy, maintain, and sell investment real estate. At one time, the family owned and maintained twelve investment properties. To further their business, the family has held various bank and investment accounts, each in the name of more than one member of the family. The court found that the family business is an informal venture, and through the generations, there have never been any contracts or written agreements between family members. Names were added to and removed from titles on properties as needed to further the growth of the business. Family members pool their money, putting in and taking out what is necessary, and working together to purchase, renovate, maintain, and sell properties. The court made detailed findings with respect to the family's business assets, both real property and monetary, and related transactions.

The court did not find it surprising that there were no contracts or written agreements between and among members of the defendant's family, stating: "The first generation of immigrants from Poland worked hard and invested well and passed down to their children assets they had accumulated as a family. The next generation, immigrants themselves, continued in the same vein, following the example of their parents, investing money, time and labor as a family. The court does not ascribe any nefarious motives to the informal way the family has conducted its business, nor does it question the fact that there are no written agreements or contracts."

With respect to the parties' relationship, the court found that they had lived together for eleven months in the defendant's Fenwick Street apartment in Hartford before they married. The defendant helped the plaintiff

obtain a student visa and eventually permanent residency. He also helped the plaintiff's daughter and son-in-law attain legal status. The court found that the parties had approximately nine years of a good marriage. In November, 2015, the defendant asked the plaintiff, for probate purposes, to sign an addendum to the agreement so that there would be contemporaneous documentation that the plaintiff would not make any claim against any of the properties or accounts the defendant acquired through his family business prior to or since the date of marriage. The court found the timing of the defendant's request significant, as it occurred shortly after he experienced serious health issues. The plaintiff refused to sign the addendum. Multiple events between 2015 and 2017 put a strain on the parties' relationship, including the defendant's health issues and the death of the plaintiff's mother in Poland. The court found that disagreements and arguments over money and real estate ultimately led the plaintiff to file for divorce.

The court determined that neither party was primarily responsible for the end of the relationship. The court also concluded that the defendant had failed to prove by clear and convincing evidence that the plaintiff married him solely to attain legal status for herself and her family. The court thus found no fraud on the part of the plaintiff and that the parties' marriage was valid.

With respect to the agreement, the court found that, when the defendant asked the plaintiff to sign the agreement, he made clear that his intention was to protect his interest in the family's business. He testified that he would not have married the plaintiff if she had not signed the agreement. At the time the agreement was drafted, the defendant showed the plaintiff bank and account statements regarding the family business.[2] During the marriage, the statements were mailed to the

[2] Four schedules, which listed the parties' respective assets and liabilities, were attached to the agreement.

marital home and, according to the defendant, the plaintiff had full access to and knowledge of the contents of the statements. The plaintiff also accompanied the defendant to the bank on several occasions.

The plaintiff testified that the defendant probably told her that he would not marry her if she did not sign the agreement. According to her, the defendant went through his financial affidavit and told her that most of the money was family money and the Fenwick Street apartment house where they were living was a family house. She acknowledged that the defendant and his family worked hard for their money and kept it together but claimed that the defendant never told her how much of the family money was his.

The defendant helped the plaintiff prepare her financial affidavit and explained the agreement to her in Polish. The plaintiff later met with Jacek I. Smigelski, a Polish-speaking attorney, to review the agreement; the defendant, who had separate counsel, was not present at the meeting. The plaintiff asked Smigelski a few questions about the agreement, which he answered. The defendant signed the agreement on July 5, 2006; the plaintiff signed it on July 7, 2006. The parties were married on August 21, 2006.

The court noted that General Statutes § 46b-36a et seq. governs premarital agreements. Under that act, a premarital contract is not enforceable under the following conditions: it was not signed voluntarily; it is unconscionable; a party was not provided fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party; or a party was not provided a reasonable opportunity to consult with independent counsel before signing it. General Statutes § 46b-36g.

The plaintiff acknowledged that both parties signed the agreement, and she did not claim that it is unconscionable. Instead, she claimed that the defendant did

not tell her that the bank accounts he disclosed were co-owned by family members and that she did not have a meaningful opportunity to review the agreement with counsel.

The court rejected both claims. It noted that, although they were not required by statute to do so, the parties appended financial affidavits to the agreement. The defendant reviewed his financial affidavit with the plaintiff prior to the time she signed the agreement and explained to her that much of the money listed in that financial affidavit belonged to his family and that they had always held those assets together. The plaintiff also testified that, at the time she signed the agreement, she understood that she was giving up any future claim for family money in the event of a dissolution. "Given that background and crediting the defendant's testimony that, at the time of the drafting and prior to the signing of the agreement, he showed the plaintiff all of the bank and account statements regarding his family money and business (which bank accounts contained other family members' names as well as the defendant's)," the court found that the defendant provided the plaintiff with a fair and reasonable disclosure of the amount, character and value of his property.

The court also found that the plaintiff had an opportunity to meet with a Polish speaking attorney to review the agreement approximately one and one-half months before the wedding, which the court considered a reasonable period of time for review. It was the plaintiff's responsibility to ensure that the legal consultation was meaningful to her. The court, therefore, concluded that the agreement was valid and enforceable.

The court then turned to the substance of the agreement. The court noted that, under section A of paragraph IX of agreement, titled "Termination of Marriage," "[n]either party [is entitled to] receive any portion of

the separate property of the other . . . and/or replacements of such property." Section B of paragraph IX further provides that the "parties shall have no right against each other by way of claims for . . . *division of property existing of this date . . . or acquire*[*d*] *in the future separately from separate* [*funds*]."[3] (Emphasis altered.) As a result, the court construed the agreement to mean that "neither party shall have a claim against the separate property (the real estate in schedules C and D [of the agreement]) or a claim against the property existing as of the date of the [a]greement/subsequent marriage (all the assets in schedules A and B), *or of any future real estate or investments that flow from these original assets.*" (Emphasis added.) On the basis of the court's construction of the agreement and its finding that "family business assets listed on the defendant's current financial affidavit [were] a direct result of the premarital assets he was in possession of at the time of the marriage, as they were acquired after the marriage, separately from separate funds," the court concluded that the plaintiff had no right or claim to the defendant's interest in the family business assets he had listed in his current financial affidavit.

[3] Section III of the agreement, titled "SEPARATE PROPERTY," provides as follows: "Each of the parties agrees that the property described hereafter, shall be defined as the separate [property] of the other party.

"A. All property of [the defendant] listed on 'Schedule C' attached hereto and all property listed of [the plaintiff] listed on 'Schedule D' attached hereto.

"B. All property, whether real or personal or whatsoever nature and wheresoever situated acquired by either party out of the proceeds or income from the separate property or any replacements thereof, or attributable to appreciation in value of said property, or their replacements, whether the enhancement is due to market conditions or to the services, skills or efforts of either of the parties.

"C. The parties shall keep adequate records of their transactions in such separate property and shall make such records available to the other from time to time, the intent being that at all times the separate property will be effectively updated by each of them in such financial records."

Schedules A and B are the parties' respective financial affidavits that were appended to the agreement. Schedules C and D document the title holders of the real estate that was listed in the parties' respective financial affidavits.

With respect to the marital home, however, the court found that the parties had commingled funds to purchase the home and that the plaintiff had helped to maintain it and assisted with improvements. She also had paid the debt on the home equity line of credit. The court concluded, therefore, that the marital home was marital property in which the plaintiff had a legitimate, legal interest.

In dissolving the marriage on the grounds of an irretrievable breakdown, the court ordered, among other things, that the parties are responsible for their respective health insurance and unreimbursed medical expenses; neither party shall receive alimony; the defendant shall quitclaim the marital home to the plaintiff, who "*shall be solely responsible for payment of the* [*home equity line of credit*]," taxes, insurance, and maintenance; the plaintiff has no interest in the defendant's family business; the parties shall retain their respective bank and retirement accounts and pay their respective debts; the defendant shall retain his rights in the family business; the parties shall retain their respective automobiles; and "[*e*]*ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case*." (Emphasis added.)

The plaintiff filed a motion to reargue on the grounds that the court had erred in classifying and assigning the property it determined was the defendant's separate property and in ordering the parties to be responsible for their own attorney's fees while also assigning the debt on the home equity line of credit to her. The defendant objected to the motion to reargue, arguing, among other things, that assigning the home equity loan to the plaintiff was not an order that the plaintiff pay the defendant's attorney's fees, but the "[c]ourt's calculation as to the appropriate award to the defendant (value of property less balance of the [line of credit])." The

court summarily denied the motion to reargue, and the plaintiff did not move for an articulation. This appeal followed.

