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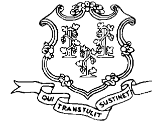

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CONNECTICUT REPORTS

Vol. 348

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* DWAYNE SAYLES
(SC 20575)

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

Syllabus

Convicted of felony murder and conspiracy to commit robbery in the first degree, among other crimes, in connection with his role in the robbery of a convenience store and the shooting death of the store clerk, the defendant appealed to the Appellate Court, claiming, inter alia, that the

trial court had improperly denied his motions to suppress evidence of his cell phone and the data contained therein. The defendant and two other men, V and S, had driven to the convenience store in V's car. While V waited in the car, the defendant and S entered the store, robbed it of cash and cigars, and fatally shot the store clerk. V then drove S and the defendant to the defendant's apartment. V later contacted the police and identified the defendant and S in photographs taken from the store's surveillance footage, which showed that they were wearing masks and gloves. Subsequently, the police obtained and executed a search warrant for the defendant's residence, where they found a ski mask and a pair of gloves. The defendant was not present during the search but thereafter met with the police for an interview. Before the interview, the defendant gave his cell phone to his mother, who was sitting outside of the interview room. After the defendant invoked his right to counsel, a detective approached the defendant's mother and asked her for the defendant's cell phone, which she gave to the detective. The police subsequently obtained a warrant to search the contents of the cell phone. The evidence retrieved from the cell phone included a draft, unsent text message to an unknown recipient, in which the defendant stated, "[i]f I get locked up tell sheema put them shits in the river some where . . . ." At trial, there was testimony that "sheema" referred to the defendant's girlfriend, and the prosecutor argued during closing argument that "shits" referred to the gun used during the robbery. The state also elicited testimony from H, who had been incarcerated with the defendant during the defendant's pretrial custody. H testified that the defendant admitted that he and S both had shot the clerk during the robbery. The state further introduced into evidence a statement made to the police by J, a friend of the defendant who had been arrested for an unrelated crime. In that statement, J indicated that he had spoken to the defendant and S on the day of the robbery and that they had admitted to having shot the clerk. The Appellate Court upheld the judgment of conviction. In doing so, the Appellate Court rejected the defendant's claims that the police had violated his rights under *Miranda* v. *Arizona* (384 U.S. 436) and article first, § 8, of the Connecticut constitution when they continued to interrogate him after he had invoked his right to counsel, that the seizure of his cell phone violated the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution, and that the affidavit the police submitted in support of their application for a warrant to search the contents of his cell phone contained materially false information. On the granting of certification, the defendant appealed to this court, claiming, inter alia, that the Appellate Court had improperly upheld the defendant's conviction and that article first, § 8, of the Connecticut constitution mandates protection of a suspect's rights under *Miranda* via the adoption of a rule that evidence obtained through the questioning of a suspect

after the suspect has invoked the right to counsel must be suppressed and cannot be used in the state's case-in-chief at a subsequent trial.

Held that any error in the admission of the contents of the defendant's cell phone was harmless beyond a reasonable doubt, and, accordingly, this court declined to address the defendant's constitutional challenges and affirmed the Appellate Court's judgment:

A review of the trial record demonstrated that the state offered an overwhelming wealth of evidence beyond the contents of the cell phone to prove that the defendant had committed the crimes with which he was charged, including surveillance footage from inside of the convenience store, which depicted two perpetrators wearing hoodies, ski masks, and gloves, and the detailed testimony from V about his and the defendant's involvement in the events that occurred on the night of the robbery, and the consistency and independent corroboration of the various witnesses' testimony and statements rendered any error with respect to the admission of the contents of the cell phone harmless beyond a reasonable doubt.

Specifically, V's detailed testimony was corroborated by H's testimony that the defendant had admitted to the robbery and had provided him with numerous details about it, including that the defendant and another man both had guns and both had shot the clerk, that he wanted to get his cell phone excluded from evidence because it contained a photograph of the gun used in the robbery, that he was worried that the ski mask and gloves discovered by the police might have his DNA on them, and that he hid the gun at his girlfriend's house after the shooting but moved it once the police searched his residence, and V's testimony was also corroborated by J's statement to the police, which included details about the robbery that were not publicly available, such as the type of gun S used and the brand of cigars they stole.

Moreover, the state presented significant evidence of the defendant's consciousness of guilt, insofar as there was testimony from H that, after J gave his statement to the police, the defendant directed his cousin to assault J to force J to recant his testimony, and testimony from J himself that, after speaking to the police, he had a physical altercation with someone who had the same name as the defendant's cousin.

Furthermore, there was physical evidence corroborating the testimony and statements of V, H, and J, including the ski mask and gloves found during the search of the defendant's residence, testimony that an analysis of the DNA discovered on that ski mask indicated that the defendant was a potential contributor to that DNA, and testimony about the historical cell site location data associated with the defendant's cell phone, which established that that phone was in the areas of the convenience store and the defendant's residence at around the same times that, according to V's testimony, V, the defendant, and S were at those locations.

Although this court acknowledged that the testimony of V and H was properly viewed with some skepticism in light of their self-interest in testifying for the state as an accomplice and a jailhouse informant, respectively, the quality of their testimony grew in strength with the degree of independent corroboration.

In addition, even though the prosecutor mentioned the unsent text message several times during closing and rebuttal arguments, when viewed in context, the prosecutor's focus on the unsent text message was minimal relative to the other evidence admitted at trial, insofar as the prosecutor addressed the testimony of the various witnesses and the cell site location data before mentioning the contents of the cell phone and emphasized that other evidence far more strongly, and the contents of the cell phone played no role in establishing an element of an offense or in bolstering or destroying the credibility of any particular witness, which lessened the impact of any improper admission of the cell phone's contents.

(*One justice dissenting*)

Argued October 11, 2022—officially released March 26, 2024

Procedural History

Substitute information charging the defendant with the crimes of felony murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Elgo*, *Alexander* and *Suarez*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Lisa M. D'Angelo*, executive assistant state's attorney, and, on the brief, *John P. Doyle*, *Jr.*, state's attorney, *Patrick J. Griffin*, former state's attorney, *Seth R. Garbarsky*, supervisory assistant state's attorney, and *Rocco A. Chiarenza*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. A jury found the defendant, Dwayne Sayles, guilty of felony murder in violation of General Statutes § 53a-54c, among other offenses, in connection with his role in the robbery of a New Haven convenience store that resulted in the fatal shooting of the store clerk. The defendant now appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming the judgment of conviction. *State* v. *Sayles*, 202 Conn. App. 736, 769, 246 A.3d 1010 (2021). On appeal, the defendant raises numerous constitutional challenges to the decision of the Appellate Court upholding the trial court's denial of his motions to suppress evidence of his cell phone and its stored data. We, however, need not address the merits of the defendant's various constitutional claims because we conclude that any error in the admission of the contents of the defendant's cell phone was harmless beyond a

[1] We granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's denial of the defendant's motion to suppress the contents of his iPhone in reliance on *United States* v. *Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004), and *State* v. *Mangual*, 311 Conn. 182, 85 A.3d 627 (2014), when the seizure of those contents was the result of questioning after he had invoked his *Miranda* rights, on the basis that a cell phone and its stored data constitute 'physical' (i.e., nontestimonial) evidence that need not be suppressed if seized as the result of a *Miranda* violation?" And (2) "[d]id the Appellate Court properly reject the defendant's claim that the holding in *Patane* does not comport with the broader protections against compelled self-incrimination afforded under article first, § 8, of the Connecticut constitution?" *State* v. *Sayles*, 336 Conn. 929, 247 A.3d 578 (2021).

The defendant initially did not seek certification to appeal from the portion of the Appellate Court's opinion rejecting his claims that (1) the seizure of his cell phone was not supported by the existence of probable cause and exigent circumstances, and (2) the affidavit supporting the application for a search warrant for his cell phone contained false information in violation of *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). See *State* v. *Sayles*, supra, 202 Conn. App. 755, 765. After we granted the defendant's petition for certification to appeal, we granted his subsequent motion for permission to file a supplemental brief raising those issues under the fourth amendment to the United States constitution.

reasonable doubt. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history, much of which is aptly set forth in the opinion of the Appellate Court. "On April 6, 2015, Leighton Vanderberg drove around in his wife's Ford Focus with the defendant and Jamal Sumler. The three men proceeded to the Fair Haven section of New Haven and then toward Forbes Avenue. Sumler requested that they stop at a store. Vanderberg complied, drove to [the Pay Rite Food Store (Pay Rite)] convenience store and parked on the street. Vanderberg asked Sumler to purchase a couple of cigars and provided him with cash to complete the transaction. The defendant and Sumler went into the convenience store while Vanderberg remained in the vehicle.

"Sumler, wearing a grey hooded sweatshirt, entered the convenience store first. As he approached the counter, he pointed a pistol at the victim, Sanjay Patel, an employee at the convenience store. As Sumler moved behind a counter, the defendant entered the convenience store. The defendant pulled out a pistol from his pocket and, after a few moments, shot the victim. The defendant was handed a box of cigars and some cash. He then moved toward the entrance of the convenience store. As Sumler and the victim, who brandished a stool, engaged in a physical altercation, the defendant fled. After the defendant departed, Sumler shot the victim." (Footnote omitted.) *State* v. *Sayles*, supra, 202 Conn. App. 739–40. The victim later died from his injuries, namely, gunshot wounds to the torso and extremities. Id., 740 and n.4.

The three men fled in the Ford Focus to the Church Street South housing complex, where the defendant lived in an apartment. Id., 740. The defendant threw an entire box of cigars and the sweatshirt he was wearing

into a nearby dumpster. Id. "After receiving approximately $20 for gas from the defendant and thirty to forty cigars from Sumler, Vanderberg left the apartment." Id., 741.

"The next night, Vanderberg learned from a friend that the victim had been shot and killed at the [Pay Rite]. Thereafter, he informed his probation officer about what had transpired . . . . Following his arrest, Vanderberg met with police detectives on April 14, 2015, and identified the defendant and Sumler in photographs that were taken from surveillance video at the [Pay Rite]." Id., 741. On April 15, 2015, the police executed a search warrant for the defendant's residence. Id., 744. During their search, the police discovered a black ski mask and a dark colored pair of gloves. Id., 744 and n.10.

The defendant was not present at the time of the search, but, when he learned about the search later that day, he contacted the police and agreed to meet for an interview with Detectives Chistopher Perrone and David Zaweski at a New Haven police station. Id., 744. At the start of the video-recorded interview, Perrone read the defendant his *Miranda*[2] rights. Id., 744–45 and n.11. Perrone subsequently took the defendant's cell phone from the defendant's mother, who was holding it for him during the interview.[3] Id., 742, 744–45. The

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

[3] Specifically, when the defendant first arrived at the police station, Perrone saw him holding his cell phone. *State* v. *Sayles*, supra, 202 Conn. App. 745. Although the detectives were not aware of this, before entering the interview room with them, the defendant had handed his cell phone to his mother, who was sitting on a nearby bench outside of that room. Id., 744. The defendant then asked to speak with an attorney. Id. Perrone briefly left the interview room, and, when he came back, he said to the defendant: "you have a cell phone . . . you had it out there. Who has your phone?" The defendant replied that his mother had the phone. Id., 742. Perrone again left the interview room, approached the defendant's mother, and asked if she had the defendant's cell phone. Id., 745. She responded affirmatively and handed it to Perrone. Id. Perrone then showed the cell phone to the defendant and asked if it was his, and the defendant confirmed that it was.

defendant and his mother then left the police station. The next day, the court granted Perrone's application for a search and seizure warrant to obtain data contained in the defendant's cell phone. Id., 742.

Ultimately, the police retrieved from the defendant's cell phone (1) an incoming text message telling the defendant not to come home at approximately the same time that the police were searching his residence, (2) a news report about the Pay Rite robbery, which had been downloaded after the search of the defendant's home, (3) communications between the defendant, Sumler, and Vanderberg on the night of the Pay Rite robbery, and (4) a draft, unsent text message, stating, "[i]f I get locked up tell sheema put them shits in the river some where worda loc."[4]

"After further investigation, the police arrested the defendant. In May, 2015, while in pretrial custody, he admitted to a fellow inmate [Derrick Hoover] that he and Sumler had shot the victim during the robbery of the [Pay Rite]." *State* v. *Sayles*, supra, 202 Conn. App. 741.

The state charged the defendant with felony murder in violation of § 53a-54c, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). Prior to trial, the defendant moved to suppress evidence of his cell phone and its stored data. Following an evidentiary hearing, the trial court denied the defendant's motions to suppress,

Concerned about the potential loss of evidence through the erasure of data or loss of the device, Perrone took custody of the cell phone immediately, pending application for a search warrant. Id.

[4] Testimony at trial established that "sheema" referred to the defendant's girlfriend, Tysheema Barker.

first orally and later in a supplemental memorandum of decision. The case was then tried before a jury, which found the defendant guilty on all counts. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of eighty years of incarceration.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming that "(1) [the] police detectives [had] violated his *Miranda* rights and his rights pursuant to article first, § 8, of the Connecticut constitution when they continued to interrogate him after he invoked his right to counsel, (2) the police detectives [had] seized his cell phone in violation of the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution, and (3) the affidavit that the police [had] submitted in support of their application for a warrant to search the contents of his cell phone contained materially false information." (Footnote omitted.) *State* v. *Sayles*, supra, 202 Conn. App. 738–39. The Appellate Court rejected these claims, following this court's decision in *State* v. *Mangual*, 311 Conn. 182, 85 A.3d 627 (2014), and concluded that, under federal case law following the United States Supreme Court's decision in *United States* v. *Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004), a violation of *Miranda* constitutes a violation of only a prophylactic rule, and, thus, the fruits of the poisonous tree doctrine[5] did not require suppression of the contents of the defendant's cell phone. See *State* v. *Sayles*, supra, 739, 751–52; see also id., 748–50. As to the defendant's state constitutional claim seeking the adoption of a new prophylactic rule "to protect against

[5] Upon the determination that a constitutional violation has occurred, the fruit of the poisonous tree doctrine requires the exclusion "not only [of] the illegally obtained evidence itself, but also . . . other incriminating evidence derived from the primary evidence." *Nix* v. *Williams*, 467 U.S. 431, 441, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

police tactics aimed at undermining the constitutional rights of a suspect," the court held that the defendant had abandoned the claim because his appellate brief contained only a single sentence of analysis. Id., 753; see id., 753–55. The Appellate Court rejected the defendant's fourth amendment claim, reasoning that the seizure of the cell phone was supported by probable cause and was justified under the exigent circumstances doctrine. See id., 761–65. Finally, the Appellate Court concluded that the record and the defendant's brief were inadequate for review of the defendant's claim under *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), that the affidavit that the police submitted in support of their application for a warrant to search the contents of his cell phone contained materially false information by omitting the fact that he had requested an attorney. See *State* v. *Sayles*, supra, 767–79. Accordingly, the Appellate Court affirmed the judgment of conviction. Id., 769. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the defendant claims that the Appellate Court improperly upheld the trial court's denial of his motions to suppress evidence of his cell phone and the data stored therein for several reasons. Principally, however, the defendant provides a comprehensive analysis under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), and claims that article first, § 8, of the Connecticut constitution mandates protection of a suspect's *Miranda* rights via the adoption of a rule "that evidence obtained through questioning a suspect after the suspect has invoked the right to counsel [pursuant to *Edwards* v. *Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)] must be suppressed and cannot be used in the state's case-in-chief [at] a subsequent trial."[6]

[6] In addition to his state constitutional claim, which presents an issue of first impression, the defendant also contends that the Appellate Court improperly relied on the United States Supreme Court's decision in *United*

In response, the state contends that it is unnecessary to reach the constitutional issues raised by the defendant because any error in the admission of the cell phone and its stored data was harmless beyond a reasonable doubt, insofar as the "evidence of the contents of the [cell] phone was relatively minor and had no tendency to influence the judgment of the jury in view of the totality of the evidence . . . ."[7] The state's arguments are consistent with "the doctrine of constitutional avoidance," which this court often applies "not to decide difficult questions of constitutional law when the state has established that any constitutional error will not affect the result of the appeal because it is harmless beyond a reasonable doubt." *State* v. *Dickson*, 322 Conn. 410, 497, 141 A.3d 810 (2016) (*Robinson*, *J.*, concurring), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see, e.g., *State* v. *Bowden*, 344 Conn. 266, 276, 278 A.3d 472 (2022) (declining to

States v. *Patane*, supra, 542 U.S. 630, in concluding that the fruit of the poisonous tree doctrine did not require suppression of the contents of the defendant's cell phone under the fifth amendment to the United States constitution. Specifically, he argues that this case did not involve a simple failure to give the *Miranda* warnings because, by continuing the interrogation, the detectives "deliberate[ly] flout[ed]" the defendant's invocation of his right to counsel under *Edwards* v. *Arizona*, supra, 451 U.S. 477. He also argues that evidence of the contents of a cell phone is not physical evidence but, instead, is testimonial evidence. As a corollary, the defendant contends that (1) the trial court made clearly erroneous factual findings concerning whether the defendant was free to leave the police station and whether the interview had ended when the police asked the defendant for his cell phone, and (2) the police interview was custodial in nature and triggered his protections under *Miranda*. Finally, the defendant argues that, under *Riley* v. *California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), and *State* v. *Smith*, 344 Conn. 229, 278 A.3d 481 (2022), the "all data" search warrant used to obtain the cell phone violated the fourth amendment to the United States constitution because it was not supported by probable cause and because it lacked sufficient particularity.

[7] As an additional, alternative ground to uphold the denial of the motion to suppress, the state also relies on the inevitable discovery and independent source doctrines to bar the application of the exclusionary rule in this case. Given our conclusion as to the state's harmless error claim, we need not address this alternative ground.

consider "[the] important issue" of whether seizure of defendant's cell phone was supported by sufficiently particular warrant because any error was harmless beyond reasonable doubt); *State* v. *Tony M.*, 332 Conn. 810, 821–22, 213 A.3d 1128 (2019) (declining to consider whether trial court properly found that defendant voluntarily waived his *Miranda* rights because any *Miranda* violation from admission of his statement would be harmless beyond reasonable doubt); *State* v. *Jordan*, 314 Conn. 89, 96–97, 100–101, 101 A.3d 179 (2014) (declining to decide whether closet was within defendant's control for purposes of search incident to arrest doctrine because any fourth amendment violation in admitting drugs found in closet was harmless beyond reasonable doubt).

Accordingly, before addressing the defendant's various constitutional claims, we turn to the state's harmless error arguments. The state contends that the importance of the cell phone data paled in comparison to Vanderberg's testimony, which was corroborated by independently obtained cell site location data—the legality of which is unchallenged[8]—establishing that

[8] The defendant does not challenge the legality of the cell site location data associated with his cell phone that was obtained via a search warrant issued to his cellular service provider. Nevertheless, the dissent argues that the cell site location data evidence is itself fruit of the poisonous tree that should have been excluded from evidence and, therefore, not considered in the harmless error analysis. See footnote 4 of the dissenting opinion. This analysis marks a departure from the adversarial process, pursuant to which claims are framed and raised by parties and then reviewed by the courts; see, e.g., *State* v. *Stephenson*, 337 Conn. 643, 653, 255 A.3d 865 (2020); insofar as the dissent raises a claim that the defendant himself has abandoned by not briefing. See, e.g., *Traylor* v. *State*, 332 Conn. 789, 805, 213 A.3d 467 (2019) ("[a]n unmentioned claim is, by definition, inadequately briefed, and one that is generally . . . considered abandoned" (internal quotation marks omitted)); *State* v. *O'Brien-Veader*, 318 Conn. 514, 562, 122 A.3d 555 (2015) (inadequately briefed claims are abandoned). Absent resort to the supplemental briefing procedure provided by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–62, 84 A.3d 840 (2014), for courts raising such claims sua sponte, we deem the legality of the cell site location data undisputed and afford it full consideration in conducting our harmless error analysis.

the defendant's phone was in the vicinity of Howard Avenue, Pay Rite, and Church Street South, where the defendant's mother lived, before, during, and after the robbery. The state emphasizes that additional corroboration of Vanderberg's account is provided by Hoover's testimony that the defendant had told him that his phone had " '[taken] a hit where the crime was,' " which he intended to address "by having his cousin take responsibility for the phone while it was in the vicinity of Pay Rite." The state argues further that Hoover's jailhouse informant testimony was "independently corroborated" with respect to "almost every important detail" and that Vanderberg's testimony was similarly corroborated by the video surveillance footage establishing "the approximate sizes of the robbers, the different lettering on their sweatshirts, the fact that they were both masked and gloved, and that they stole cigars in bluish wrappers." Finally, the state observes that "DNA consistent with that of the defendant and Sumler was found on the masks seized from their residences."

Focusing in particular on the unsent text message telling Baker to "put them shits in the river," which the state suggested referred to murder weapons, the defendant contends in response that the state cannot establish that any error was harmless beyond a reasonable doubt. The defendant argues that this evidence covered up numerous gaps in the state's case, which "rested on inferences from imprecise cell site location data and the testimony of dubious value from shady felons," and which suffered from "no eyewitnesses to the shooting, no evidence (aside from Vanderberg's self-serving testimony) placing the defendant definitively at the scene, no fingerprints or DNA linking the defendant to the shooting, no murder weapon, and no evidence after a search of his house or clothes that linked him to the shooting." In particular, the defendant observes that the prosecutor referred to the unsent text message

four times during closing argument, which "demonstrates its importance" to the state's case. The defendant also argues that the "fact that a mask found in [his] home had his DNA on it . . . is meaningless. He owned it. There was no connection made between the mask and the shooting of the clerk." (Citation omitted.) Finally, the defendant argues that he had been "eliminated as a contributor to the DNA found on and in Vanderberg's car and the mask found in it," and that the police failed (1) "[to test] the gloves taken from the defendant's home for gunshot residue," (2) to "pull any footage from video cameras near the defendant's apartment to check Vanderberg's testimony about the dumpster," and (3) to locate "Vanderberg's sweatshirt" or analyze his DNA. We agree with the state, however, and conclude that the consistency and independent corroboration of the testimony of Vanderberg, Hoover, and a statement from Jeremiah Samuels, a friend of the defendant, render any error with respect to the admission of the unsent text message harmless beyond a reasonable doubt.

It is well established that "the test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors that we have considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Internal quotation marks omitted.)

State v. *Johnson*, 345 Conn. 174, 196, 283 A.3d 477 (2022). "In other words, we [must be] satisfied beyond a reasonable doubt that the result would be the same without the admission of the assumedly improper evidence." *State* v. *Jordan*, supra, 314 Conn. 104; see, e.g., *State* v. *Russaw*, 213 Conn. App. 311, 358, 278 A.3d 1, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022). This inquiry is an objective one and requires us to consider the quality and quantity of both the inadmissible evidence and the admissible evidence that remains to support the verdict of the jury. See, e.g., *State* v. *Van Kirk*, 306 Mont. 215, 227–28, 32 P.3d 735 (2001); *State* v. *Boudreau*, 175 N.H. 806, 817, 305 A.3d 905 (2023); see also *State* v. *Bowden*, supra, 344 Conn. 276–77 ("we begin our analysis of harmlessness by placing the pieces of inadmissible evidence obtained from the defendant's cell phone in the context of the other evidence properly admitted at trial").

Our review of the trial record demonstrates that the state offered an overwhelming wealth of evidence beyond the unsent text message to prove that the defendant had committed felony murder and conspiracy to commit robbery in the first degree. To begin, surveillance camera footage from inside the Pay Rite on Forbes Avenue shows that a person entered the store holding a handgun in his right hand and wearing a gray hoodie with writing down the sleeves, a dark ski mask, and dark gloves. This person approached the counter and pointed a gun at the clerk. A second person then entered the store wearing a dark colored hoodie with light colored writing across the front, a dark ski mask, and dark gloves. The first person went behind the counter as the second person stood in front of it. The second person removed a handgun from his hoodie and fired it at the clerk, who is seen clutching his midsection. The first person handed what appears to be a handful of currency to the second person as the wounded clerk handed the

second person what appears to be a cigar box. As the second person began to exit the store, the clerk swung a stool at the first person, who also shot the clerk before exiting the store.

Testifying for the state, Vanderberg, who drove the car used in the commission of the Pay Rite robbery, identified the two shooters in the surveillance video as the defendant and Sumler, and he described them both as being approximately five feet, seven inches tall. As to the events leading up to the robbery and shooting, Vanderberg testified that, on the day of the crime, he had been driving around New Haven in his wife's green Ford Focus when he received a call or FaceTime from either the defendant or Sumler, and they planned to meet and hang out. About fifteen minutes after the call, Vanderberg picked up the defendant and Sumler in his wife's vehicle on Dixwell Avenue in New Haven, and they drove around smoking marijuana. Vanderberg testified that he, the defendant, and Sumler never discussed committing a robbery. According to Vanderberg, at Sumler's request, he parked at "Eddy's" convenience store on Howard Avenue, where Sumler placed a gun in a cupholder and then exited the vehicle. The defendant took the gun from the cupholder. After a few minutes, Sumler returned to the vehicle with two pairs of black gloves, put on one pair, and gave the defendant the other. The defendant returned the gun to Sumler and asked Vanderberg for a sweatshirt. Vanderberg gave him a blue Nautica hoodie.

The three men then continued to drive around New Haven before stopping at the Pay Rite on Forbes Avenue. Vanderberg parked around the corner and asked the defendant and Sumler to get him some cigars. The defendant and Sumler exited the vehicle; both were wearing hoodies, and Sumler was holding his gun. A few minutes later, the defendant came back to the vehicle, walking fast while holding something in his hoodie and

dropping cigars from his hands. Sumler then walked calmly back to the vehicle. Vanderberg drove the defendant and Sumler to the defendant's apartment complex, where the defendant threw a cigar box and Vanderberg's hoodie in a dumpster. Once inside the defendant's apartment, Sumler handed the defendant his gun, which the defendant placed in a storage area outside of his apartment. While talking at the apartment, the defendant told Vanderberg that his and Sumler's actions at Pay Rite were "some spur of the moment shit," from which Vanderberg inferred that they had robbed the convenience store. At that point, however, he did not know about the shooting. Vanderberg testified that, the day after the shooting, he learned that the clerk had been killed, and what happened "just wasn't sitting right with" him. Accordingly, he decided to inform his probation officer of what had happened and to arrange a meeting with law enforcement officers. He testified at trial pursuant to a plea agreement with the state.[9]

Vanderberg's detailed testimony was far from the only evidence linking the defendant to the crime.[10] Hoo-

[9] Vanderberg acknowledged further that he had a history of criminal activity, including charges of felony murder in connection with the robbery of a Bridgeport convenience store a few days after the events at issue in the present case. He also admitted that he had unspecified pending charges and had entered into a plea agreement with the state, pursuant to which he agreed to testify, although the state did not promise to recommend a specific sentence unless required to do so by the court.

[10] The dissent disagrees with our view that, for purposes of assessing harmless error, the value of the testimony of Vanderberg and Hoover, and the prior inconsistent statement of Samuels, is enhanced by the fact that this evidence independently corroborates each other. The dissent contends that it is "most likely" that the evidence from the defendant's cell phone persuaded the jury to believe their otherwise "inherently dubious" testimony. Part III of the dissenting opinion. The dissent then illustrates the suspect nature of testimony from accomplices or jailhouse informants by citing certain sister state cases for the proposition that some states will not even permit the testimony of accomplices or jailhouse informants to come into evidence without corroboration by a source other than another accomplice or jailhouse informant. See part III and footnote 7 of the dissenting opinion; see also, e.g., *State* v. *Harris*, 405 N.W.2d 224, 227 (Minn. 1987); *People* v.

ver, a jailhouse informant, testified that, for four or five

Ohlstein, 54 App. Div. 2d 109, 112, 387 N.Y.S.2d 860 (1976), aff'd, 44 N.Y.2d 896, 379 N.E.2d 222, 407 N.Y.S.2d 696 (1978); *Chapman* v. *State*, 470 S.W.2d 656, 660 (Tex. Crim. App. 1971); cf. *Schnidt* v. *State*, 357 S.W.3d 845, 851 (Tex. App. 2012) (standard for corroboration of accomplice and jailhouse informant testimony is same, and one cannot corroborate the testimony of the other), review denied, Texas Court of Criminal Appeals, Docket No. PD-0311-12 (April 18, 2012). The dissent "fail[s] to understand" how such witnesses' "powerful incentive . . . to implicate the defendant falsely in the crimes charged . . . is eliminated or even reduced by the fact that multiple witnesses all share the same motivation." Part III of the dissenting opinion.