I

The plaintiff first claims that the court lacked subject matter jurisdiction to enforce the agreement because the defendant did not comply with the requirements of Practice Book § 25-2A.[4] We disagree.

We begin with the standard of review. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Aley* v. *Aley*, 97 Conn. App. 850, 854, 908 A.2d 8 (2006). Subject matter jurisdiction "may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) Id. A determination of a court's subject matter jurisdiction is a question of law, and, therefore, our review is plenary. See, e.g., *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 846, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 95 (2001), and cert. denied sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon Village, Inc.*, 258 Conn. 947, 788 A.2d 96 (2001).

The following procedural facts are relevant to our resolution of this claim. The plaintiff commenced the

[4] Practice Book § 25-2A provides in relevant part: "(a) If a party seeks enforcement of a premarital agreement . . . he or she shall specifically demand the enforcement of that agreement, including its date, within the party's claim for relief. The defendant shall file said claim for relief within sixty days of the return date unless otherwise permitted by the court.

"(b) If a party seeks to avoid the premarital agreement . . . he or she shall, within sixty days of the claim seeking enforcement of the agreement, unless otherwise permitted by the court, file a reply specifically demanding avoidance of the agreement and stating the grounds thereof."

present action in October, 2017. The complaint contained no allegation regarding the agreement. On May 14, 2018,[5] the defendant simultaneously filed three pleadings: an answer, a cross complaint, and a "notice" to which he attached a copy of the parties' agreement, including schedules. The defendant did not expressly reference or demand enforcement of the agreement in his prayer for relief.

On October 18, 2018, approximately six months after the defendant had filed with the court the notice and agreement and just twelve days before trial was scheduled to commence, the plaintiff filed a motion to preclude the agreement on the grounds that the defendant had failed to comply with Practice Book § 25-2A, which provides that a party seeking to enforce a premarital agreement "shall specifically demand the enforcement of that agreement, including its date, within the party's claim for relief" within sixty days of the return date "unless otherwise permitted by the court." The plaintiff argued that the defendant did not include a demand for enforcement of the agreement within his claim for relief, did not file the agreement itself within sixty days of the November 21, 2017 return date, and did not seek permission from the court to file any such claim for relief after the deadline for doing so had passed. As a result, she argued that the agreement was not properly before the court and could not be enforced, citing *Warren* v. *Gardel*, Superior Court, judicial district of Fairfield, Docket No. FA-15-6048865-S (November 28, 2016), and *Olderman* v. *Olderman*, Superior Court, judicial district of New Britain, Docket No. FA-14-4034221-S (August 13, 2014).[6]

[5] In its order denying the plaintiff's motion to preclude the agreement, the court cites different dates on which the answer, cross complaint, and notice were filed. Those dates appear to be the dates the documents were signed or captioned, however. According to the docket prepared by the clerk, all three documents were filed on May 14, 2018.

[6] In *Warren*, the court noted that Practice Book § 25-2A "requires that a party seeking to enforce a pre- or post-nuptial agreement plead the agree-

On the following day, October 19, 2018, the court heard and denied the plaintiff's motion to preclude the agreement. In its order, the court acknowledged that the rules of practice required the defendant to file with his answer and cross complaint a demand for enforcement of the agreement on or before January 21, 2018. The court noted, however, that Practice Book § 25-2A (a) permits "the court to exercise its discretion" with respect to the time to demand enforcement of an agreement. The court also found that the defendant's filing of the "notice" and agreement "constitute[d] a demand for the enforcement of [the] agreement." The court further found that the plaintiff did not file a timely reply pursuant to Practice Book § 25-2A (b) but, instead, waited until the eve of trial to file her motion to preclude the agreement. As a result, the court denied the motion to preclude but continued the trial in order to provide the parties with more time to conduct discovery regarding the agreement.[7]

On appeal, the plaintiff claims that the court lacked subject matter jurisdiction to enforce the agreement because the defendant did not comply with the specific pleading requirements of Practice Book § 25-2A. As a result, she argues that any orders flowing from the agreement are void. We disagree.

ment in the prayer for relief." *Warren* v. *Gardel*, supra, Superior Court, Docket No. FA-15-6048865-S. Because neither party had done so, the court concluded that it did "not have the authority to issue orders enforcing the terms of the pre-nuptial agreement itself." Id. Similarly, in *Olderman*, neither party had pleaded or demanded enforcement of the premarital agreement in accordance with Practice Book § 25-2A. The court concluded, without discussion or analysis, that, "[c]onsequently, a claim for enforcement of the premarital agreement is not properly before this court." *Olderman* v. *Olderman*, supra, Superior Court, Docket No. FA-14-4034221-S. Neither court suggested that a party's failure to comply with Practice Book § 25-2A deprived the court of *subject matter jurisdiction* over the agreement, which is the plaintiff's claim in the present appeal.

[7] The trial was rescheduled for April 16, 2019.

Pursuant to General Statutes § 46b-1, the Superior Court has broad jurisdiction over family matters involving dissolution of marriage, including prenuptial agreements.[8] "Jurisdiction of the [subject matter] is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Muller* v. *Muller*, 43 Conn. App. 327, 331, 682 A.2d 1089 (1996). Under § 46b-1, there is no question that the court had jurisdiction over the dissolution of the parties' marriage, including whether the agreement should be enforced. See *Amodio* v. *Amodio*, 247 Conn. 724, 729, 724 A.2d 1084 (1999) (Superior Court as general jurisdiction tribunal has plenary and general subject matter jurisdiction over legal disputes in family matters). Moreover, it is well settled that the rules of practice, including those pertaining to pleading requirements, do not implicate a court's subject matter jurisdiction. See General Statutes § 51-14 (a) ("[s]uch rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts").

Accordingly, the plaintiff's claim that the court lacked subject matter jurisdiction to enforce the agreement fails.[9]

[8] General Statutes § 46b-1 provides in relevant part: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage, contested and uncontested . . . (15) actions related to prenuptial . . . agreements . . . ."

[9] The plaintiff's claim on appeal is that the defendant's failure to comply with the pleading requirements of Practice Book § 25-2A deprived the court of subject matter jurisdiction to enforce the agreement. The only hint of an alternative, nonjurisdictional claim challenging the court's *authority* to enforce the agreement appears in the following sentence of her reply brief:

II

The plaintiff's second claim is that there was insufficient evidence for the court to find that, at the time of the dissolution, certain properties constituted the defendant's "separate property" under the agreement. See footnote 3 of this opinion. The plaintiff argues that the defendant failed to provide sufficient evidence for the court to trace the properties he owned at the time of trial to the separate properties he owned at the time the parties signed the agreement and were married. She also claims that the court erred by failing to assign a specific value to the defendant's ownership interest in the family business. We disagree.

We begin with the applicable standard of review. "[I]n domestic relations cases . . . this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies

"Since [the] [d]efendant never pleaded the agreement, the trial court was without [subject matter] jurisdiction to hear it, or, *in the alternative*, could not enforce it." (Emphasis added.) Because the plaintiff did not make such a claim in her principal brief, we need not decide the separate question of whether the pleading requirements of § 25-2A are mandatory, as opposed to directory, and whether the defendant's alleged failure to comply strictly with those provisions deprived the court of the *authority*, as opposed to the jurisdiction, to enforce the premarital agreement. See, e.g., *Calcano* v. *Calcano*, 257 Conn. 230, 244, 777 A.2d 633 (2001) (arguments cannot be raised for first time in reply brief).

the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 87–88, 995 A.2d 1 (2010). "When a trial court has evidence in a dissolution action sufficient for its decision, garnered from the testimony, exhibits and financial affidavits, its rulings will not be disturbed even though the memorandum of decision is silent as to that evidence." *Russo* v. *Russo*, 1 Conn. App. 604, 606–607, 474 A.2d 473 (1984).

In its memorandum of decision, the court quoted in relevant part the following provision of the agreement: "Neither party shall receive any portion of the separate property of the other . . . and/or replacements of such property. . . . The parties shall have no right against each other by way of . . . *division of property existing* [*as*] *of this date* . . . or acquire[d] in the future separately from separate [funds]." (Emphasis added.) The court found that the "family business assets listed on the defendant's current financial affidavit [were] a direct result of the premarital assets he was in possession of at the time of the marriage, as they were acquired after the marriage, separately from separate funds." As a result, the court concluded that, under the agreement, the plaintiff had no right or interest in any of those family business assets.

At trial, the defendant introduced evidence of the premarital family business assets that he owned on the date the parties married, including the agreement with the attached schedules setting forth each parties' assets at the time of the marriage and the value thereof. The defendant's daughter and sister also testified about the family business and how it operated during the parties' marriage, including the family's acquisition of numerous investment properties during that time frame.

The plaintiff argues that the court was required to trace more precisely the defendant's current assets

back to the separate property he owned at the time the parties married. She points to paragraph C of section III of the agreement, titled "Separate Property," which provides that the "parties shall keep adequate records of their transactions in such separate property and shall make such records available to the other from time to time, the intent being that at all times the separate property will be effectively updated by each of them in such financial records." She also argues that the agreement, in effect, required the court to sit as a "community property state" and not as an "equitable distribution state" and that courts in community property jurisdictions have held that a party seeking to claim assets as separate property "bears a heightened burden of proof to trace any allegedly converted assets to premarital assets."

In making this claim, however, the plaintiff ignores the court's findings that (1) the defendant complied with the agreement's record keeping provision during the course of the marriage and (2) upon commencing these divorce proceedings and without the defendant's consent, the plaintiff removed from the marital home several boxes of documents containing the defendant's financial records and information on the defendant's computer. According to the court, the plaintiff's failure to produce this information during discovery made it "difficult and at times impossible for the defendant to trace in detail and with specificity all of the family business accounts and premarital assets transactions from the date of the marriage to the present." The plaintiff has not challenged these findings on appeal.

As noted earlier in this opinion, the court heard and credited the testimony of witnesses who described the family business as an informal venture. Family members pooled their money, working together to purchase, renovate, maintain, and sell properties. The court did not find it surprising that there were no contracts or

written agreements between and among members of the defendant's family and did not ascribe any nefarious motives to the informal way the family conducted its business. The court made detailed findings concerning the value of the family business assets at the time of the parties' marriage and at trial. It also found that five separate properties in which the defendant had an interest were acquired by the family business during the course of the marriage. With the exception of one such property,[10] the court found that the plaintiff did not contribute any funds toward the purchase of those properties or contribute money or labor toward the renovation, maintenance or upkeep of the properties. The court stated that its findings were based on the evidence and testimony presented at trial and on its observations and assessments of the credibility of the witnesses. "[I]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016).

On the basis of our review of the entire record, we conclude that, under the circumstances of this case, there was sufficient evidence to support the trial court's findings with respect to the defendant's separate property. We reach that conclusion in part because the court determined that the plaintiff's removal and failure to produce the defendant's financial records prevented him from performing the kind of detailed tracing the plaintiff claims was required. See *Certo* v. *Fink*, 140 Conn. App. 740, 743, 749–50, 60 A.3d 372 (2013) (court did not commit error in relying on plaintiffs' estimate

[10] With respect to the Fenwick Street property in Hartford, the court found that the plaintiff paid utilities and contributed toward the rent from the time the building was sold out of the family's business in 2014 until the parties moved to the marital home in December, 2015.

of damages when court credited plaintiffs, discredited defendant, and found that plaintiffs had to rely on estimate of damages as result of defendant's failure to provide discovery).

We also reject the plaintiff's claim that the court improperly failed to place a total value on the defendant's interest in the family business, in violation of General Statutes § 46b-81 (c). That statute concerns the court's authority to assign to either spouse all or part of the estate of the other spouse. In this case, the court determined that the defendant's interest in the family business constituted his separate property under the agreement and, in accordance with the agreement, ordered that, upon dissolution, the defendant shall retain his interest in that separate property. Thus, § 46b-81 (c) had no applicability because the court did not assign to either party the other party's interest in the family business. Accordingly, the plaintiff's claim that the court improperly classified and assigned the defendant's separate property interest in the family business fails.

III

The plaintiff's third and final claim is that the court abused its discretion in assigning to her the entire outstanding debt on the parties' home equity line of credit. We agree because that order conflicts with the court's order regarding attorney's fees.

"The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed.

. . . The judgment should admit of a consistent construction as a whole." (Citations omitted; internal quotation marks omitted.) *Lashgari* v. *Lashgari*, 197 Conn. 189, 196–97, 496 A.2d 491 (1985).

"Our standard of review for financial orders in a dissolution action is clear. The trial court has broad discretion in fashioning its financial orders, and [j]udicial review of a trial court's exercise of [this] broad discretion . . . is limited to the question of whether the . . . court correctly applied the law and could reasonably have concluded as it did." (Internal quotation marks omitted.) *Hammel* v. *Hammel*, 158 Conn. App. 827, 835–36, 120 A.3d 1259 (2015). "This deferential standard of review is not, however, without limits. There are rare cases in which the trial court's financial orders warrant reversal because they are, for example, logically inconsistent . . . or simply mistaken . . . ." (Internal quotation marks omitted.) Id., 836.

The following additional facts are relevant to this claim. In December, 2015, the parties obtained a home equity line of credit and used some of the funds to pay off the plaintiff's personal line of credit, totaling $24,271. The parties also drew on the line of credit for their respective attorney's fees in this dissolution matter. The court specifically found that the defendant borrowed $10,000 under this line of credit to pay his own attorney's fees in this matter but also ordered, among other things, that the "plaintiff shall be solely responsible for payment of the [home equity line of credit],"[11] and that "[e]ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case."

On appeal, the plaintiff argues that the court's order regarding the home equity line of credit conflicts with

[11] The court also ordered that no further funds were to be drawn on the home equity line of credit.

its order that the parties are responsible for the payment of their respective attorney's fees. We agree that the two orders are irreconcilable. We, therefore, reverse the judgment only with regard to the order that the plaintiff is solely responsible for the debt on the home equity line of credit and remand the case with direction to resolve the inconsistency.[12]

The judgment is reversed only as to the order regarding the home equity line of credit and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

TERRANCE MILLS FREIDBURG *v.* JO-ELLEN KURTZ ET AL.
(AC 43695)

Elgo, Suarez and Palmer, Js.

Syllabus

The plaintiff landlord sought to recover damages for, inter alia, the defendants' alleged violations of a lease agreement entered into in connection with the rental of a furnished, single-family home. Within thirty days of the termination of their tenancy, the plaintiff sent to the defendants an accounting of their security deposit and the alleged damages to the leased property, which indicated that there had been more than $50,000 in damages and that the deposit had been fully expended to cover certain of the expenses incurred in connection therewith. The defendants filed a counterclaim in which they alleged that the plaintiff violated the security deposit statute (§ 47a-21) and the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Following a bench trial, the trial court rendered judgment in favor of the plaintiff on his complaint and on the defendants' counterclaim, and the defendants appealed to this court. *Held*:

[12] During oral argument before this court, counsel for the parties agreed that the order regarding payment of the home equity line of credit was severable from the mosaic of the court's financial orders. We agree. See *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013) (financial order severable when not interdependent with other orders).

1. The defendants could not prevail on their claim that the trial court erred in rendering judgment against them for damages to the premises without determining the age and condition of the property at the time of the commencement of the tenancy and the relative wear and tear of the items at the time of the termination of the tenancy: the trial court had ample evidence before it that supported its calculation of damages, including a comprehensive list of the damaged items and fixtures, photographs of the damage, and receipts for repairs and replacement purchases; moreover, any wear and tear of the individual items was insignificant, given the scope of the documented damage; accordingly, the trial court's damages award was not improper.
2. The defendants could not prevail on their claim that the trial court erred in failing to render judgment in their favor on the counterclaim:

   a. The trial court's finding with respect to the amount of the security deposit paid to the plaintiff was not clearly erroneous: the lease agreement, which was admitted into evidence as an exhibit at trial, substantiated the court's factual finding as to the amount of the security deposit; moreover, the defendants did not offer any documentary evidence at trial, such as receipts or other banking records, of payments made to the plaintiff in excess of the security deposit amount set forth in the lease.

   b. The trial court's determination that the plaintiff properly provided the defendants with a written accounting of the deductions made from the security deposit, as required by § 47a-21 (d) (2), was not clearly erroneous: a comprehensive written statement prepared by the plaintiff, which detailed the damages to the property, the costs incurred in association therewith, and the balance of the security deposit, was introduced into evidence at trial along with evidence that the plaintiff sent such statement to each defendant within thirty days of the termination of their tenancy; moreover, the remaining security deposit funds were properly applied to the damages caused by the defendants because the costs of repairing and replacing the damaged items, as documented in the written statement, exceeded the balance of the security deposit.

   c. This court declined to disturb the trial court's conclusion that the defendants failed to establish that the plaintiff had violated § 47a-21 (h) by failing to retain the security deposit in a separate escrow account: the defendants discussion of the plaintiff's alleged violation of § 47a-21 (h) was limited to the foundation that they laid for their counterclaim under CUTPA and, accordingly, this court's ability to grant relief was conditioned on whether the plaintiff's failure to hold the security deposit in an escrow account was a CUTPA violation; moreover, the plaintiff's alleged conduct, even if found by the court, was not sufficiently unfair or deceptive to constitute a CUTPA violation; furthermore, even if the plaintiff's alleged conduct did amount to a violation of CUTPA, the defendants were barred from recovery because they failed to satisfy the requirements of the applicable statute (§ 42-110g (a)), as they did not put forth any evidence of an ascertainable loss stemming from the plaintiff's

handling of their security deposit and they failed to show that the plaintiff misappropriated or otherwise improperly took money out of the initial security deposit.