We respectfully disagree with the dissent's reliance on this body of case law. First, as the dissent acknowledges, the accomplice corroboration rule is one of evidentiary sufficiency that is not required at common law and that has largely been implemented by statute in approximately one-half of the states, "requiring, in varying degrees, that the testimony of an alleged accomplice be corroborated by independent evidence, that is, evidence not dependent on an accomplice." *State* v. *Jones*, 466 Md. 142, 158, 216 A.3d 907 (2019). In overruling its common-law accomplice corroboration rule as arbitrary and an intrusion on the jury's constitutional role as fact finder; see id., 160–62; Maryland's highest court recently observed that "most jurisdictions (thirty-two states, the District of Columbia, the federal courts, Puerto Rico, Guam, and the Virgin Islands) either have not adopted the accomplice corroboration rule or have since repealed it," leaving Tennessee as "the only [jurisdiction] with a [judicially created] accomplice corroboration rule." Id., 160–61. Most significant, Connecticut does not have a common-law or statutory rule requiring the corroboration of accomplice or jailhouse informant testimony as a matter of law, with recent legislation addressing jailhouse informant testimony concerning disclosure; see General Statutes § 54-86*o*; and, in certain serious felony cases, more wholistic assessments of reliability beyond corroboration under General Statutes § 54-86p. See, e.g., *State* v. *Jones*, 337 Conn. 486, 505–506, 254 A.3d 239 (2020). Instead, in our view, the informant and accomplice testimony in this case is consistent with those indicators of reliability, including "(1) [t]he extent to which the jailhouse witness's testimony is confirmed by other evidence; (2) [t]he specificity of the testimony; (3) [t]he extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) [t]he circumstances under which the jailhouse witness initially provided information supporting such testimony to [the police] . . . or a prosecutorial official, including whether the jailhouse witness was responding to a leading question." General Statutes 54-86p (a); see, e.g., *State* v. *Jones*, supra, 506.

Second, even in states that have accomplice corroboration rules, it is by no means settled law that the testimony of a jailhouse informant cannot be

months, he was held in the same correctional facility as the defendant after the defendant's arrest for the Pay Rite robbery. According to Hoover, he and the defendant spoke almost every day during that time, and the defendant talked to him about the Pay Rite robbery three or four times per week. Specifically, the defendant told Hoover that he and another man had shot the clerk at the Pay Rite on Forbes Avenue. The defendant also told Hoover that he wanted to get his cell phone "thrown out" of evidence because it contained a photograph of the gun used in the robbery, that the police had discovered his ski mask and gloves at his residence, that he was worried that the ski mask and gloves might have his DNA on them, that he planned to testify that he had used the mask for dirt biking, that Vanderberg had remained in the vehicle during the robbery, that they shot the clerk because he "took too long," that both he and Sumler shot the clerk, that they both had guns, that they stole money and cigars, that, after the shooting, he hid the gun at his girlfriend's house but moved it after the police searched his residence, that his cell phone "took a hit" where the crime occurred, that he planned to testify that his cousin had his cell phone in that area, that, if he could get a low enough bond, he would run "down south," and that he wanted someone to call Vanderberg's wife to tell her that Vanderberg

used to corroborate that of an accomplice. Compare *People* v. *Huggins*, 235 Cal. App. 4th 715, 718–19, 185 Cal. Rptr. 3d 672 (2015) (concluding that statutes requiring corroboration of accomplice and jailhouse informant testimony do not preclude use of jailhouse informant testimony to corroborate accomplice testimony, and rejecting request "to impose a judicially created rule that accomplices and in-custody informants cannot corroborate each other's testimony because both are self-interested"), review denied, California Supreme Court, Docket No. S226350 (July 8, 2015), and *State* v. *Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002) (rejecting argument that jailhouse informant was not credible as matter of law for purposes of corroborating accomplice testimony), with *Johnson* v. *State*, Docket No. 11-14-00311-CR, 2017 WL 3923665, *6–7 (Tex. App. August 31, 2017) (discussing split of authority on this point among intermediate appellate courts in Texas).

needed to recant. Hoover testified that he documented these conversations on a notepad in his cell so he could "help [his] situation."

Additional corroboration was provided by a statement by Samuels, which was admitted into evidence for substantive purposes under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).[11] Samuels had been arrested for another crime when, during an interview with the police, he provided information about the Pay Rite robbery, some of which was not publicly available. Specifically, Samuels told the police that he had spoken to Sumler and the defendant on the day of the Pay Rite robbery, and they told him that Sumler had a .357 caliber firearm, that Sumler and the defendant had both worn masks and had both shot the clerk, and that the proceeds of the robbery amounted to Dutch Masters brand cigars and some money. Samuels also told the police that he previously had known Sumler and the defendant to possess or have access to a semiautomatic handgun that he referred to as either a "deuce deuce" (.22 caliber) or a "deuce five" (.25 caliber). Samuels also informed the police that, after Vanderberg's arrest, the defendant told Samuels that Vanderberg could not inculpate him because Vanderberg had not been inside the store with him and Sumler during the robbery.

The state also offered evidence that, after Samuels spoke with the police, but before his incarceration on other charges, the defendant had his cousin, James

[11] "In *Whelan*, [this court] adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination. This rule has also been codified [at] § 8-5 (1) of the Connecticut Code of Evidence, which incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided." (Internal quotation marks omitted.) *State* v. *Gray*, 342 Conn. 657, 686, 271 A.3d 101 (2022).

"Sucky" Douglas, assault Samuels to force him to recant his testimony. Specifically, Hoover testified that the defendant told him that he had Sucky beat up an individual identified as either "JS or JC" to get him to recant his statement to the police. Consistent with Hoover's testimony, Samuels testified that he had a physical altercation with someone named Sucky after he spoke to the police. The state offered into evidence a statement Samuels wrote after this physical altercation, in which he stated that he had provided the police with false information and that he wanted to recant. Samuels also wrote a letter to Sumler, stating that he could "make it right" by giving a statement that he had been "high" at the time of the interview and that he had provided the police with "bullshit." Indeed, at trial, Samuels testified that he had been under the influence of Xanax during the police interview, had lied to the police about the Pay Rite case, and wished to recant. This testimony set the foundation for the admission of a redacted version of his interview with the police under *Whelan*.

The record also contained physical evidence corroborating the testimony and statements of Vanderberg, Hoover and Samuels.[12] The state entered into evidence

[12] Thus, we respectfully disagree with the dissent's blanket statement that "[t]here was *no physical evidence* connecting the defendant to the crimes." (Emphasis added.) Part III of the dissenting opinion. The dissent, however, concedes that the police recovered a ski mask and gloves—plainly items of physical evidence—from the defendant's home but seeks to diminish the importance of this evidence because, in the dissent's view, ski masks and gloves are commonly found items in many homes located in the northeastern United States. See id. The presence of the mask and gloves is nevertheless of greater significance in light of the other evidence showing that the robbers wore ski masks and that the defendant's cell phone was in the vicinity of the Pay Rite at the time of the shooting. Moreover, the defendant's statement to Hoover about his concern that the police might find his DNA on the mask and gloves would be an odd thing say if he was not concerned that the police would be able to link the mask and gloves to those worn by the perpetrators. Finally, the jury was free to compare the mask and gloves recovered from the defendant's closet to the mask and gloves worn by the perpetrators in the surveillance video for similarities that would render them more probative evidence.

a black ski mask and a pair of black gloves, which the police had seized when they searched the defendant's home in the Church Street South housing complex. Additionally, Daniel Renstrom, a forensic science examiner with the state forensic science laboratory, testified that an analysis of the DNA discovered on the ski mask found inside the defendant's apartment indicated that the defendant was a potential contributor to that DNA, with the expected frequency of Black and white people as contributors to that sample being one in five. The defendant is a Black male.[13]

James J. Wines, a special agent for the Federal Bureau of Investigation, testified regarding the historical cell site location data associated with the defendant's cell phone. This data established that the cell phone was in the areas of Howard Avenue, the Pay Rite convenience store on Forbes Avenue where the victim was killed, and Church Street South at about the same times that Vanderberg testified that he, the defendant, and Sumler were at those locations. In particular, prior to the shooting, at both 7:11 and 7:15 p.m., the defendant's cell phone pinged the same cell tower, which covered the area of Howard Avenue. At 7:16 p.m., the defendant's phone pinged a different cell tower that covered an area that included the Pay Rite on Forbes Avenue. Wines testified that both cell towers pinged during this timeframe were in clear signal areas, meaning that the likelihood of the cell signal being redirected to another tower was minimal. Following the shooting, between 8:29 and 11:30 p.m., the defendant's cell phone pinged a third cell tower near his apartment eleven times. Wines conceded that he could not provide the exact location of the

[13] Additionally, upon a search of Sumler's residence pursuant to a warrant, the police discovered grey sweatpants, black gloves, a black mask, nine millimeter bullets, and .38 caliber bullets. Jill Therriault, a firearms examiner, testified that three .38 caliber bullets and one .25 caliber bullet were recovered from the crime scene. All three .38 caliber bullets were fired from the same gun.

defendant's cell phone at any specific time. He also acknowledged that a cell phone signal could move from one tower to another without the cell phone and user moving.

In addition to physical evidence, the state also offered the testimony of Jonathan Gavilanes. He testified that, at the time of the shooting, he was across the street from the Pay Rite at an auto repair shop. He heard the sound of a gunshot, looked out the shop window, and saw a man wearing a ski mask run out of the convenience store. He then heard a second gunshot and saw another man wearing a ski mask run out of the convenience store. Gavilanes testified that both men were wearing sweatshirts, and both were "[a]bout five feet, seven inches [tall], almost [Gavilanes'] height," which was six feet tall.

Having reviewed the record in this case, we are convinced that any impropriety in the admission of the cell phone and its stored data was harmless beyond a reasonable doubt. The defendant correctly observes that the testimony of Vanderberg and Hoover is properly viewed with some skepticism, given their obvious self-interest in testifying for the state as an accomplice and a jailhouse informant, respectively. See, e.g., *State* v. *Jones*, 337 Conn. 486, 501–503, 254 A.3d 239 (2020); *Birch* v. *Commissioner of Correction*, 334 Conn. 37, 65–66, 219 A.3d 353 (2019); *State* v. *Patterson*, 276 Conn. 452, 468–70, 886 A.2d 777 (2005). Nevertheless, what may be qualitatively weak evidence—especially standing alone—may grow in strength considerably when viewed in context. See, e.g., *State* v. *Maner*, 147 Conn. App. 761, 778, 780–81, 83 A.3d 1182 (in determining that claimed confrontation clause violation was harmless beyond reasonable doubt, court considered defendant's confession to jailhouse informant in combination with eyewitness testimony), cert. denied, 311 Conn. 935, 88 A.3d 550 (2014). The record demonstrates that the qual-

ity of the testimony of Hoover and Vanderberg grows by leaps and bounds with the degree of independent corroboration present in this case.

First, Vanderberg's testimony was corroborated by the video of the police interview, admitted under *Whelan*, in which Samuels stated that the defendant had also admitted to him his involvement in the robbery and shooting of the store clerk at the Pay Rite. Evidence that the defendant had his cousin use physical force to intimidate Samuels into recanting provides significant evidence of consciousness of guilt and also bolstered Samuels' previous statement to the police that the defendant had admitted his role in the robbery and the shooting to him. See *State* v. *Bowden*, supra, 344 Conn. 279–80 (impact of improper cell phone and text message evidence was heavily undercut by consciousness of guilt evidence, namely, witness tampering and destruction of evidence).

Second, Vanderberg's testimony was independently corroborated by Hoover's testimony that the defendant admitted that (1) he had robbed the Pay Rite and shot the clerk, (2) his cell phone "took a hit" in the area of the crime, (3) he planned to testify that his cousin had his cell phone at the time of the crime, and (4) he was worried about his DNA being on the ski mask and gloves that the police had discovered at his residence. In addition to this level of detail, what makes the quality of Hoover's jailhouse informant testimony particularly compelling is that it contains information—not available to the public—that would not have been known to anyone except the perpetrators. See *State* v. *Jones*, supra, 337 Conn. 510 (in assessing credibility of informant, fact finder may consider, inter alia, "[t]he extent to which his testimony is confirmed by other evidence . . . [t]he specificity of the testimony . . . [and] [t]he extent to which the testimony contains details known only by the perpetrator" (internal quotation marks omit-

ted)). That Hoover, who had no prior connection to the defendant or the crimes at issue, knew details about the crime that were not available to the public significantly bolstered his credibility and the qualitative strength of his testimony.

Finally, the most powerful evidence corroborating the testimony of Hoover and Vanderberg is cell site location data, the legality of which is unchallenged; see footnote 8 of this opinion; establishing that the defendant's phone was (1) in the area of Howard Avenue when he was picked up by Vanderberg, (2) in the area of the Pay Rite on Forbes Avenue at the approximate time of the robbery and shooting, and (3) in the area of Church Street South, where the defendant lived with his mother, just after the crime. Nevertheless, the defendant contends that the cell site location data are of minimal weight because "[t]he fact that [his] cell phone was in the vicinity of his . . . apartment, as well as Howard Avenue and the general area where the shooting occurred at around the same time as the shooting . . . is not dispositive; he lived there." (Citation omitted.) This argument oversimplifies the meaning of the evidence. As Wines explained, the cell site location data did not merely show that the defendant was in the vicinity of these three areas at the same time; it did not show that, at 7:16 p.m., the defendant's phone pinged a cell tower that covered all of Howard Avenue, the area of the shooting *and* his apartment. Rather, this evidence showed that the defendant was closest to the tower in the area of the shooting, and *not* the tower in the area of the apartment where he lived, at 7:16 p.m. Indeed, Wines testified that the cell towers in the area of the defendant's apartment and in the area of the shooting each had clear visibility, limiting the potential for the cell phone to have pinged cell towers further away from the cell phone's actual location. Although Wines conceded that the cell site location data could

not precisely pinpoint the defendant's location, this imprecision nevertheless was limited by the fact that the clear visibility at each cell tower meant that it was far more likely that the defendant's location was within the area of the pinged cell tower.