Submitted on briefs September 20, 2021—officially released February 1, 2022

Procedural History

Action to recover damages for breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the Housing Session at Bridgeport, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Spader*, *J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendants appealed to this court. *Affirmed.*

Abram J. Heisler, filed a brief for the appellants (defendants).

Matthew R. Russo, filed a brief for the appellee (plaintiff).

Opinion

ELGO, J. In this landlord-tenant dispute, the defendants, Jo-Ellen Kurtz, Andrew Kurtz, and Janice Levy,[1] appeal from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiff, Terrance Mills Freidburg.[2] On appeal, the defendants claim that the court erred (1) in rendering judgment against them for damages to the property that they leased from the plaintiff without determining its age and condition at the commencement of the tenancy and the relative wear

[1] The record indicates that, following the commencement of this action, Jo-Ellen Kurtz legally changed her name to Jo-Ellen Levy. In addition, we note that Janice Levy was named as a defendant by virtue of her status as the guarantor of the other defendants' obligations under the lease agreement between them and the plaintiff. It is undisputed that Janice Levy never resided at the property in question.

[2] The plaintiff testified at trial that, following the commencement of this action, he legally changed his name to Terrance Mills.

and tear of the items at the termination of the tenancy and (2) in failing to render judgment for the defendants on their counterclaim concerning their security deposit that they paid to the plaintiff when they entered into an agreement to lease the property. We affirm the judgment of the trial court.

The following facts, as found by the court or otherwise undisputed, and procedural history are relevant to this appeal. On January 8, 2011, the parties executed a lease agreement pertaining to real property owned by the plaintiff and located at 118 Wilton Road in Westport (property). The initial lease was for a term of one year and six months; the parties renewed the lease for several terms thereafter. When the defendants took possession, a move in inspection was conducted and a document was executed by the parties detailing various " 'luxury items' " on the premises and an associated liquidated damages amount the parties agreed on if the items were damaged. The lease agreement required an initial payment of $27,060, consisting of the first and last months' rent totaling $13,000, a $500 pet deposit, a $560 prepayment of the cost of alarm monitoring at the property for one year, and a security deposit of $13,000. On August 29, 2015, at the end of the defendants' tenancy, the plaintiff sent an accounting to the defendants of the security deposit and the alleged damages to the property. The August 29, 2015 accounting further indicated that the deposit was fully expended and that there was allegedly more than $50,000 in damages to the luxury items previously identified in the inspection document.

The plaintiff commenced the present action on December 7, 2015, alleging violations of the lease agreement and negligence on the part of the defendants. The defendants thereafter filed an answer and a special defense in which they denied liability for the causes of action set forth in the plaintiff's complaint and alleged

that they had "returned the [property] in the same condition in which it was originally tendered, reasonable wear and tear excepted." The defendants also filed a two count counterclaim in which they alleged violations of the security deposit statute, General Statutes § 47a-21,[3] and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[4] In his

[3] General Statutes § 47a-21 provides in relevant part: "In the case of a tenant under sixty-two years of age, a landlord shall not demand a security deposit in an amount that exceeds two months' rent.

* * *

"Upon termination of a tenancy, any tenant may notify the landlord in writing of such tenant's forwarding address. Not later than thirty days after termination of a tenancy or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later, each landlord other than a rent receiver shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest, or (B) the balance of such security deposit and accrued interest after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages. Any landlord who violates any provision of this subsection shall be liable for twice the amount of any security deposit paid by such tenant, except that, if the only violation is the failure to deliver the accrued interest, such landlord shall be liable for ten dollars or twice the amount of the accrued interest, whichever is greater.

* * *

"Each landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in [§ 47a-21 (h) (2)]. . . . The escrow agent may withdraw funds from an escrow account to . . . retain all or any part of a security deposit and accrued interest after termination of tenancy equal to the damages suffered by the landlord by reason of the tenant's failure to comply with such tenant's obligations . . . .

* * *

"[E]ach landlord other than a landlord of a residential unit in any building owned or controlled by any educational institution and used by such institution for the purpose of housing students of such institution and their families, and each landlord or owner of a mobile manufactured home or of a mobile manufactured home space or lot or park . . . shall pay interest on each security deposit received by such landlord . . . ."

[4] General Statutes § 42-110b provides: "(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

reply, the plaintiff denied the substance of that counterclaim.

A trial was held on October 2, 2019, at which the parties testified. The plaintiff also submitted into evidence exhibits pertaining to the property. On November 25, 2019, the court issued a memorandum of decision wherein it rendered judgment in favor of the plaintiff and awarded $25,600.77 in damages, plus postjudgment interest pursuant to General Statutes § 37-3a (a). The court noted that "the parties agreed to the items that were in the furnished home at the commencement of the lease." The court found "most of the plaintiff's claims of damages credible." The court further found that the plaintiff established to "its satisfaction $33,100.77 in damages beyond normal wear and tear at the end of a tenancy by a fair preponderance of the evidence . . . ." The court subtracted the security deposit balance of $7500 from the total cost of the damages that it found were the responsibility of the defendants.

With respect to the defendants' counterclaim, the court found that the defendants had failed to prove

"(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.

"(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.

"(d) It is the intention of the legislature that this chapter be remedial and be so construed."

General Statutes § 42-110g (a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."

their claims at trial. Specifically, the court found, the defendants had not demonstrated that the security deposit they paid to the plaintiff exceeded the $13,000 security deposit requirement in the lease agreement. The court ultimately concluded that it was undisputed that the security deposit balance remaining as of August, 2015, was $7500. This appeal followed.

I

On appeal, the defendants challenge the propriety of the damages awarded by the court. They claim that the court erred in rendering judgment against the defendants for damages to the premises without determining the age and condition of the property at the commencement of the tenancy and the relative wear and tear of the items at the termination of the tenancy. They argue that the court should have factored in the age and previous wear and tear of certain damaged items when calculating the damages award. We are not persuaded.

We begin by setting forth the relevant applicable standard of review. "[O]ur appellate courts accord plenary review to the court's legal basis for its damages award. . . . The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 465, 250 A.3d 696 (2021). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 799, 239 A.3d 381 (2020).

In the present case, the court had ample evidence before it that supported the court's calculation of damages. At trial, the plaintiff testified that he surveyed the property after the conclusion of the tenancy and

observed significant damage compared to what was listed in the inspection report. In addition, the plaintiff submitted into evidence photographs of damage to various appliances and portions of the property, taken shortly after the defendants vacated the premises. The plaintiff also prepared a document that catalogued the damaged items and fixtures in a comprehensive list, which, along with the corresponding receipts for repairs and replacement purchases, was entered into evidence. On our review of the record, we agree with the trial court that any preexisting wear and tear of individual items or fixtures is insignificant given the scope of the damage documented at the conclusion of the defendants' tenancy. Additionally, insofar as the defendants take issue with the court's inclusion of certain items in its damages award that were not the subject of testimony at trial, we agree with the plaintiff that the record contains ample documentary evidence to support all damages found by the court. It does not affect our analysis of the court's findings that the evidence concerning these items was not testimonial in nature. In light of the foregoing, we conclude that the court's damages award was proper.

II

The defendants also challenge the court's ruling on their counterclaim. The defendants contend that the court improperly rejected their claims that the plaintiff (1) charged an excessive security deposit as a condition of tenancy in violation of § 47a-21 (b) (1); (2) failed to properly provide to the defendants a written accounting of deductions that were made from the security deposit as prescribed by § 47a-21 (d) (2); and (3) failed to store the security deposit in a separate escrow account as mandated by § 47a-21 (h).[5] We disagree.