Beyond the cell site location data, still more evidence independently corroborated nearly every important detail of Vanderberg and Hoover's testimony, including the in-store surveillance footage, consistent with Gavilanes' eyewitness testimony, showing the suspects' height, and the presence of black gloves and a ski mask in the defendant's residence. See, e.g., *State* v. *Smith*, 344 Conn. 229, 262–63, 278 A.3d 481 (2022) (in determining harm, testimony of witness was bolstered by video footage). Nevertheless, the defendant argues that Gavilanes' eyewitness testimony did not bolster the testimony of Hoover or Vandenberg because Gavilanes testified that the two shooters were "almost [his] height," which was six feet tall, whereas the defendant was five feet, seven inches tall. This argument mischaracterizes Gavilanes' testimony. He testified that both suspects were "[a]bout five feet, seven inches [tall], *almost* [Gavilanes'] height," which was six feet tall, so Gavilanes testified that the suspects were "shorter" than him. (Emphasis added.) Similarly, the defendant argues that the in-store surveillance footage and Vanderberg's testimony conflicted because the footage did not show Vanderberg giving the defendant a sweatshirt from his truck *right before* the robbery, and, thus, neither corroborated the testimony of Hoover and Samuels. This argument again misunderstands the testimony. Vanderberg testified that he had given the defendant a sweatshirt from his trunk before the robbery but that he was not sure precisely when and where he did so. Specifically, he thought this occurred while the three men were "at Eddy's or somewhere in the Hill [section of New Haven]."

We also disagree with the defendant's argument that the lack of linchpin DNA evidence significantly undermines the state's harmless error claim in this case. The evidence showed that the defendant was one of the 20 percent of Black or white Americans who could have contributed DNA to the ski mask, the ski mask was discovered where the defendant lived, and the mask was similar in appearance to the ski mask worn by the suspects shown in the surveillance footage. Although the DNA evidence standing alone is far from definitive, considered in the context of the other properly admitted evidence, it nevertheless supports a nexus between the defendant and the shooting.

Finally, in assessing the potential impact of improperly admitted evidence on the jury's verdict, we consider the parties' closing arguments in order to assess its centrality to the factual issues in the case, with the degree of the parties' emphasis and reliance on the improperly admitted evidence indicative of its importance to the jury's verdict. See, e.g., *State* v. *Culbreath*, 340 Conn. 167, 195, 263 A.3d 350 (2021). We acknowledge that the prosecutor mentioned the draft text message retrieved from the defendant's cell phone—evidence that the defendant principally claims to have harmed him[14]—several times during closing and rebut-

[14] As we noted previously; see text accompanying footnote 4 of this opinion; and as the dissent emphasizes in great detail; see part II of the dissenting opinion; the police retrieved other potentially incriminating evidence from the defendant's cell phone, as well, including a text message purportedly from his mother not to come home during the execution of the search warrant and Internet searches for news stories about the Pay Rite robbery. Nevertheless, the defendant's harmless error arguments are focused exclusively on the impact of the unsent text message. Although we focus on the case as argued by the defendant, which relies nearly entirely on the unsent text message element, we emphasize that the inclusion of the other items found in the data on the defendant's cell phone does not change our conclusion that the strength of the state's case renders the assumed constitutional violation harmless beyond a reasonable doubt. See, e.g., *State* v. *Stephenson*, 337 Conn. 643, 653, 255 A.3d 865 (2020) (describing how parties customarily raise and argue claims in adversarial system).

tal arguments. Viewed in context, however, the prosecutor's focus on the unsent text message was minimal relative to the other evidence admitted at trial. Not only did the prosecutor address the testimony of Vanderberg and Hoover, the statement of Samuels, and Wines' testimony about the cell site location data before mentioning the contents of the cell phone, but the prosecutor emphasized that other evidence far more strongly.[15] After defense counsel's closing argument, in which counsel asserted the theory that Vanderberg had framed the defendant to mitigate his own culpability as the getaway driver for both the Pay Rite robbery and another fatal convenience store shooting in Bridgeport,[16] the prosecutor gave a rebuttal argument. In the

[15] Specifically, during her initial closing argument, the prosecutor reviewed the evidence that the state had presented. The prosecutor spent the first quarter of her closing argument focused on Vanderberg's testimony. Then, the prosecutor reviewed the testimony of Gavilanes, the police officers who responded to the crime scene, and the associate medical examiner who examined the victim's body. The prosecutor emphasized the contents of the video recording of Samuels' original statement to the police and then reviewed Hoover's testimony. Only then did the prosecutor mention the cell phone's contents and, even then, referred specifically to the unsent, draft text message only briefly. Instead, the prosecutor proceeded to emphasize Wines' testimony and the cell site location data.

Specifically, with respect to the contents of the defendant's cell phone, the prosecutor argued: "In the series of text messages that [was] presented, there's a text message that was received by the defendant's [cell] phone at 3:55 a.m. on April 15, 2015, that says, '[d]o not come here.' There was also testimony that, later that day, the same day, April 15, 2015, the defendant and his mother went to the New Haven Police Department to talk to detectives about why they were at . . . his house. In the same string of text messages, there's a text message that . . . was not sent, although [there was testimony establishing that] there were numerous reasons why a text message may not be sent. Maybe [the cell phone] lost contact with the server, but there's a text message that was typed on the defendant's phone, '[i]f I get locked up tell sheema put them shits in the river some where [worda loc].' "

[16] During his closing argument, defense counsel asserted that it was Vanderberg and not the defendant who had robbed the Pay Rite and shot the clerk. Defense counsel's closing argument contained an exhaustive attack on Vanderberg's credibility, focusing on the fact that he was involved in another robbery and shooting in Bridgeport soon after the Pay Rite robbery

rebuttal argument, the prosecutor addressed the various attacks on Vanderberg's credibility. The prosecutor again emphasized the importance of the cell site location data and urged the jury to credit the testimony of Hoover and the video of Samuels' police interview, both of which independently referred to statements by the defendant admitting his participation in the Pay Rite robbery and shooting. Only after discussing in detail the other physical evidence of the crime—the bullet fragments and the gloves and ski mask found in the defendant's residence—did the prosecutor again raise the topic of the unsent draft text message, arguing that it referred to throwing the gun used in the robbery into the river.[17] Thus, the contents of the defendant's cell phone played only a minor role in the prosecutor's closing and rebuttal arguments relative to the other evidence that more directly linked the defendant to

and that both crimes shared many similarities, like two suspects wearing ski masks, robbing a convenience store, and shooting the clerk. Thus, counsel argued that the defendant was not involved in the Pay Rite robbery at all and that Vanderberg falsely accused the defendant in an attempt to create a credible defense that Vanderberg did not know that he had used his wife's car to act as a getaway driver for deadly convenience store robberies in Bridgeport and New Haven.

[17] The prosecutor specifically argued in rebuttal: "And what were those texts? When he got the first one right around the time the police are actually tossing his house, from someone to [the defendant], '[d]o not come here.' Later that day, a text that we know was never sent, but it was drafted on that phone, '[i]f I get locked up tell sheema put them shits in the river some where [worda loc].' Shits can mean anything, right? People are constantly throwing stuff in the river. Does that make sense, or does it make more sense that he keeps his gun at his girlfriend's house? He knows he's going to get locked up for this offense, and he's desperately trying to get the word out to get rid of those guns. . . . How about the conversation with Sheema? They're talking about the text message. She had met with [the inspector from the state's attorney's office] a couple [of] days earlier. Of course, she hasn't seen [the defendant] in over [one] year, but she decides to go and pay him a visit days before she gets on the stand. And he says, '[t]hat don't mean nothing. You never got it. That don't mean nothing.' He's not worried at all. What's he referring to? Is he referring to the guns? Is he referring to the text message? I don't know. It certainly shows knowledge of something though, doesn't it?"

the charged crimes. Additionally, the contents of the defendant's cell phone played no role in establishing an element of the offense, or bolstering or destroying the credibility of any particular witness, which lessens the impact of any improper admission into evidence.

Indeed, our case law establishes that a prosecutor's reliance on illegally obtained evidence in closing arguments —even evidence more directly incriminating than the text message at issue in this case—is not dispositive. See *State* v. *Tony M.*, supra, 332 Conn. 819, 823–25 and n.8 (any *Miranda* violation resulting from defendant's statement that tossing his infant son off bridge was akin to basketball " 'free throw' " was harmless beyond reasonable doubt as to element of intent, even though it was used to impeach his testimony at trial that drop was accidental, given "[the] overwhelming, independent evidence of the defendant's intent to kill his baby that the jury could have credited," including text messages sent to baby's mother on night of murder, statements to psychiatry resident at hospital, statements to his mother and baby's mother on night of murder, and fact that statement was mentioned only briefly during summation); *State* v. *Jordan*, supra, 314 Conn. 103–105 (admission of ecstasy pills illegally seized from defendant's closet was harmless beyond reasonable doubt with respect to his intent to sell, despite prosecutor's heavy reliance on them in closing argument, given "[the] ample additional circumstantial evidence . . . that [he] intended to sell the thirty pills he possessed on his person at the time of his arrest," including testimony from multiple witnesses that they had seen defendant sell similarly marked ecstasy pills in several locations).

In sum, we conclude that the evidence against the defendant, viewed cumulatively and in context, was overwhelmingly strong and that the admission into evidence of the contents of the cell phone did not contribute to the jury's verdict. Vanderberg's narrative of the

defendant's actions on the evening of the Pay Rite robbery was independently corroborated by the defendant's separate admissions of guilt to Hoover and Samuels, along with the cell site location data and the discovery of a ski mask and gloves at the defendant's residence. There was also consciousness of guilt evidence in the form of witness intimidation, insofar as Sucky assaulted Samuels in an attempt to keep him from testifying against the defendant, which Hoover testified occurred at the defendant's direction. These evidentiary underpinnings together convince us that any error in the admission of the contents of the defendant's cell phone was harmless beyond a reasonable doubt.

The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, D'AURIA and MULLINS, Js., concurred.

ECKER, J., dissenting. In conducting harmless error review of a constitutional violation, it is tempting for a reviewing court to take on the role of a thirteenth juror by reconstructing a hypothetical trial at which the tainted evidence was not admitted and then asking whether the properly admitted evidence is so strong that the court can be confident that it establishes the defendant's guilt beyond a reasonable doubt. Our case law teaches that we must avoid this temptation because the inquiry asks and answers the wrong question. The correct question is whether there is a reasonable possibility that the improperly admitted evidence had a tendency to influence the judgment of the particular jury in the case before us. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been [returned], but whether the guilty verdict actually [returned] in *this* trial was surely unattributable to the error." (Emphasis

in original.) *Sullivan* v. *Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). In my view we can only answer that question "no" in the present case.

The state has not come close to providing the level of assurance required to find the alleged constitutional error harmless beyond a reasonable doubt. I base my conclusion principally on the lack of physical evidence connecting the defendant, Dwayne Sayles, to the charged crimes, the kind and quality of the state's circumstantial evidence, the highly inculpatory nature of some of the tainted evidence procured from the defendant's cell phone in presumptive violation of the prophylactic rules created by *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Edwards* v. *Arizona*, 451 U.S. 477, 483–85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), and the prosecutor's heavy reliance at trial on that tainted evidence to persuade the jury of the defendant's guilt. As a result, I believe that we must reach the constitutional issues certified by this court and briefed and argued by the parties on appeal.[1]

I

LEGAL PRINCIPLES GOVERNING HARMLESS ERROR REVIEW

The error that we are presuming is of constitutional magnitude. This means that the process by which the

[1] We granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's denial of the defendant's motion to suppress the contents of his [cell phone] in reliance on *United States* v. *Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004), and *State* v. *Mangual*, 311 Conn. 182, 85 A.3d 627 (2014), when the seizure of those contents was the result of questioning after he had invoked his *Miranda* rights, on the basis that a cell phone and its stored data constitute 'physical' (i.e., nontestimonial) evidence that need not be suppressed if seized as the result of a *Miranda* violation?" And (2) "[d]id the Appellate Court properly reject the defendant's claim that the holding in *Patane* does not comport with the broader protections against compelled self-incrimination afforded under article first, § 8, of the Connecticut constitution?" *State* v. *Sayles*, 336 Conn. 929, 247 A.3d 578 (2021). Additionally, we granted

defendant was convicted and sentenced to eighty years of incarceration violated our most fundamental norms of justice. Under these circumstances, the burden properly falls on the state to demonstrate that the error, despite its grave nature, nonetheless did not possibly affect the jury's verdict and, therefore, was harmless beyond a reasonable doubt. This standard is "demanding . . . ." *State* v. *Mangual*, 311 Conn. 182, 212, 85 A.3d 627 (2014). "[W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) Id., 214–15.

Harmless error review analyzes the impact of the constitutional error on the result of the trial, rather than on whether the jury arrived at a correct finding of guilt, because the United States constitution guarantees every defendant the right to a trial by the *actual* jury convened to hear the evidence. A criminal conviction cannot be based on the verdict of a hypothetical jury. The doctrine governing constitutional harmless error review is designed with this precise principle in mind. The leading case remains *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which, as construed by the United States Supreme Court, prescribes the required analysis: "Consistent with the [jury trial] guarantee, the question [that *Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have [on] a reasonable jury, but rather what effect it had [on] the guilty

the defendant permission to raise on appeal a fourth amendment claim challenging the sufficiency and particularity of the search warrant used to obtain the contents of his cell phone pursuant to our recent decision in *State* v. *Smith*, 344 Conn. 229, 246–52, 278 A.3d 481 (2022).

verdict in the case at hand. . . . [Harmless error] review looks, [the United States Supreme Court has] said, to the basis on which the jury *actually rested* its verdict. . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been [returned], but whether the guilty verdict actually [returned] in *this* trial was surely unattributable to the error." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Sullivan* v. *Louisiana*, supra, 508 U.S. 279. Thus, "[t]he [harmless error] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); see also *State* v. *Mangual*, supra, 311 Conn. 214 ("[W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.)).

It follows that harmless error review is not the same as sufficiency of the evidence review. See, e.g., *Fahy* v. *Connecticut*, 375 U.S. 85, 86–87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) ("We are not concerned . . . with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."); *State* v. *Bruno*, 197 Conn. 326, 336, 497 A.2d 758 (1985) (*Shea*, *J.*, concurring) ("Legal sufficiency of the evidence is not the test for harmless error even if only a nonconstitutional error is involved. The harmlessness of an error depends [on] its impact on the trier and the result

. . . ."), cert. denied, 475 U.S. 1119, 106 S. Ct. 1635, 90 L. Ed. 2d 181 (1986); see also *State* v. *Torres*, 343 Conn. 208, 245, 273 A.3d 163 (2022) (*Ecker*, *J.*, dissenting) ("the legal sufficiency of the evidence is not the issue, and the . . . marshaling of evidence sufficient to support the conviction misapprehends the point of harmless error analysis").

Many courts and commentators have emphasized this important distinction. The following words of the Florida Supreme Court summarize the point: "The test is not a [sufficiency of the evidence], a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the [trier of fact] by simply weighing the evidence. The focus is on the effect of the error on the [trier of fact]. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." (Emphasis omitted; internal quotation marks omitted.) *Ventura* v. *State*, 29 So. 3d 1086, 1089–90 (Fla. 2010); see also *State* v. *Gibson*, 391 So. 2d 421, 427 (La. 1980) ("[a]lthough the [harmless error] standard requires a reviewing court to consider the evidence in order to determine if there is a reasonable possibility that the error had prejudicial effect, it does not permit a court to substitute for the verdict its judgment of what the jury would or should have decided in the absence of error"); *State* v. *Alvarez-Lopez*, 136 N.M. 309, 319–320, 98 P.3d 699 (2004) ("[C]onstitutional error cannot be deemed harmless simply because there is overwhelming evidence of the defendant's guilt. Our focus must remain squarely on assessing the likely

impact of the error on the jury's verdict."), cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

In sum, the proper standard to determine whether a constitutional error is harmless does not, as the majority states, assess whether the result of the trial would have been the same *without* the admission of the presumptively improper evidence. The correct inquiry, rather, is whether we are assured beyond a reasonable doubt that the result of the trial would have been the same *despite* the admission of the presumptively improper evidence. The distinction between these two formulations is subtle but important. The former inquiry incorrectly focuses on the properly admitted evidence and the correctness of the jury's verdict, whereas the latter inquiry correctly focuses on the improperly admitted evidence and its likely impact on the jury's verdict.

II

THE TAINTED EVIDENCE AND THE STATE'S RELIANCE ON IT

The majority accurately recounts the facts that the jury reasonably could have found, and I will not repeat those facts at any length here. I consider the majority's legal analysis flawed because it alternatively understates or altogether overlooks the full extent of the tainted evidence and the prosecutor's heavy reliance on that evidence at trial. The proper analysis must begin by examining more closely the evidence extracted from the defendant's cell phone, the fruits of that evidence,[2] and the manner in which the prosecutor emphasized all of the presumptively inadmissible evidence during

[2] "As a general principle, the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the . . . United States constitution. . . . The rule applies to evidence that is derived from unlawful government conduct, which is commonly referred to as the fruit of the poisonous tree . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Brocuglio*, 264 Conn. 778, 786, 826 A.2d 145 (2003).

closing and rebuttal arguments to support an inference of guilt.

The most damaging tainted evidence is the text messages extracted from the defendant's cell phone. Emanuel Hatzikostas, a digital forensic examiner with the computer analysis response team at the Federal Bureau of Investigation (FBI), testified about these text messages. According to Hatzikostas, at 3:55 a.m. on April 15, 2015, the date on which the search warrant for the residence of the defendant's mother was executed during the early morning hours, someone texted the defendant, "[d]o not come here." Approximately three hours later, at 7:48 a.m., someone texted the defendant, "M sai call his [s]hit now." On that same date, the defendant drafted the following text message, which was never sent, to an unknown recipient: "If I get locked up tell sheema put them shits in the river some where worda loc." It should come as no surprise that the content and meaning of these text messages became a focal point of the state's case.

The text messages are central to the harmlessness analysis, and I will return to them shortly, but it is important to understand at the outset that those messages were by no means the only presumptively inadmissible evidence extracted from the defendant's cell phone and presented to the jury. Multiple screenshots of a news article regarding the murder and robbery also were admitted into evidence. Specifically, the jury heard that, following the search of his mother's residence on April 15, 2015, the defendant searched the news feed of WTNH, a local New Haven news station, for information regarding the crimes for which he was on trial. On that same date, the defendant also accessed a news article on Instagram pertaining to the crimes. This tainted evidence, largely unexamined by the majority, was relied on extensively by the prosecutor during closing and rebuttal arguments to buttress the state's theory of guilt.

The tainted evidence also included the fact that the name associated with the defendant's cell phone was "Blackhead" and that the name associated with the Instagram account on the defendant's cell phone was "Black Hoodie," consistent with the testimony of the state's witnesses, Leighton Vanderberg, Derrick Hoover, and Jeremiah Samuels, regarding the defendant's street names. A photograph of the defendant also was among the tainted evidence, depicting him wearing white sneakers, black jeans, and a shirt emblazoned with "Born Fly As F*ck." The photograph not only portrays the defendant as proudly transgressive, using profanity to describe his nature, but, more important, shows him wearing the same color shoes and jeans worn by the perpetrator of the charged crimes.[3] This is the kind of detail that can matter to a jury.

The inadmissible contents of the defendant's cell phone yielded additional probative evidence that the prosecutor used at trial to establish the defendant's guilt.[4] The unsent text message referencing "sheema"

[3] The perpetrator also was wearing white sneakers and dark colored jeans.

[4] It appears that the cell site location data, which were utilized by the prosecution to track the defendant's movements on the night at issue, also are fruits of the presumed constitutional violation. The record reflects that the search warrant used to obtain the call detail records and cell site location information, like the search warrant used to obtain the contents of the defendant's cell phone, was based on information acquired as a direct and proximate result of the alleged violation of the defendant's *Miranda* rights. Specifically, the warrant recites that, "[o]n April 15, 2015, [the defendant] came to [p]olice [h]eadquarters with his mother. Prior to any questioning, [the defendant] was given his *Miranda* [r]ights from a New Haven Police Department *Miranda* [w]aiver form. [The defendant] requested an attorney and no questioning took place. Prior to [the defendant's] leaving, his mother handed to [the] detectives a [cell phone that] she said belonged to [the defendant] and provided [a certain ten digit number] as the phone number. The phone was seized and placed in an electronic protective bag to prevent remote erasure of data. A [s]earch and [s]eizure [w]arrant was obtained to retrieve data from within the [cell phone] . . . . Detectives were unable to gain access to the [cell phone] without the required passcode." Just as we are presuming in the present appeal that the defendant's cell phone and its contents should have been suppressed as fruits of the poisonous tree because the phone was obtained from the defendant's mother as a result of the alleged violation of the defendant's *Miranda* rights, so, too, must we

led the state to the defendant's then girlfriend, Tysheema Barker. Douglas Jowett, an inspector in the

presume that the defendant's cell phone number and the information obtained as a result of the procurement of the defendant's cell phone number must be suppressed because they were obtained from the defendant's mother in the same encounter pursuant to the same alleged *Miranda* violation. Because the information provided by the defendant's mother is the only information in the warrant that links the defendant to the cell phone number used to generate the cell site location data, and the record plainly reflects that it was obtained "by exploitation of [the alleged] illegality," it is fruit of the poisonous tree. (Internal quotation marks omitted.) *Wong Sun* v. *United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The majority does not address the substance of my assertion that the cell site location data are fruits of the presumed constitutional violation and affords the evidence "full consideration" in its harmless error analysis on the ground that the defendant abandoned any challenge to this evidence through inadequate briefing. Footnote 8 of the majority opinion. I cannot agree for three reasons. First, the defendant's challenge to the cell site location data is subsumed within and intertwined with his claim that that the evidence obtained as a result of the violation of his *Miranda* rights improperly was admitted into evidence at trial. The police obtained his cell phone and cell phone number from his mother as the direct and proximate result of an interrogation that we presume was illegal, and precisely the same analysis applies to both. See, e.g., *Meribear Productions, Inc.* v. *Frank*, 340 Conn. 711, 732, 265 A.3d 870 (2021) ("[w]e may . . . review legal arguments that differ from those raised by the parties if they are subsumed within or intertwined with arguments related to the legal claim before the court" (internal quotation marks omitted)). Second, the burden is not on the defendant to establish that the presumed constitutional violation was harmless; the burden instead rests on the state, and the state has failed to explain why the cell site location data can be treated any differently from the cell phone itself in this respect. Cf. *State* v. *Jacques*, 332 Conn. 271, 294, 210 A.3d 533 (2019) (reversing defendant's conviction because state did not claim in its appellate brief that constitutional violation was harmless beyond reasonable doubt). Third, the overriding question that we must answer when conducting harmless error review, under any standard, is whether we have confidence in the fairness and integrity of the verdict despite the error, and answering this question requires a careful and searching review of the entire record. See, e.g., *State* v. *Mangual*, supra, 311 Conn. 214–15. Our appellate review must independently assess whether the state has met its heavy burden of establishing that a constitutional error is harmless beyond a reasonable doubt. See, e.g., *State* v. *Alexander*, 343 Conn. 495, 510, 275 A.3d 199 (2022) (conducting "our harmless error analysis . . . on the basis of our independent review of the record"). This mandate does not authorize the court to ferret out new issues unrelated to the constitutional claims raised by the defendant, but, by the same token, I do not see how our independent assessment of the entire record can treat evidence as untainted when it comes from the very same poisonous tree that rendered the defendant's cell phone and its contents inadmissible.

state's attorney's office, testified that he visited Barker to "[confront] her with the text message" and to serve her with a subpoena to testify at the defendant's trial. Jowett explained that Barker was "irate" and that, not long afterward, the Department of Correction notified Jowett that she had gone to visit the defendant at the New Haven Correctional Center. Barker appeared at trial pursuant to the state's subpoena and testified regarding her relationship with the defendant, the unsent text message, and her visit to the defendant at the correctional center. Barker explained that she lived with the defendant in April, 2015, and that she never saw the defendant with any guns. Barker also testified that she never received the unsent text message drafted on the defendant's cell phone and that the term "loc" refers to "somebody who passed away." According to Barker, she visited the defendant for the first time since "[a]lmost [one] year ago" because she was very upset that she had been subpoenaed to testify at his criminal trial. During that visit, she informed the defendant that she had been asked about the unsent text message on his cell phone, and the defendant replied: "You're straight. Just don't worry. They're going to try to get you mad." The defendant also said about the unsent text message something to the effect of, "[y]eah, fuck that shit. That don't mean anything . . . . You never got it. That don't mean anything." Barker acknowledged that, afterward, she and the defendant communicated nonverbally through the glass separating them during their noncontact visit so that a portion of their conversation would not be recorded by the Department of Correction. The testimony of Jowett and Barker was fruit of the presumed constitutional violation, and, as set forth in detail in this opinion, the prosecutor relied on it extensively in closing argument to urge the jury to find that the "sheema" referred to in the unsent text message was Barker and that the "shits" was the gun used in the

commission of the crimes with which the defendant was charged.

The state relied heavily on the tainted evidence to prove its case in a manner significantly more extensive and rhetorically persuasive than acknowledged by the majority. The prosecutor used the contents of the defendant's cell phone and the fruits of those contents during closing and rebuttal arguments not only to demonstrate the defendant's participation in the commission of the crimes but also to lend credibility to the disparate bits and pieces of the state's admissible evidence that either were unsupported, uncorroborated, or inherently suspect.

The prosecutor made strong and effective use of the most powerful piece of evidence that presumptively was admitted in violation of the defendant's constitutional rights, namely, the unsent text message on the defendant's cell phone instructing his girlfriend, Barker, to throw "them shits in the river" if he were arrested. If the jury credited the prosecutor's claim that "shits" meant "gun," an extremely plausible interpretation, then the unsent text message was the functional equivalent of a confession by the defendant. The persuasive force of this evidence was obvious, as the prosecutor pointedly highlighted for the jury during initial closing argument: "You heard from FBI analyst . . . Hatzikostas. . . . Hatzikostas testified that he was able to analyze a [cell] phone belonging to the defendant. If you recall, it had the [defendant's] name . . . on it, Blackhead. He was able to retrieve a series of text messages from April 15, 2015. Now, if you recall, there is testimony that, in the early hours of April 15, [at] approximately 3 a.m., [the] New Haven Police Department executed a search warrant . . . [at] the defendant's residence. In the series of text messages that [was] presented, there's a text message that was received by the defendant's phone at 3:55 a.m. on April 15, 2015, that says, '[d]o not come here.' There was also testimony that,

later that day, the same day, April 15, 2015, the defendant and his mother went to the New Haven Police Department to talk to detectives about why they were at . . . his house. In the same string of text messages, there's a text message that . . . was not sent, although . . . Hatzikostas said there were numerous reasons why a text message may not be sent. Maybe [the cell phone] lost contact with the server, but there's a text message that was typed on the defendant's [cell] phone, '[i]f I get locked up tell sheema put them shits in the river some where [worda loc].'"[5]

The prosecutor also emphasized the significance of the unsent text message by tying the gun (the "shits") allegedly referenced in that message to the testimony of other witnesses, with the effect of providing a mutually reinforcing narrative. The prosecutor explained to the jury that Barker testified that "she also goes by the name Sheema. . . . She testified that, after [one] year of not going to visit . . . the defendant in jail, after she was served with a subpoena by . . . Jowett . . . she went to go visit him on January 27, 2018, a little [more than one] week ago. She testified that she knows those telephone calls while you're in a face-to-face visit are recorded. She also testified that, when they want to talk about things that they don't want recorded, they put the phone down and talk through the glass. She told you that she told the defendant that . . . Jowett had come to see her and that . . . Jowett ha[d] asked her about the text message, '[i]f I get locked up tell sheema . . . put them shits in the river' or to lie. The defendant at that point told her not to worry." The inference was both obvious and compelling: the suspi-

[5] Defense counsel also referred to the unsent text message in his closing argument, stating, "[t]his text message [about] the shits . . . could mean anything. They want you to think, oh, it was guns, right? That's what they want you to think. Who knows, right? It could be drugs. It could be stolen property. It could be anything. It doesn't have to be guns. You don't have to believe this because they say it. And [the unsent text message] never even gets sent."

cious and secretive communications between Barker and the defendant at the correctional center were further evidence that the unsent text message meant exactly what the prosecutor suggested it meant.

Similarly, the prosecutor reminded the jury that there was evidence from both Samuels and Hoover that the defendant had stashed the gun used in the commission of the crimes at Barker's residence. The prosecutor referenced Samuels' prior inconsistent statement to the police, which was admitted into evidence for substantive purposes under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), "that the defendant had a girlfriend by the name of Tysheema, that he had a baby's mother by the name of Imani, and that the guns were probably at either one of those locations." The prosecutor later referenced Hoover's testimony that "[t]he defendant told . . . Hoover that the guns were at [the defendant's] girlfriend's house [and] that, after the police raided his house, he moved them." On the basis of this testimony, the prosecutor simultaneously tied together disparate threads of evidence and bolstered the credibility of the jailhouse informants by implicitly but unmistakably suggesting to the jury that the "shits" mentioned in the defendant's unsent text message referred to the gun used in the commission of the crimes, consistent with the statement of Samuels and the testimony of Hoover.