[5] The defendants also claim that the plaintiff failed to provide the defendants with the interest accrued on their security deposit under § 47a-21 (i). Although the trial court did not expressly address this contention in its memorandum of decision, the court did state generally that the defendants

A

First, we address the portion of the claim in which the defendants argue that the court improperly rejected their claim that the plaintiff charged an excessive security deposit as a condition of tenancy in violation of § 47a-21 (b) (1). The defendants' claim is factual in nature, as it is focused on whether, in rejecting their claim, the court's finding with respect to the amount of the security deposit was clearly erroneous.

As a preliminary matter, we note that "[a] reviewing authority may not substitute its findings for those of the trier of the facts. . . . The factual findings of a [trial court] on any issue are reversible only if they are clearly erroneous. . . . [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *Fitzpatrick* v. *Scalzi*, 72 Conn. App. 779, 781–82, 806 A.2d 593 (2002); see also *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 347, 154 A.3d 1037 ("[i]t is the trier's exclusive province to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)), cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017).

As previously noted, in its memorandum of decision, the court concluded that the defendants had not proven the claims alleged in their counterclaim. With respect to the actual amount of the security deposit at issue, the court emphasized that "[i]t was never truly established [at trial] how much the initial payment to the plaintiff was. . . . No initial payment amount was ever

had not proven their claims. Moreover, the court was not bound to credit testimony adduced by the defendants in support of their contention concerning the accrual of interest on the security deposit. See, e.g., *Benjamin* v. *Island Management, LLC*, Conn. , , A.3d (2021) ("[t]he trial court is not required to credit a witness' testimony"). Consequently, the defendants are not entitled to prevail on this claim.

established and the court cannot determine what it was." Accordingly, the court found, "based upon the lack of credible evidence otherwise," that "the security deposit was the $13,000 set forth in the lease." The lease agreement was appended to the plaintiff's complaint and was admitted into evidence as an exhibit at trial. That agreement, which was signed by all parties, states in relevant part: "The Tenant shall . . . pay the Security Deposit . . . in advance and upon the signing of this Lease in the amount of $13,000.00." That evidence substantiates the court's factual finding as to the amount of the security deposit. Moreover, the defendants did not offer any documentary evidence at trial, such as receipts or other banking records, of payments made to the plaintiff in excess of that amount.[6] We therefore conclude that the court's finding with respect to the amount of the security deposit was not clearly erroneous.

B

Next, we address the portion of the claim in which the defendants argue that the court improperly rejected their claim that the plaintiff failed to properly provide to the defendants a written accounting of deductions that were made from the security deposit as prescribed by § 47a-21 (d) (2). As this court has explained, "[§] 47a-21 (d) (2) imposes liability for twice the value of any security deposit on a landlord who *violates the provisions of that subsection*. The provisions of the subsection are that within thirty days after termination of a tenancy a landlord must deliver to the terminating tenant either the full amount of the tenant's security deposit plus interest or a written notification advising the tenant of the nature of any damages suffered by [the] landlord by reason of [the] tenant's failure to comply with [the] tenant's obligations. If the landlord

[6] We note that the defendants do not contend that the $13,000 security deposit set forth in the lease was in some way improper under § 47a-21.

chooses to deliver the notification of damages, [she] must deliver, within sixty days after termination of the tenancy, a written statement itemizing the nature and amount of the damages [she] sustained along with any balance of the security deposit plus interest. . . . The court, therefore, *need only determine two factual questions to award twice the value of the security deposit under the statute*: (1) Was the security deposit returned with interest, or a written notification of damages delivered, within thirty days of the tenant's termination; and (2) if a written notification of damages was delivered, was the balance of the security deposit and a statement of damages delivered within sixty days of the termination?" (Emphasis in original; internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 349–50.

The record before us reflects that the plaintiff provided the defendants with a comprehensive written statement, including the balance of their security deposit and summarizing the damages to the property and the associated costs incurred. That accounting was introduced into evidence at trial, as was evidence that the plaintiff sent it to each defendant within thirty days of the termination of their tenancy. Because the cost of repairing and replacing the damaged items and fixtures exceeded the remaining balance of the security deposit, as documented in the written accounting that the plaintiff timely provided to the defendants, we agree with the trial court that the remaining security deposit funds were "properly applied to the damages caused by the defendants." The defendants, therefore, cannot prevail on their claim that the court erred in not concluding that the plaintiff failed to comply with § 47a-21 (d) (2).

C

Third, we address the defendants' claim that the court improperly rejected their claim that the plaintiff failed

to store the security deposit in a separate escrow account as mandated by § 47a-21 (h). We note that the court made no explicit findings concerning the plaintiff's use or nonuse of an escrow account in retaining the security deposit. Although the defendants point to the plaintiff's testimony indicating that he did not put the security deposit in an escrow account, the court specifically found that the defendants did not establish their claim by a fair preponderance of the evidence. The court was free to assess the credibility and sufficiency of that testimony and make its determination accordingly. We, therefore, must defer to the court's factual findings as laid out in the memorandum of decision and decline to disturb its conclusion that the defendants failed to establish that the plaintiff violated § 47a-21 (h) by failing to retain the security deposit in an escrow account.

Even if we were to conclude that the court improperly found that the plaintiff had not violated the statute by retaining the security deposit in an escrow account, we typically would consider which (if any) remedies were available to the defendants under § 47a-21. The defendants, however, did not request at trial any relief under the applicable provision of § 47a-21 for violations of § 47a-21 (h).[7] The extent to which the defendants address the plaintiff's alleged violation of § 47a-21 (h) in their brief is limited to the foundation they lay for their counterclaim under CUTPA. Our ability to grant the defendants relief on this claim would thereby be conditioned on whether the plaintiff's failure to hold

[7] At trial, the defendants requested in relevant part: "Twice the value of their deposit plus accumulated interest in accordance with the provisions of . . . § 47a-21." This refers to the remedy set forth in § 47a-21 (d) (2) (B). As discussed in part II B of this opinion, however, this remedy is available only for violations of § 47a-21 (d). See *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 349. Although § 47a-21 (k) (2) does set forth penalties for violations of § 47a-21 (h), the defendants do not reference this subsection of the statute at any point in their counterclaim.

the security deposit in an escrow account can be shown to violate CUTPA.

"In determining whether a tenant can prevail in her claim for damages under CUTPA, the court must first find that the landlord's conduct at issue constitutes an unfair or deceptive trade practice." *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 354. "It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 472.

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]omission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition,

CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Herron* v. *Daniels*, 208 Conn. App. 75, 94–95, 264 A.3d 184 (2021).

The defendants appear to argue that the plaintiff's alleged violations of the security deposit statute amount to per se violations of CUTPA. Aside from reciting the legal standard for a CUTPA claim, the defendants cite no case law in support of the proposition that the plaintiff's actions rose to the level of a violation of CUTPA. Indeed, such an approach would not be consonant with the long-standing principle that our analysis of CUTPA claims depends on the particular facts of the case before us; see id., 96; see also *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 353 (alleged violation of other provision of § 47a-21 was insufficient to establish violation of CUTPA on its face); a principle no less applicable to CUTPA claims predicated on an alleged violation of § 47a-21 (h) than it is to CUTPA claims predicated on any other alleged impropriety. See *Tarka* v. *Filipovic*, 45 Conn. App. 46, 55–56, 694 A.2d 824 (landlords' violation of § 47a-21 (h) was owed to ''ignorance of their obligations'' and thereby did not violate CUTPA), cert. denied, 242 Conn. 903, 697 A.2d 363 (1997); cf. *Herron* v. *Daniels*, supra, 208 Conn. App. 98–99 (declining to extend holding in *Tarka* in light of ''markedly different'' factual findings with respect to landlord's experience dealing with rental property and ''continued'' § 47a-21 violations ''with respect to other tenants . . . up to and through the trial''). In the absence of any findings that the plaintiff violated § 47a-21, beyond failing to hold one tenant's security deposit in an escrow account, we cannot conclude that the plaintiff's alleged conduct, even if found by the court, was sufficiently unfair or deceptive to constitute a CUTPA violation.