The prosecutor continued to hammer home the significance of the tainted evidence during rebuttal argument to construct a compelling narrative of guilt. In one instance, the prosecutor argued that "April 15 is kind of an interesting time frame because . . . Vanderberg goes down April 14, he gives the information to [the] police, and then everything starts rolling. . . . The next day, the defendant [was] on the WTNH app . . . looking up the story. Pretty coincidental. And he's looking

up this story when he's got nothing to do with it? He's so concerned that he's reading details in the afternoon time on April 15 about this Forbes [Avenue] gas station and homicide. . . . He got a series of texts, right? . . . And what were those texts? . . . [H]e got the first one right around the time the police [were] actually tossing his house, from someone to [the defendant], '[d]o not come here.' Later that day, a text [message] that we know was never sent, but it was drafted on that phone, '[i]f I get locked up tell sheema put them shits in the river some where [worda loc].' Shits can mean anything, right? People are constantly throwing stuff in the river. Does that make sense, or does it make more sense that he keeps his gun at his girlfriend's house? He knows he's going to get locked up for this offense, and he's desperately trying to get the word out to get rid of those guns."

The prosecutor continued: "How about the conversation with Sheema? They're talking about the text message. She had met with . . . Jowett a couple [of] days earlier. Of course, she hasn't seen [the defendant] in over [one] year, but she decides to go and pay him a visit days before she gets on the stand. And he says, '[t]hat don't mean nothing. You never got it. That don't mean nothing.' He's not worried at all. What's he referring to? Is he referring to the guns? Is he referring to the text message? I don't know. It certainly shows knowledge of something though, doesn't it?"

The record, in short, establishes without question that the prosecutor's use of the tainted evidence was extensive, integral to the state's theory of guilt, and rhetorically effective.

III

HARMLESS ERROR ANALYSIS

Applying the proper standard of review, I cannot conclude on this record that the presumed constitutional

error is harmless beyond a reasonable doubt. The inculpatory nature of the tainted evidence strikes me as self-evident. The timing of the text messages and the defendant's searches for news articles was highly suspicious because they occurred on the same day and around the same time that his mother's residence was being searched for evidence of the murder and robbery with which the defendant eventually was charged. The jury heard that, at the time the search warrant was executed at his mother's residence, someone texted the defendant "[d]o not come here." Additionally, soon thereafter, the defendant searched the WTNH news app and Instagram for information regarding the very crimes at issue. Even more damning is the unsent text message: "If I get locked up tell sheema put them shits in the river some where worda loc." It is irrelevant to the analysis that this text message never was sent—the important point is that the message reflects the defendant's own acknowledgment that he might get "locked up," i.e., arrested, presumably for the crimes for which his mother's residence was searched and for which he was soon to be charged. The jury readily could have inferred, as the prosecutor plainly argued, that the unsent text message captures the defendant himself acknowledging that there is inculpatory evidence of his participation in those crimes, namely, the "shits" that the defendant tells his girlfriend to throw into the river.

This is strong evidence of guilt by any standard. The prosecutor knew that it was powerful and deployed it accordingly. The prosecutor invited the jury to infer that the word "shits" in the unsent text message referred to the gun used in the commission of the murder and robbery, which never was recovered. She implored the jurors to use their common sense and to find that there was no innocent explanation for the text: "Shits can mean anything, right? People are constantly throwing stuff in the river. Does that make sense, or does it make

more sense that he keeps his gun at his girlfriend's house? He knows he's going to get locked up for this offense, and he's desperately trying to get the word out to get rid of those guns." The prosecutor expressed even greater incredulity that there could be an innocent explanation for the defendant's Internet searches for news of the crimes: "The next day, the defendant [was] on the WTNH app . . . looking up the story. Pretty coincidental. And he's looking up this story when he's got nothing to do with it? He's so concerned that he's reading details in the afternoon time on April 15, about this Forbes [Avenue] gas station and homicide." The prosecutor also suggested to the jury that an innocent man, one unconnected to the crimes with which the defendant was charged, would not be instructed "[d]o not come here" during the execution of a search warrant. These are good arguments, and I cannot imagine being confident that they had no tendency to persuade the jury to reach a guilty verdict.

The other evidence extracted from the defendant's cell phone led directly to additional inculpatory evidence, which the prosecutor used to strengthen the case against the defendant. The jury heard that the unsent text message led the state to Barker, who, after being confronted with the text message, visited the defendant for the first time in approximately one year. According to Barker, the defendant was unconcerned about the unsent text message, purportedly saying to Barker: "Yeah, fuck that shit. That don't mean anything . . . . You never got it. That don't mean anything." Through questioning and argument, the prosecutor used the inculpatory nature of the text message to suggest to the jury that Barker and the defendant continued their cover-up when the defendant and Barker intentionally communicated nonverbally so that their conversation would not be overheard by the Department of Correction: "How about the conversation with Sheema?

They're talking about the text message. She had met with . . . Jowett a couple [of] days earlier. Of course, she hasn't seen [the defendant] in over [one] year, but she decides to go and pay him a visit days before she gets on the stand. And he says, '[t]hat don't mean nothing. You never got it. That don't mean nothing.' He's not worried at all. What's he referring to? Is he referring to the guns? Is he referring to the text message? I don't know. It certainly shows knowledge of something though, doesn't it?"

The prosecutor appealed to the jurors to use their common sense and experience to find that the defendant's text messages, searches for news articles, and conversation with Barker reflected the defendant's guilt and an attempt to cover up his commission of the crimes. This would have been entirely appropriate advocacy if the evidence had been admissible. See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 347, 260 A.3d 1152 (2021) (prosecutor is permitted to "appeal to [the jurors'] common sense in closing remarks" (internal quotation marks omitted)). But we are presuming in the present appeal that the evidence was improperly admitted in violation of the defendant's constitutional rights, as guaranteed by *Miranda* v. *Arizona*, supra, 384 U.S. 478–79, and *Edwards* v. *Arizona*, supra, 451 U.S. 483–85. The prosecutor's pointed and repeated reliance on the tainted evidence during closing and rebuttal arguments undermines the majority's conclusion that the admission of this evidence was harmless beyond a reasonable doubt.

We previously have observed that a prosecutor's "frequent and repeated emphasis on [inadmissible evidence] during [his or her] closing and rebuttal arguments indicates that [its] admission was not harmless." *State* v. *Culbreath*, 340 Conn. 167, 195, 263 A.3d 350 (2021); see also *State* v. *Ayala*, 333 Conn. 225, 235, 215 A.3d 116 (2019) ("in evaluating harm [we] look to see how the

state used [the inadmissible] evidence in its closing argument"); *State* v. *Sawyer*, 279 Conn. 331, 360–61, 904 A.2d 101 (2006) (finding harm because, among other reasons, state repeatedly emphasized improperly admitted evidence during its closing argument), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008). Although we have not explicitly articulated our rationale for this principle, the logic is unmistakable. The prosecutor's own selection of evidence to use during closing and rebuttal arguments at trial, chosen specifically for the purpose of persuading the jury of the defendant's guilt, is among the very best indicators of what evidence would have had a tendency to impact the jury's assessment of guilt. Why, after all, would the prosecutor repeatedly emphasize the contents of the defendant's cell phone to persuade the jury of his guilt if that evidence was trivial, inconsequential, equivocal, or immaterial? If we are attempting to reconstruct what evidence reasonably was relied on by *this* jury to arrive at its verdict, and if our inquiry must strive (as much as possible) to avoid the risk of retrospective appellate hypothesizing, I would think that the state would have great difficulty meeting its burden of demonstrating harmlessness on appeal when, as here, the particular evidence that it now seeks to characterize as having had no tendency to persuade the jury was, in fact, evidence handpicked by the prosecutor precisely for its persuasive force at trial and explicitly and repeatedly relied on by the prosecutor to convince the jury of the defendant's guilt.

The majority's failure to adequately consider the effect that the prosecutor's heavy reliance on the improperly admitted evidence likely had on the jury marks a departure from our usual harmless error analysis. Rather than examine what the prosecutor said and the likely impact it had on the jury, the majority focuses on the number of impermissible arguments in comparison to

the permissible arguments, concluding that, "[v]iewed in context . . . the prosecutor's focus on the unsent text message was minimal relative to the other evidence admitted at trial."

This analysis is flawed for two reasons. First, even if I were to accept the suggestion that the harmlessness analysis focuses on the relative quantity of references to the tainted evidence vis-à-vis the untainted evidence, and even if numerous references to the tainted evidence throughout the prosecutor's arguments could be considered insubstantial—both flatly erroneous propositions in my view—the tainted evidence in this case was far more extensive than just the unsent text message. It also included all of the other evidence found on the defendant's cell phone and the fruits of the constitutional violation, such as the defendant's searches for news articles regarding the crimes of conviction, the text message sent to him when his mother's residence was being searched ("[d]o not come here"), and Barker's testimony about her off-the-record conversation with the defendant regarding the unsent text message at the correctional center. The prosecutor relied on all of this evidence, at length, during her closing and rebuttal arguments. Indeed, it is fair to say that the tainted evidence pervaded the prosecutor's closing and rebuttal arguments.

Second, regardless of the number of references, when examining the likely effect that inadmissible evidence had on the jury, our review must be qualitative, not quantitative. See, e.g., *State* v. *Van Kirk*, 306 Mont. 215, 224, 32 P.3d 735 (2001) (when conducting harmless error review, appellate courts cannot "simply tally the *quantity* of the admissible evidence of guilt, [but] instead [must] evaluat[e] the *qualitative* impact the inadmissible evidence might have had on the finder of fact" (emphasis in original)). That is to say, we must examine the quality and nature of the improperly admitted evi-

dence in relation to the other evidence adduced at trial and carefully assess the manner in which the prosecutor highlighted that evidence to the jury and encouraged the jury to rely on it to find the defendant guilty. In my view, the inculpatory nature of the inadmissible evidence combined with the prosecutor's pointed and repeated references to that evidence during closing and rebuttal arguments demonstrate why the state cannot meet its burden of proving harmlessness beyond a reasonable doubt.[6]

Even in the strongest of cases, it would be difficult to conclude that such damaging evidence had no possible tendency to affect the jury's verdict. And this is not the strongest of cases. There was no physical evidence connecting the defendant to the crimes. For example, there were no impartial eyewitnesses who identified the defendant as a participant, there was no forensic or DNA evidence placing the defendant at the scene of the crimes, and there was no ballistic evidence connect-

[6] I agree with the majority that a prosecutor's reliance on illegally obtained evidence in closing argument is not dispositive, but I find the cases cited by the majority to be distinguishable because, in those cases, the tainted evidence paled in comparison to the strength and quality of the properly admitted evidence, such that we could say beyond a reasonable doubt that the result of the trial would have been the same despite the admission of the tainted evidence and the prosecutor's reliance on it. See, e.g., *State* v. *Tony M.*, 332 Conn. 810, 823–25, 213 A.3d 1128 (2019) (improper admission of defendant's statement that he tossed infant son off bridge in manner similar to " 'free throw' " was harmless beyond reasonable doubt as to defendant's intent in light of defendant's numerous text messages detailing his intent and testimony from multiple witnesses); *State* v. *Jordan*, 314 Conn. 89, 104, 101 A.3d 179 (2014) (improper admission of evidence of drugs found in closet was harmless beyond reasonable doubt as to issue of intent to sell because number of pills found on defendant's person, combined with fact that these pills "contained identical markings to pills [the defendant] previously had sold, [was] consistent with a drug dealer soliciting repeat business"). Importantly, in the cases relied on by the majority, the remaining evidence of guilt did not derive predominantly from "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals [that] are 'dirty business' [and] may raise serious questions of credibility." *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952).

ing the defendant to the gun used in the commission of the crimes.

The admissible evidence of the defendant's guilt was derived predominantly from the testimony of convicted felons (Vanderberg, Hoover, and Samuels), jailhouse informants (Hoover and Samuels), and the defendant's accomplice (Vanderberg). Although each of these witnesses implicated the defendant in the charged crimes, they suffered from serious credibility problems and had a powerful incentive, fueled by self-interest, to falsely implicate the defendant in the crimes charged. See, e.g., *State* v. *Jones*, 337 Conn. 486, 496, 254 A.3d 239 (2020) (Jailhouse informants have "a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant . . . is inevitably suspect." (Internal quotation marks omitted.)); *State* v. *Patterson*, 276 Conn. 452, 469, 886 A.2d 777 (2005) ("[a]s the United States Supreme Court observed . . . '[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility' "), quoting *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). The testimony of jailhouse informants and accomplices regarding a defendant's allegedly inculpatory admissions is inherently suspect, particularly damaging, and has a significant influence on conviction rates. See *State* v. *Jones*, supra, 502 ("false confession evidence from informants is *the* leading factor associated with wrongful convictions in capital cases and a major factor contributing to wrongful convictions in noncapital cases" (emphasis in original; internal quotation marks omitted); J. Neuschatz et al., "The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making," 32 Law & Hum. Behav. 137, 146 (2008) ("the presence of a secondary confession provided by a cooperating witness ha[s] a strong influence on conviction

rates when compared with the absence of such testimony"). For this reason, the jury in the present case was instructed to "look with particular care at the testimony of" these witnesses and to "scrutinize it very carefully before . . . accept[ing] it."

The credibility of these witnesses plainly was important to the state's case, and any evidence that tended to bolster their credibility likely would have affected the jury's verdict. See *State* v. *Fernando V.*, 331 Conn. 201, 223–24, 202 A.3d 350 (2019) ("[when] credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a [witness'] credibility is not harmless error" (internal quotation marks omitted)). The tainted evidence did just that—it corroborated the testimony of Vanderberg and Hoover that the defendant was involved in the commission of the crimes charged and tended to support their testimony that he hid the murder weapon at the home of his girlfriend. Given "[t]he commonsense inference that corroborated statements tend to be true," the inadmissible evidence necessarily enhanced the credibility of these crucial witnesses. *State* v. *Fauci*, 282 Conn. 23, 40, 917 A.2d 978 (2007).

Further compounding the harm to the defendant is the fact that the accuracy and believability of the evidence from the defendant's cell phone—particularly the unsent text message, "[i]f I get locked up tell sheema put them shits in the river some where worda loc"—could not seriously be doubted once heard by the jury. The jury could not easily discount this evidence as self-serving, mistaken, or unreliable because, after all, it came from the defendant himself. See *Zappulla* v. *New York*, 391 F.3d 462, 473 (2d Cir. 2004) (inculpatory admissions from defendant are "the most probative and damaging evidence that can be admitted against him" because they "come from the actor himself, the most knowledgeable and unimpeachable source of informa-

tion about his past conduct" (internal quotation marks omitted)), cert. denied, 546 U.S. 957, 126 S. Ct. 472, 163 L. Ed. 2d 358 (2005). Together, the tainted evidence and the testimony of Vanderberg, Hoover, and Samuels had a synergistic effect, which reinforced the state's theory of guilt and likely affected the outcome of the jury's verdict.

The majority acknowledges "that the testimony of Vanderberg and Hoover is properly viewed with some skepticism, given their obvious self-interest in testifying for the state as an accomplice and a jailhouse informant, respectively," but finds this evidence to be compelling in large part because the testimony of each was corroborated by the testimony of the other and the prior inconsistent statement of Samuels, another jailhouse informant. I cannot agree with the majority that the suspect testimony of a jailhouse informant "grow[s] in strength considerably" simply because it is repeated by another jailhouse informant or accomplice. In determining whether independent corroboration exists in the context of harmless error review, we must exercise care that we do not abandon our well justified skepticism about the untrustworthy nature of testimony provided by accomplices and jailhouse informants. The untrustworthy nature of this testimony exists because these witnesses have a powerful incentive, animated by self-interest, to falsely implicate the defendant in the crimes charged. I fail to understand how this powerful incentive is eliminated or even reduced by the fact that multiple witnesses all share the same motivation. Indeed, some states will not even permit the testimony of accomplices or jailhouse informants to come into evidence without corroboration by a source other than another accomplice or jailhouse informant. See, e.g., *State* v. *Harris*, 405 N.W.2d 224, 227 (Minn. 1987) ("[a]ccomplice testimony, it is clear, may not be corroborated solely by the testimony of another accomplice"); *People* v. *Ohlstein*,

54 App. Div. 2d 109, 112, 387 N.Y.S. 2d 860 (1976) ("[t]estimony of each of several accomplices is not corroborative of the other"), aff'd, 44 N.Y.2d 896, 379 N.E.2d 222, 407 N.Y.S.2d 696 (1978); *Chapman* v. *State*, 470 S.W.2d 656, 660 (Tex. Crim. App. 1971) ("it is a fundamental principle that the testimony of one accomplice witness cannot corroborate another accomplice witness' testimony"); see also *Schnidt* v. *State*, 357 S.W.3d 845, 851 (Tex. App. 2012, pet. ref'd) (standard for corroboration of accomplice and jailhouse informant testimony is same, and one cannot corroborate the testimony of other).[7]

We need not go so far in the present case, which does not involve the admissibility or sufficiency of evidence but, rather, the different question of whether the evidence demonstrates the harmlessness of the presumed constitutional error beyond a reasonable doubt. The inherently dubious testimony of accomplices or jailhouse informants and accomplices simply cannot supply what the majority characterizes as "overwhelming" evidence of guilt; nor is it sufficiently strong to remove the taint of the improper admission of the defendant's cell phone and its contents. To the extent that the jury found the testimony of Vanderberg, Hoover, and Samuels credible, I consider it most likely that they were persuaded to believe this testimony only because

[7] The majority contends that my reliance on *State* v. *Harris*, supra, 405 N.W.2d 227, *People* v. *Ohlstein*, supra, 54 App. Div. 2d 112, *Chapman* v. *State*, supra, 470 S.W.2d 660, and *Schnidt* v. *State*, supra, 357 S.W.3d 851, is misplaced because Connecticut has not adopted a corroboration rule for the testimony of accomplices and jailhouse informants. See footnote 10 of the majority opinion. The majority misapprehends my point. I do not intend to suggest that independent corroboration of accomplice and jailhouse testimony is necessary to adduce sufficient evidence of a criminal defendant's guilt. As I previously explained, sufficiency of the evidence review is distinct from harmless error review, and the two types of appellate review should not be conflated. My argument, which the majority does not refute, is that the testimony of accomplices and jailhouse informants is inherently suspect and, absent objectively verifiable substantiation, is inadequate in the present case to satisfy the state's burden of establishing that the presumed constitutional violation is harmless beyond a reasonable doubt.

it was corroborated by the highly inculpatory contents of the defendant's own cell phone, which the defendant could not explain away. This is the very definition of harmful error.

The cell site location data, which the majority characterizes as "the most powerful evidence corroborating the testimony of Hoover and Vanderberg," appears to be fruit of the poisonous tree because the warrant used to procure that data was based on information obtained as a direct and proximate result of the presumed constitutional violation. See footnote 4 of this opinion. Regardless, even if we were we to include the cell site location data in the harmless error analysis, it did not establish any of the essential elements of the crimes charged or that the defendant was in the actual location of the murder and robbery when those crimes occurred. At most, this evidence established that the defendant was in the general vicinity of the Forbes Avenue gas station approximately seventeen minutes beforehand. The defendant's location at 7:33 p.m., the approximate time of the murder and robbery, is unknown. Indeed, the cell site location data indicate that the defendant was moving in and around the city during the one and one-half hours between 7:00 and 8:30 p.m. At 7:15 p.m., he was in the Long Wharf area of New Haven, but, one minute later, at 7:16 p.m., he was across the Quinnipiac River in the area where the gas station on Forbes Avenue was located. More than one hour later, at 8:29 p.m., he was again across the Quinnipiac River in the area of New Haven where his mother's residence was located. His movements between 7:16 and 8:29 p.m. are unclear, but what is clear is that the cell site location data do not disclose the defendant's precise location at the time of the crimes charged. Moreover, given that the defendant's cell phone pinged on two different cell towers in two separate areas of New Haven within less than two minutes, it is reasonable to infer that the defendant

was moving around the city at the time and could have traveled a considerable distance in the seventeen minute time period between 7:16 and 7:33 p.m. It may be equally reasonable to infer that the defendant's movements remained static during this time period and that he was in the vicinity of Forbes Avenue when the crimes occurred, but, under any scenario, the defendant's presence in the general area of the crime is hardly powerful evidence of guilt because the imprecision of the cell site location data and the dense population of the city would at best make him one of countless potential suspects.

The testimony of the impartial eyewitness, Jonathan Gavilanes, who observed two men fleeing the scene of the crime, does nothing to remove the doubt surrounding the state's case. Gavilanes did not identify the defendant as one of the men and was unable to provide a detailed description of the perpetrators, aside from their clothing and height. As to their height, Gavilanes' testimony was equivocal. Gavilanes, who is six feet tall, described the perpetrators' height as "[a]bout five feet, seven inches [tall], almost my height."[8] On cross-examination, Gavilanes acknowledged that there is "a big difference between five foot, seven inches, and six feet," and reiterated that the perpetrators were about his own height—six feet. On redirect examination, Gavilanes testified that he was "guessing" that the perpetrators were about five feet, seven inches tall. Given the inconsistent nature of Gavilanes' testimony and the fact that the average height of all men is between five feet, seven inches, and six feet tall, his description adds no strength to the state's case.

I likewise see no significant force added to the state's case by the black ski mask and gloves found in the residence of the defendant's mother. There was DNA

[8] The defendant is five feet, seven inches tall.

evidence indicating that the defendant was a possible contributor—as were one out of every five other African Americans in the population. The majority candidly acknowledges the tenuous connection between the ski mask and gloves and the defendant, stating that "the DNA evidence standing alone is far from definitive . . . ." I agree with that assessment. The connection between the black ski mask and gloves and the crimes charged is even weaker. There was nothing distinctive about the black ski mask and gloves used in the murder and robbery—no unique markings, patterns, or colors—to distinguish those items from the type or color of ski masks and gloves commonly found in a typical Connecticut household. There is nothing unusual or inherently inculpatory in possessing a black ski mask and gloves. Given Connecticut's cold winters, countless residents of this state have these items in their closets. Absent some evidence connecting the black ski mask and gloves found in the residence of the defendant's mother with the black ski mask and gloves used in the commission of the crimes, I cannot conclude that this evidence constitutes physical evidence connecting the defendant to the murder and robbery.

For the foregoing reasons, the properly admitted evidence was of a circumstantial nature and dubious or imprecise quality that does not come close to the kind of evidentiary showing that would remove or diminish the harmful effect that the improperly admitted evidence likely had on the jury's verdict in the present case. Accordingly, I cannot conclude, beyond a reasonable doubt, that the alleged constitutional violation was harmless. I am not any more eager than the majority to reach the constitutional issues analyzed by the Appellate Court, certified by this court, and briefed and argued by the parties on appeal, but I do not believe that we can dispose of this case on the ground of harmless error. The defendant has a constitutional right to have a duly constituted jury deter-

mine his guilt on the basis of lawfully obtained evidence. Absent waiver of this right, only a jury, not a panel of judges, can find the defendant guilty of the crimes charged beyond a reasonable doubt. As a result of this fundamental mandate, when an error of constitutional magnitude occurs at trial, the defendant is entitled to a new jury trial unless a reviewing court can say beyond a reasonable doubt that the error did not have a tendency to influence the jury's verdict. I cannot reach that conclusion on this record, and, accordingly, I respectfully dissent.

ORDERS

CONNECTICUT REPORTS

Vol. 348

JAMIE LOVE *v.* COMMISSIONER OF CORRECTION

The petitioner Jamie Love's petition for certification to appeal from the Appellate Court, 223 Conn. App. 658 (AC 45738), is denied.

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

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

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

Decided March 12, 2024

MARQZ ROBOTHAM *v.* COMMISSIONER OF CORRECTION

The petitioner Marqz Robotham's petition for certification to appeal from the Appellate Court, 223 Conn. App. 905 (AC 46087), is denied.

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

Nicole P. Britt, assigned counsel, in support of the petition.

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

Decided March 12, 2024

IN RE NIYA B.

The respondent mother's petition for certification to appeal from the Appellate Court, 223 Conn. App. 471 (AC 46488), is denied.

Matthew C. Eagan, assigned counsel, in support of the petition.

John E. Tucker, assistant attorney general, in opposition.

Decided March 12, 2024

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Tortious interference with expected inheritance; summary judgment; collateral estoppel; certification from Appellate Court; whether Appellate Court properly dismissed for lack of subject matter jurisdiction defendant's appeal from trial court's partial denial of his motion for summary judgment on ground that there was no appealable final judgment; whether trial court correctly concluded that

plaintiff was collaterally estopped from litigating issue of whether defendant had exerted undue influence over decedent when decedent created her will, when appeal of Probate Court decree admitting will to probate and rejecting undue influence claim was pending; whether pending probate appeal that was to be conducted as trial de novo suspended preclusive effect of otherwise final judgment for purposes of collateral estoppel doctrine.
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Trial court's jurisdiction to decide motion to open judgment dismissing criminal charges following defendant's purportedly successful completion of statutory (§ 54-56l) supervised diversionary program for persons with psychiatric disabilities; certification from Appellate Court; whether Appellate Court correctly concluded that trial court was divested of jurisdiction to decide motion to open when trial court had dismissed defendant's pending criminal charges pursuant to § 54-56l (i); whether statutory (§ 52-212a) "four month rule," which permits trial court to retain jurisdiction over civil judgment for four months after notice of judgment has been sent and to open judgment during that four month period, was applicable in criminal cases; State v. Wilson *(199 Conn. 417), to extent that*

it held that four month rule of § 52-212a applied to criminal judgments, overruled; whether civil rule permitting trial court to open judgment obtained by fraud applied in criminal context; whether record supported finding of fraud or intentional misrepresentation.
State *v.* Christopher R. (Order) 946
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Violation of probation; certification from Appellate Court; whether Appellate Court erred in failing to reverse trial court's judgment revoking defendant's probation on ground that evidence was insufficient to establish that defendant's failure to pay restitution was wilful; whether Appellate Court correctly concluded that trial court had not abused its discretion in imposing term of imprisonment for defendant's violation of probation rather than some lesser sanction; appeal dismissed on ground that certification was improvidently granted.
State *v.* Henderson 648
Home invasion; burglary first degree; burglary third degree as lesser included offense of burglary first degree; claim that home invasion conviction should be vacated or that new trial should be granted because jury's verdict of guilty of home invasion and verdict of not guilty of lesser included offense of third degree burglary was legally inconsistent; whether State v. Arroyo *(292 Conn. 558), should be overruled or modified insofar as it held that consistency in verdicts is immaterial and that legally inconsistent verdicts are not reviewable on appeal; claim that trial court committed plain error by accepting legally inconsistent verdicts; claim that trial court abused its discretion in denying defense counsel's motion for mistrial when jury deliberations were delayed for twenty-five days because defendant was exposed to and eventually contracted COVID-19.*
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Manslaughter first degree with firearm; criminal possession of firearm; illegal possession of weapon in motor vehicle; claim that trial court violated defendant's constitutional right to confrontation by allowing chief medical examiner to testify about photographs and report from autopsy that former employee of medical examiner's office had performed; whether chief medical examiner's testimony regarding autopsy report was harmless; claim that evidence was insufficient to support defendant's conviction of illegal possession of weapon in motor vehicle insofar as trial court, in finding that defendant could not have had proper permit for weapon for purposes of charge of illegal possession of weapon in motor vehicle, relied on parties' stipulation that defendant had prior felony conviction, when stipulation was admitted only for purposes of another charge and stipulation was only evidence that defendant had previously been convicted of felony.
State *v.* Russo (Order) 938
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Sexual assault first degree; risk of injury to child; unpreserved claim that defendant's constitutional right to due process was violated by admission of testimony about his prior sexual misconduct to prove propensity under relevant provision (§ 4-5 (b)) of Connecticut Code of Evidence insofar as state's notice of its intent to offer such evidence was inadequate and did not conform to evidence elicited at trial; claim that trial court had abused its discretion in admitting evidence of defendant's prior sexual misconduct on ground that uncharged sexual miscon-

duct, which occurred fourteen years before conduct giving rise to charged offense, was not proximate in time to charged offense and, therefore, was too remote in time to be relevant.