Additionally, even if the plaintiff's failure to hold the security deposit in an escrow account did amount to a violation of CUTPA, that alone would not entitle the defendants to damages under CUTPA. See *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 651–52, 916 A.2d 827 ("Our courts have interpreted [General Statutes] § 42-110g (a) to allow recovery only when the party seeking to recover damages meets the following two requirements: 'First, he must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he must present evidence providing the court with a basis for a reasonable estimate of the damages suffered.' . . . 'Thus, in order to prevail in a CUTPA action, a plaintiff must establish both that the defendant has engaged in a prohibited act *and* that, "as a result of" this act, the plaintiff suffered an injury. The language "as a result of" requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff.' " (Citations omitted; emphasis in original.)), cert. denied, 282 Conn. 904, 920 A.2d 309 (2007). In *Herron*, this court further expanded on the requirement set forth in § 42-110g (a) as follows: "The ascertainable loss requirement [of § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . [F]or purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the amount of the actual loss. . . . Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a

CUTPA claim . . . .'' (Internal quotation marks omitted.) *Herron* v. *Daniels*, supra, 208 Conn. App. 100.

The record before us reflects that the defendants have failed to put forth any evidence of an ascertainable loss stemming from the plaintiff's handling of their security deposit. The defendants made no showing that the plaintiff misappropriated or otherwise improperly took money out of the initial security deposit. In light of this, as well as the conflicting information regarding the amount of the security deposit at issue, we conclude that the defendants' failure to meet the standard set forth in § 42-110g (a) would bar them from recovery even if the court had found that the plaintiff violated CUTPA.

The judgment is affirmed.

In this opinion the other judges concurred.

CRAIG SALAMONE ET AL. *v.* WESLEYAN UNIVERSITY ET AL.
(AC 43819)

Elgo, Cradle and Flynn, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant university for personal injuries they sustained as a result of allegedly being sexually assaulted by B while he was a student at the university and a resident advisor or head resident in a dormitory on the university's campus. The plaintiffs alleged that, when they were between thirteen and fifteen years old, B had sexually assaulted them in his dormitory room after he had arranged to meet them there to teach them exercise and stretching routines. The plaintiffs alleged that their injuries were caused by the university's negligent supervision of B in his capacity as a resident advisor or head resident. The trial court granted the university's motion for summary judgment on the ground that the plaintiffs failed to demonstrate that there was a genuine issue of material fact that the alleged sexual assaults were reasonably foreseeable. From the judgment rendered thereon, the plaintiffs appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of the university,

that court having correctly determined that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to whether the alleged sexual assaults were reasonably foreseeable, as the university presented undisputed evidence that B had no criminal history, complaints or accusations either before or during his tenure as a student and resident advisor or head resident at the university, and the plaintiffs failed to present any evidence from which it reasonably could be inferred that the university knew or should have known that B would sexually assault them in his dormitory room.

Argued November 9, 2021—officially released February 1, 2022

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, brought to the Superior Court in the judicial district of Middlesex, where the court, *Hon. Edward S. Domnarski*, judge trial referee, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Eamon T. Donovan, for the appellants (plaintiffs).

Richard E. Fennelly III, with whom were *Jonathan P. Ciottone* and *Eric S. Larson*, for the appellee (named defendant).

Opinion

CRADLE, J. The plaintiffs, Craig Salamone and Doug Cartelli, commenced this action, claiming that they were sexually assaulted by a resident advisor or head resident on the campus of the defendant Wesleyan University.[1] In this appeal, the plaintiffs challenge the summary judgment rendered in favor of the defendant on the ground that a genuine issue of material fact existed as to whether the harm alleged was reasonably foreseeable. We affirm the judgment of the trial court.

[1] The Young Men's Christian Association of Northern Middlesex County and Andrew Barer also were named as defendants in this action but are not parties to this appeal. Accordingly, any reference herein to the defendant is to Wesleyan University only.

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history. In September, 2017, the plaintiffs commenced this action, claiming that they were sexually assaulted on the defendant's campus between 1982 and 1984. By way of a revised complaint dated September 26, 2018, they alleged that they were sexually assaulted by Andrew Barer, while he was a student and a resident advisor or head resident in a dormitory on the defendant's campus. At the time of the alleged incidents, Barer also "was a member of the official basketball team for the defendant" and "used the basketball facilities located on the property owned by the defendant . . . to engage with minor children, including the plaintiff[s]," who were between the ages of thirteen and fifteen at the time. The plaintiffs alleged that "Barer's . . . engagement with minor children was in the guise of instructing them in plyometrics, stretching, and other physical activity in order to enhance their athletic ability, but, in reality, it was a means to allow him to commit sexual abuse, sexual assault, and sexual exploitation of said minor children." They further alleged that, in the winter of 1983, as to Salamone, and between 1982 and 1984, as to Cartelli, "Barer made arrangements for [each of them] to meet with Barer alone in Barer's dormitory room located in the housing facilities on the [defendant's] campus." They alleged that "Barer's arranging the meeting with [them] in [his] dormitory room was in the guise of teaching [them] exercise and stretching routines when the actual purpose was for Barer to sexually abuse, sexually assault, and sexually exploit [them]." The plaintiffs alleged that Barer allowed them into the dormitory in his capacity as a resident advisor or head resident, and that, at the meetings in Barer's dormitory room, "under the guise of teaching [them] exercise and stretching routines, Barer sexually abused,

sexually assaulted, and sexually exploited [them]." The plaintiffs alleged that, prior to the incidents involving them, Barer "engaged in a pattern of behavior wherein he lured other minor children into his dormitory room and sexually abused, sexually assaulted, and sexually exploited them" and that the "general risk of harm or injury of the type suffered by the plaintiff[s] . . . was foreseeable by the defendant . . . ." The plaintiffs alleged that the defendant "failed to properly monitor and supervise [Barer] in order to prevent injuries to minors such as [them]" and "allowed [Barer] to be alone with [them] inside housing facilities owned by the defendant . . . without monitoring or supervising him in any way."[2] The plaintiffs alleged that, as a result of the defendant's negligence and carelessness, they suffered bodily injury and severe emotional distress.

On April 15, 2019, the defendant filed a motion for summary judgment, claiming that it was entitled to judgment as a matter of law on the grounds that Barer was not an employee of the defendant when the alleged sexual assaults involving the plaintiffs occurred and that those incidents were not reasonably foreseeable. On September 6, 2019, the plaintiffs filed an objection to

[2] The plaintiffs also alleged in their revised complaint that the defendant "failed to investigate, warn, or inform parents and guardians of children, including those of the plaintiff[s] . . . of the danger that [Barer] posed to children" and "negligently hired [Barer] when a reasonable investigation or background check would have uncovered the danger that [he] posed to children, including the [plaintiffs]." The undisputed evidence submitted by the defendant in support of its motion for summary judgment disclosed that Barer had never been accused of any crime or misconduct during or prior to his tenure as a student of the defendant, so a background check would not have revealed any basis for not hiring him. At oral argument before this court, the plaintiffs conceded that they had no evidence that the defendant had actual knowledge of the danger Barer allegedly posed to the plaintiffs. Thus, the defendant could not have warned the plaintiffs' parents or guardians of such alleged danger, and, therefore, the plaintiffs acknowledged that they were proceeding only on their claims of negligent supervision of Barer in his capacity as a resident advisor or head resident.

the defendant's motion for summary judgment, arguing that there existed genuine issues of material fact as to whether Barer was "an agent, servant, and/or employee of the defendant" and whether the defendant had a duty to supervise Barer and to alleviate danger posed to the plaintiffs due to the fact that the defendant knew or should have known of prior instances of Barer engaging in similar conduct. In support of their objection, the plaintiffs submitted affidavits from three individuals, who averred that, prior to the incidents involving the plaintiffs, Barer brought those individuals, who were teenage boys at the time, to his dormitory room on the defendant's campus, "without concealing [their] presence and in plain sight," and sexually assaulted them.

On September 20, 2019, the defendant filed a reply to the plaintiffs' objection to the motion for summary judgment, arguing that the plaintiffs had failed to show that a genuine issue of material fact existed that the alleged sexual assaults were foreseeable because, "[e]ven if Barer brought the affiants into [his] dorm-[itory] 'without concealing them' and 'in plain sight,' these facts are insufficient to show that [the defendant] should have known that Barer would likely commit sexual assault." The defendant argued that, because there was no record that Barer had committed any crimes, had never been accused of a crime, had never been accused of unlawful sexual conduct, and had never been the subject of any complaints, there was no evidence demonstrating that the defendant had any reason to know that Barer would engage in the alleged conduct.

On October 3, 2019,[3] the plaintiffs filed a surreply to the defendant's reply to their objection to the motion

[3] On October 2, 2019, the plaintiffs filed a motion for a continuance of the hearing on the defendant's motion for summary judgment to conduct further discovery. In support of that motion, the plaintiffs' attorney attached an affidavit, in which he averred: "[I]n order to adequately respond to the [defendant's] response to the plaintiff's objection to [the defendant's] motion

for summary judgment, reiterating their argument that

for summary judgment it is necessary to take the deposition of the member of [the defendant] who is best situated to testify as to [the] following: the hiring, training and supervising of . . . resident advisors [at the defendant] for the years 1980 through 1984; the policies and procedures for documenting non-students accessing the buildings on [the defendant's campus] for the years 1980 through 1984; and reporting procedures for . . . resident advisors [at the defendant who] fail[ed] to comply with regulations and/or guidelines. . . . [S]uch discovery is necessary to establish that there is a genuine issue of material fact as to whether [the defendant] knew or should have known of the risk posed to the plaintiffs and that such risk was foreseeable to the defendant . . . ." On October 3, 2019, the court summarily denied the plaintiff's motion for a continuance.

The plaintiffs claim on appeal that the court erred in denying their motion for a continuance. We note that, on January 17, 2018, the parties signed a scheduling order providing, inter alia, that the depositions of all fact witnesses would be completed by June 15, 2018. On July 2, 2018, that date was extended to August 31, 2018. On January 4, 2019, the parties entered into a new scheduling order that required the depositions of all fact witnesses to be completed by June 1, 2019. The scheduling order also required all dispositive motions to be filed by April 15, 2019. Despite the foregoing scheduling orders, and the fact that the plaintiffs had filed this action in September, 2017, and thus had more than two years to conduct discovery, they sought additional time to take the deposition of at least one fact witness to support their argument opposing the defendant's motion for summary judgment, and they challenge on appeal the denial of their motion for a continuance to do so. The plaintiffs have failed, however, to argue that the trial court abused its discretion in denying their motion for a continuance, which is the only basis on which such a ruling may be reversed. See, e.g., *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 268, 242 A.3d 542 (2020) ("Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary." (Internal quotation marks omitted.)). Although the plaintiffs set forth the abuse of discretion standard in their appellate brief and alleged that the trial court abused its discretion in denying their motion for a continuance, they did not brief that claim. Rather, they simply asserted that they needed the discovery they sought because it was "necessary to establish that there is a genuine issue of material fact as to whether the defendant . . . knew or should have known of the risk posed to the plaintiffs and that such [risk] was foreseeable to the defendant . . . ." Indeed, at oral argument before this court, when asked if he was claiming that the trial court abused its discretion when it denied the plaintiffs' motion for a continuance, the plaintiffs' attorney responded: "My argument on that, Your Honor, is that I would have had

the affidavits that they previously filed with the court were evidence of prior instances of Barer bringing teenage boys into his dormitory room for the purpose of sexually assaulting them. They contended that such evidence gave rise to a genuine issue of material fact as to whether the defendant knew or should have known of the danger Barer posed to teenage boys in general and to the plaintiffs specifically.

By way of a memorandum of decision filed on January 8, 2020, the court granted the defendant's motion for summary judgment on the ground that there was no genuine issue of material fact that the alleged sexual assaults of the plaintiffs were not reasonably foreseeable.[4] The court concluded that the defendant did not know or have reason to know that Barer would allegedly sexually assault the plaintiffs in his dormitory room. The court reasoned that the defendant met its burden of demonstrating the absence of any genuine issue of material fact as to the foreseeability of the alleged sexual assaults of the plaintiffs when it submitted evidence indicating that Barer had no criminal history before or during his enrollment as a student at the defendant or before or during his period of allegedly serving as a resident advisor or head resident at the defendant, that it never received any complaints about Barer during his attendance at the defendant, and that it did not locate any records indicating that disciplinary action

more information to present to the trial court on the argument for summary judgment had I been allowed to proceed with the depositions. That's as far as an argument as I am going to make today." The plaintiffs were on notice from the date of their revised complaint as to what they would have to prove to prevail on their claim of negligent supervision and the need to conduct discovery for that proof. Moreover, the plaintiffs' attorney conceded that there had been previous opportunities to conduct the discovery for which he sought the continuance. The plaintiffs, therefore, cannot prevail on this claim.

[4] Because the court concluded that the alleged incidents were not reasonably foreseeable, it declined to address the defendant's argument that Barer was not its agent, servant, and/or employee at the time they occurred.

has ever been taken against him. The court therefore reasoned that the burden shifted to the plaintiffs to present evidence to demonstrate the existence of a factual dispute as to the issue of foreseeability. The court noted the affidavits submitted by the plaintiffs in opposition to summary judgment and reasoned: "With regard to the alleged negligent monitoring or supervision of Barer, the plaintiffs do not submit any additional evidence to suggest that anyone personally witnessed or would have witnessed Barer leading the boys to his dormitory room, that any particular campus security protocols were breached . . . or that anyone reported any suspicious behavior to [the defendant] that would have provided [the defendant] with the requisite knowledge to prompt an investigation.

"Therefore, it appears that the plaintiffs merely rely on (1) the affidavits stating that Barer brought teenage boys . . . to his dormitory room 'without concealing [their] presence and in plain sight' . . . and (2) the broad-brush allegation in their complaint that 'administrators, professional staff, coaching staff, security officers and other employees knew, should have known or could have known upon investigation, that . . . Barer . . . took the plaintiff[s] . . . into his dorm[itory] room . . . on . . . [the defendant's] campus.' . . . Without more evidentiary support to suggest that someone in particular witnessed the incidents or reported Barer's improper conduct to [the defendant], however, this is insufficient to dispute the defendant's evidence demonstrating that [the defendant] had no knowledge that Barer allegedly had or would sexually assault the plaintiffs or anyone else." (Citations omitted; footnote omitted.) On that basis, the court concluded that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to whether the alleged incidents were reasonably foreseeable and,

accordingly, rendered summary judgment in favor of the defendant. This appeal followed.

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action. . . .

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside

the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Only if the defendant as the moving party has submitted no evidentiary proof to rebut the allegations in the complaint, or the proof submitted fails to call those allegations into question, may the plaintiff rest upon factual allegations alone. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, 207 Conn. App. 525, 532–33, 262 A.3d 885 (2021).

The following additional legal principles guide our consideration of the plaintiffs' claim that a genuine issue of material fact existed as to whether the harm they allegedly sustained was reasonably foreseeable. "[A]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal. . . . [A]s a general matter, a defendant is not responsible for anticipating the intentional misconduct of a third party . . . unless the defendant knows or has reason to know of the third party's criminal propensity. . . .

"[T]here are [however] exceptions to this general rule. More specifically . . . [t]here are . . . situations in which the actor, as a reasonable man, is required to

anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where . . . the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. . . . One situation in which the actor will be required to guard against the intentional misconduct of another is [w]here the actor acts with knowledge of peculiar conditions which create a high degree of risk of [such] intentional misconduct. . . . For purposes of this exception, [t]he actor's conduct may be negligent solely because he should have recognized that it would expose [another] person . . . to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability . . . . [Moreover], it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission. . . .

"[I]t is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence . . . it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the

risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it. . . .

"Thus, for purposes of this exception, the issue is twofold: (1) whether the defendant's conduct gave rise to a foreseeable risk that the injured party would be harmed by the intentional misconduct of a third party; and (2) if so, whether, in light of that risk, the defendant failed to take appropriate precautions for the injured party's protection." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 316–18, 147 A.3d 104 (2016).

In the present case, the plaintiffs claim that the defendant's supervision of Barer was inadequate and, consequently, gave rise to the foreseeable risk that Barer would sexually assault them. In support of its motion for summary judgment, the defendant presented undisputed evidence that Barer had no criminal record, complaints, or accusations either before or during his tenure as a student at the defendant. As the trial court aptly noted, this undisputed evidence rebutted the plaintiff's allegations that the defendant knew or should have known that Barer would sexually assault the plaintiffs, and the burden then shifted to the plaintiff to demonstrate the existence of a genuine issue of material fact as to foreseeability. In support of their position, the only evidence submitted by the plaintiffs were the affidavits of three individuals who averred that they, like the plaintiffs, had been sexually assaulted by Barer in his dormitory room. Although the affiants averred that they were brought to the defendant's campus prior to the alleged incidents involving the plaintiffs, the affidavits do not contain the circumstances under which they were there or any specifics as to how or when they were brought to the campus, or whether anybody, including a member of the defendant's administration or staff,

saw them on campus. Moreover, even if the affiants had been observed by an agent or representative of the defendant on campus or in a dormitory, they did not allege that anybody observed any improper conduct by Barer or was aware that they allegedly were sexually assaulted by Barer at those times. Accordingly, the plaintiffs failed to present any evidence from which it reasonably could be inferred that the defendant knew or should have known that Barer would sexually assault them in his dormitory room.

This case is readily distinguishable from cases in which our Supreme Court has held that the issue of foreseeability involves a fact intensive inquiry that is not amenable to determination on summary judgment but, rather, should be resolved by a jury. For instance, in *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 303, the court determined that the issue of foreseeability was a question of fact because a jury reasonably could infer that promoting opportunities for groups of minors, who are either unsupervised or can easily evade supervision, to spend extended periods of time together in remote and secluded places increased the risk of sexual misconduct to an unreasonable degree and that the defendant knew or should have known of the increased risk. Id., 328. In that case, the plaintiff also presented evidence that the defendant was aware of numerous instances of sexual abuse of participants in the Boy Scouts during scouting activities in the years preceding the patrol leader's sexual abuse of the plaintiff. Id., 331.

Similarly, in *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 72 A.3d 929 (2013), in which our Supreme Court held that the issue of whether it was reasonably foreseeable that the defendant hospital's failure to supervise a physician who was conducting a growth study within its facility "would result in the sexual abuse of the plaintiff, even though the hospital

did not know or have reason to know of [that physician's] pedophilia, presented a question of fact for the jury." Id., 188. The court based its determination on the plaintiff's evidence that, "for years, parents were persuaded to have their children participate in the growth study based in large part on the good name and reputation that the hospital enjoyed in the community," and the hospital "exercised no supervision whatsoever over the study, even though it knew or should have known that [the physician] was touching, photographing and filming the genitalia of naked children in his office, sometimes for hours, without a chaperone present and without any legitimate medical or scientific reason for conducting such a study in the first place." Id., 188–89. The court noted that the plaintiff sought to, and did, persuade the jury that "there was a foreseeable risk that the children who had been volunteered to participate in the study—children who, unbeknownst to their parents, were required to strip naked so that [the physician] could physically examine, photograph and film their genitalia—would be sexually exploited or abused in some manner, such that the hospital was required to take at least *some* precautions to protect this highly vulnerable group of subjects." (Emphasis in original.) Id., 189.

In both cases, the defendants played some role in creating or fostering the circumstances or relationship that gave rise to the harm sustained by the plaintiffs. See also *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 501, 537 A.2d 527 (1988) ("question of foreseeability [was] not such as would lead to only one conclusion; rather, under the circumstances of [the] case, the foreseeability of whether the defendant's conduct in permitting [its employee] to have a key to the plaintiff's apartment would result in a sexual assault . . . [was] a question to be resolved by the trier of fact"). That is not the case here. In the present case, the plaintiffs have alleged

that the defendant should have supervised Barer in his role as a resident advisor or head resident and that its failure to do so created a reasonably foreseeable risk that the plaintiffs would be sexually assaulted by him. They have provided no evidence, nor have they alleged any facts, that the defendant even knew that Barer was in contact with younger teenage boys, particularly in his capacity as a resident advisor or head resident. The plaintiffs have also failed to allege how Barer's position as a resident advisor or head resident distinguished him from any other student residing in the defendant's dormitories in terms of creating a reasonable risk that he would sexually assault younger teenage boys whom he brought to his dormitory room. Indeed, during argument on the motion for summary judgment, the plaintiffs argued that, "because a college student brings three individuals . . . who are younger than college age onto campus . . . [t]hat should give rise to the notice and foreseeability that unacceptable conduct would occur." In the absence of evidentiary support, this bald assertion was insufficient to create a material issue of fact as to whether the defendant's conduct created an unreasonable risk that Barer would bring young teenage boys to his dormitory room and sexually assault them. Because the plaintiffs made no showing of evidentiary facts or presented any evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred as to whether the defendant knew or should have known of the risk to the plaintiffs in this case, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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AMY A. DAVIS *v.* ALEXANDER F. DAVIS, SR.
(AC 44034)

Moll, Cradle and DiPentima, Js.

Submitted on briefs January 19—officially released February 1, 2022

Defendant's appeal from the Superior Court in the judicial district of New Britain, *Hon. Gerard I. Adelman*, judge trial referee.

Per Curiam. The judgment is affirmed.

JOHN ALAN SAKON *v.* JAMES N. SAKONCHICK ET AL.
(AC 43405)

Elgo, Clark and Sheldon, Js.

Argued January 20—officially released February 1, 2022

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Aurigemma*, *J.*

Per Curiam. The judgment is affirmed.

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Argued January 18—officially released February 1, 2022

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NOTICE OF CONNECTICUT STATE AGENCIES

Notice of Intent to Amend Connecticut Green Bank

C-PACE Program Guidelines

In accordance with Section 1-121 of the General Statutes of Connecticut, NOTICE IS HEREBY GIVEN that the Connecticut Green Bank (the ''Green Bank'') proposes to update the program guidelines (the ''Program Guidelines'') for the commercial sustainable energy program authorized pursuant to Section 16a-40g of the General Statutes of Connecticut (the ''C-PACE Program'').

Summary of written procedures: The updated Program Guidelines for the C-PACE Program establish the rules for all program participates (e.g. capital providers, technical reviewers, borrowers etc.). The proposed amendment would update the new construction technical requirements for qualifying projects seeking C-PACE Program financing and incorporate such requirements into the Program Guidelines. The updated Program Guidelines will supersede the C-PACE Program new construction pilot program which was published separately from the Program Guidelines.

Statement of purpose: To adopt the updated Program Guidelines for the C-PACE Program.

The proposed Program Guidelines may be viewed on Green Banks website, at the following address: https://www.ctgreenbank.com/publiccomment/. Due to COVID-19 restrictions, the offices of the Green Bank are not open to the public, however a copy may be requested via e-mail at: barbara.johnson@ctgreenbank.com. All interested parties may submit comments in connection with theproposed Program Guidelines, within thirty (30) days following publication of this notice, to Barbara Johnson, the Administrative Coordinator at the Connecticut Green Bank, 75 Charter Oak Avenue, Suite 1-103, Hartford, CT 06106 or via e-mail at: publiccomment@ctgreenbank.com.

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the Release of Co-Borrowers section of the CHESLA Loan Program – Program Manual (the ''Program Manual'') by adding the following sentence at the end of subsection 10 of Section C:

''Provided that for Education Loans originated on or after March 10, 2022, the provisions of this subsection shall not apply to Co-Borrowers who are residents of Colorado or Maine.''

Such amendment shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendment to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

All written comments, questions, and concerns regarding the proposed amendment may be submitted within 30 days of the publication of this notice in the Connecticut Law Journal to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

A copy of the proposed amendment is available at no cost and upon request by contacting Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Adopt the Alliance Teacher Refi Loan Program – Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to adopt the Alliance Teacher Refi Loan Program – Program Manual (the ''Program Manual''), for purposes of establishing the Alliance Teacher Refi Loan Program (the ''Program''). The intent of the Program is to provide long-term financing and interest rate subsidies for teachers employed by Connecticut Alliance Districts seeking to refinance CHESLA loans or private education loans. The Program Manual sets forth the guidelines for the Program.

The Program Manual shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

All written comments, questions, and concerns regarding the proposed Program Manual may be submitted within 30 days of the publication of this notice in the Connecticut Law Journal to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

A copy of the proposed Program Manual is available at no cost and upon request by contacting Jeanette W. Weldon, Executive Director, Connecticut Higher Education

Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

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NOTICE

STATE OF CONNECTICUT

DOCKET NO. CV 14 6046179 S. CHIEF DISCIPLINARY COUNSEL VS. DRESSLER, LAWRENCE. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN, JANUARY 27, 2022.

NOTICE

Notice is given that Lawrence Dressler (407011) filed an Application for Reinstatement as an attorney admitted to the practice of law in Connecticut. The application, which was filed in the Superior Court for the Judicial District of New Haven on January 11, 2022, has been filed in the following electronic file: NNH CV14-6046179 S -Chief Disciplinary Counsel vs. Lawrence Dressler. The application has been referred to the Standing Committee on Recommendations for Admission to the Bar for Fairfield County.

Giovanni Spennato
Chief Clerk
New Haven, Superior Court