State *v.* Sayles 669

Felony murder; conspiracy to commit robbery first degree; motions to suppress; certification from Appellate Court; whether Appellate Court improperly upheld defendant's conviction; propriety of trial court's denial of defendant's motions to suppress contents of defendant's cell phone; claim that article first, § 8, of Connecticut constitution mandates protection of suspect's rights under Miranda *v.* Arizona *(384 U.S. 436) via adoption of rule that evidence obtained through questioning suspect after suspect has invoked right to counsel must be suppressed and cannot be used in state's case-in-chief at subsequent trial; whether any error in admission into evidence of contents of defendant's cell phone was harmless beyond reasonable doubt.*

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State *v.* Thomas S. (Order). 943

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Breach of contract; collective bargaining; pension benefits for municipal firefighters; interest arbitration award issued pursuant to statute (§ 7-473c) granting Meriden firefighters 2 percent retroactive wage increase; claim that defendant city and defendant municipal pension board had breached collective bargaining agreement between plaintiffs' union and city by failing to recalculate plaintiff retirees' pension benefits based on retroactive wage increase awarded in binding interest arbitration; unpreserved claim that trial court lacked subject matter jurisdiction on basis that plaintiffs had failed to exhaust their administrative remedies by requesting relief directly from pension board before filing present action; whether plain language of collective bargaining agreement, pension plan, and interest arbitration award required defendants to apply 2 percent wage increase only to active employees and not to former employees who voluntarily retired before issuance of arbitration award.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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IN RE JOSYAH L.-T.*
(AC 46679)

Bright, C. J., and Suarez and Harper, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that this court should recognize her right to be the child's legal guardian because she would be a better caregiver to him than the petitioner, the Commissioner of Children and Families. The trial court granted the termination petition, concluding by clear and convincing evidence that the Department of Children and Families had made reasonable efforts to reunify the respondent with the child but that the respondent was unable or unwilling to benefit from those efforts and had not achieved the degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, considering the child's age and needs, she could assume a responsible position in his life. *Held* that the judgment of the trial court terminating the respondent's parental rights was affirmed, as the respondent abandoned any possible claim related to the judgment by failing to identify in her brief to this court any claim of legal or factual error that the trial court made in its decision; accordingly, as the respondent's status as a self-represented party did not permit this court to overlook that omission, this court was unable to afford her any relief in connection with this appeal.

Argued February 28—officially released March 20, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

** March 20, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, and tried to the court, *Sanchez-Figueroa, J.*; judgment terminating the respondent father's parental rights and denying the petition as to the respondent mother; thereafter, the petitioner filed a petition to terminate the respondent mother's parental rights with respect to her minor child, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Burgdorff, J.*; judgment terminating the respondent mother's parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Celina T., self-represented, the appellant (respondent mother).

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent, Celina T., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, Josyah L.-T. (Josyah). The respondent, who is self-represented in this appeal, asserts that this court should recognize her right to be the legal guardian of Josyah because she would be a better caregiver to him than the petitioner, the Commissioner of Children and Families. Because the respondent has failed to identify any cognizable claim of error in relation to the court's decision terminating her parental rights as to Josyah, we affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Josyah was born in July, 2016. In its May 12, 2023 memorandum of decision terminating the respondent's parental rights

as to Josyah, the trial court, *Burgdorff, J.*, found the following: "[The Department of Children and Families' (department)] involvement with this family commenced in August, 2016. A neglect petition was filed on Josyah's behalf on October 7, 2016. The identified concerns at that time included [the respondent's] homelessness and transience, substance abuse issues, and [her] unaddressed mental [health] issues that impacted her ability to parent and care for . . . Josyah. Josyah was adjudicated neglected [on December 15, 2016] and removed from [the respondent's] care on November 13, 2017, due to a domestic dispute involving a physical and verbal altercation with Josyah's current foster mother in the foster mother's home where [the respondent] was also residing.[1] Josyah was present when the altercation occurred. [The respondent] was criminally charged, and a protective order was issued through March, 2018, with the foster mother as the protected person." (Footnote added.) On November 16, 2017, the petitioner filed an ex parte motion for an order of temporary custody. On November 22, 2017, the court, *Woods, J.*, sustained the order of temporary custody. On June 28, 2018, Josyah was committed to the care and custody of the petitioner, and the court issued specific steps to the respondent to facilitate her reunification with Josyah.

In its memorandum of decision, the court, *Burgdorff, J.*, further stated: "[The respondent] was discharged from . . . [a] housing [assistance] program in December, 2018, and has not demonstrated the ability to obtain and sustain consistent housing since that time. . . . [The respondent] has never been married and reported that she was not in a relationship with [the biological] father. She has had several romantic relationships with

[1] On November 13, 2017, when he was fifteen months old, Josyah was placed in a special study fictive kin medically complex foster home. He continues to reside in that home and has a close attachment with his foster mother.

the most recent being with Kelsey B., which involved intimate partner violence . . . concerns and resulted in two arrests with [the respondent] reported as the aggressor."

On January 15, 2019, the petitioner filed a termination of parental rights petition against both the respondent and the biological father. A trial was held on January 14 and 23, 2020. On June 3, 2020, the court, *Sanchez-Figueroa*, *J.*, issued a memorandum of decision granting the petition as to the biological father[2] and denying the petition as to the respondent. The court also ordered the petitioner to continue making efforts to reunite Josyah with the respondent and to increase visitation between them.

The petitioner made continued efforts without success and, on September 9, 2021, filed a subsequent petition seeking to terminate the respondent's parental rights as to Josyah. In its memorandum of decision granting the petition, the trial court, *Burgdorff*, *J.*, stated: "The petition allege[s] that the parental rights of [the respondent] should be terminated on the ground that Josyah has been found in a prior proceeding to have been neglected or uncared for, and [the respondent] has failed to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of Josyah, she could assume a responsible position in the life of Josyah." The court held a trial over the course of four nonconsecutive days between April 5 and 12, 2023. The court heard testimony from multiple witnesses, including the respondent and two expert witnesses. In addition, twenty-eight exhibits were offered by the petitioner and entered into evidence as full exhibits.

[2] Josyah's biological father did not appeal from the June 3, 2020 judgment terminating his parental rights. All references to the respondent in this opinion pertain only to Celina T.

In its memorandum of decision terminating the respondent's parental rights as to Josyah, the court found by clear and convincing evidence that "[the respondent] was born [in July, 1996] and is presently twenty-six years of age. . . . [The respondent] had an extensive history of abuse and neglect as a child and was in [the department's] care from 2009 to 2014. She was placed in residential, group home, and foster care settings. During her childhood, she presented with significant mental health and behavioral issues. She was diagnosed with post-traumatic stress disorder . . . attention deficit/hyperactivity disorder . . . oppositional defiant disorder, and bipolar disorder." (Footnote omitted.) The court also found by clear and convincing evidence that the department made reasonable efforts to reunify Josyah with the respondent, that the respondent was unable or unwilling to benefit from those reunification efforts, and that the respondent "has not achieved the requisite degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, considering Josyah's age and needs, [she] could assume a responsible position in [his] life . . . ." This appeal followed.

On appeal, the respondent asserts that this court should recognize her right to be the legal guardian of Josyah because she would be a better caregiver to him than the petitioner. The respondent's appellate brief does not identify any claim of legal or factual error that the court made in rendering judgment terminating her parental rights.

It is well established that, "[a]lthough self-represented parties are not excused from complying with relevant rules of procedural and substantive law, [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party.

. . . Thus, like the trial court, [this court] will endeavor to see that such a litigant shall have the opportunity to have [her] case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law . . . and [w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstraction, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *In re Olivia W.*, 223 Conn. App. 173, 182–83, 308 A.3d 571 (2024).

By failing to identify any cognizable claim of error in the trial court's decision, the respondent has abandoned any possible claim related to the judgment from which she has appealed. The respondent's status as a self-represented party does not permit us to overlook such omission. Because the respondent has abandoned any claim of error related to the judgment, we are unable to afford her any relief in connection with this appeal.

The judgment is affirmed.

ALBERTO RIOS *v.* COMMISSIONER OF CORRECTION
(AC 46164)

Alvord, Elgo and Prescott, Js.

Syllabus

The petitioner, who had been convicted of several crimes committed in 2013, sought a writ of habeas corpus, claiming that the retroactive

application to him of an amended administrative directive of the respondent, the Commissioner of Correction, violated the ex post facto clause of the federal constitution. The petitioner claimed that the amendment's change in the calculation of risk reduction credit he could earn toward completion of his sentence resulted in a longer period of incarceration for him and a postponement of his parole eligibility date to a time later than had originally been projected. Under the statutorily (§ 18-98e) created risk reduction earned credits program, the respondent had the sole discretion to award up to five days of risk reduction credit per month toward the completion of eligible inmates' sentences. Under the administrative directive in effect in 2013, the petitioner had been earning five days of risk reduction credit per month. In 2016, when the respondent amended the 2013 administrative directive to align the award of risk reduction credit with inmates' overall risk classification levels, the petitioner began earning risk reduction credit at a rate of three days per month due to his risk classification. The petitioner filed a motion for summary judgment, claiming, inter alia, that he had earned approximately 104 fewer risk reduction credits from the time that the 2016 administrative directive was applied to him until the time of the habeas proceedings than he would have earned under the 2013 administrative directive. The respondent filed a motion to dismiss the habeas petition, arguing that, pursuant to the applicable rule of practice (§ 23-29 (1)), the court lacked subject matter jurisdiction over the habeas petition and, alternatively, that, pursuant to Practice Book § 23-29 (2), the petitioner had failed to state a claim on which relief could be granted. The habeas court granted the petitioner's motion for summary judgment, reasoning that the 2016 administrative directive was a law within the meaning of the ex post facto clause and that its retroactive application to the petitioner violated the ex post facto clause because it created a sufficient risk of prolonging his incarceration. The court rendered judgment denying the respondent's motion to dismiss and granting the habeas petition, from which the respondent, on the granting of certification, appealed to this court. *Held* that the habeas court improperly granted the petitioner's motion for summary judgment and improperly denied the respondent's motion to dismiss the habeas petition, as the 2016 amended administrative directive did not constitute a law within the meaning of the ex post facto clause, and, thus, the petitioner failed to state a claim on which relief could be granted: whereas the constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them, the 2016 administrative directive was not a law but an internal Department of Correction policy that the respondent adopted in his sole discretion, pursuant to § 18-98e (f), to determine the amount of risk reduction credit that inmates may earn according to their overall security risk level, as the adoption of the 2016 administrative directive was an Executive Branch function that was part of the respondent's responsibility to oversee the internal

management of the correctional system; moreover, although the petitioner correctly asserted that administrative regulations may implicate the ex post facto clause, the respondent did not adopt the 2016 administrative directive in the exercise of authority delegated to him by the legislature to promulgate rules, which are subject to the notice and comment procedures under the Uniform Administrative Procedure Act (§ 4-166 et seq.), as the 2016 administrative directive was not a regulation subject to legislative approval but was merely a notice regarding how the respondent chose to exercise his unilateral statutory discretion concerning risk reduction credit; furthermore, the petitioner's failure to demonstrate that the 2016 administrative directive was a law within the meaning of the ex post facto clause meant that his claim was legally insufficient; accordingly, the habeas court improperly failed to grant the respondent's motion to dismiss on the ground that the habeas petition failed to state a claim on which relief could be granted pursuant to Practice Book § 23-29 (2).

Argued November 6, 2023—officially released March 26, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the court, *Bhatt, J.*, denied the respondent's motion to dismiss, and granted the petitioner's motion for summary judgment and rendered judgment thereon, from which the respondent, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Edward Rowley, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellant (respondent).

Judie Marshall, assigned counsel, for the appellee (petitioner).

Opinion

PRESCOTT, J. The present appeal concerns the determination of the habeas court that an amended administrative directive of the respondent, the Commissioner of Correction, as applied to the petitioner, Alberto Rios, violated the ex post facto clause of the United States constitution. The amended administrative directive at

issue, which the habeas court concluded constituted a law within the meaning of the ex post facto clause, changed the calculation of credits an inmate may earn under the risk reduction earned credits (RREC) program. That program was created by General Statutes § 18-98e,[1] and allows eligible inmates to earn a certain amount of credit per month toward completion of their sentences.

The respondent appeals from the summary judgment rendered by the habeas court granting the petition for a writ of habeas corpus filed by the petitioner. The respondent also appeals from the court's denial of his motion to dismiss, in which he asserted that the habeas court lacked jurisdiction over the petitioner's ex post facto claim and that the petitioner failed to state a claim upon which habeas corpus relief can be granted.

On appeal, the respondent first claims that the court improperly concluded that the amended administrative directive at issue was subject to ex post facto scrutiny because it constitutes a law within the meaning of that clause. The respondent also argues, in the alternative, that, even if the amended administrative directive were subject to scrutiny under the ex post facto clause because it constitutes a law within the meaning of that clause, the court nonetheless improperly concluded that the application of the amended administrative directive to the petitioner violated the ex post facto clause prohibition. We agree with the respondent's first argument and, accordingly, reverse the judgment of the habeas court.

At the outset, we note that "[t]he ex post facto prohibition forbids the Congress and the [s]tates to enact

[1] Although the legislature has amended § 18-98e since the administrative directive at issue took effect in 2016; see Public Acts 2018, No. 18-155, § 3; that amendment is not relevant to this appeal. We therefore refer in this opinion to the current revision of § 18-98e.

any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (Footnote omitted; internal quotation marks omitted.) *Weaver* v. *Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The following undisputed facts and procedural history are relevant to our resolution of the respondent's claims on appeal. The petitioner was convicted, in connection with conduct occurring on April 22, 2013, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), assault in the second degree in violation of General Statutes § 53a-60, and three counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63. On May 15, 2014, he was sentenced to twenty years of incarceration, suspended after fourteen years, followed by five years of probation.

Pursuant to the RREC program created by § 18-98e, the respondent has the discretion to award RREC to eligible inmates, which credits count toward a completion of their sentences of up to a maximum of five days per month for such things as good behavior, participation in eligible programs and activities, and obedience to institutional rules. The administrative directive of the Department of Correction (department) concerning the earning of RREC that was in effect at the time the petitioner committed the underlying offenses was administrative directive 4.2A (2013 administrative directive). Conn. Dept. of Correction, Administrative Directive 4.2A (effective March 22, 2013). That administrative directive provided that risk reduction credit is "[t]ime awarded at the discretion of the [respondent] or designee at the rate of five (5) days per month for participation in programs or activities, good conduct and obedience to departmental rules, unit and/or program rules in accordance with RREC guidelines as

determined by the [respondent] or designee." Administrative Directive 4.2A (3) (D) (effective March 22, 2013).

Pursuant to the 2013 administrative directive, once an incarcerated individual signs an offender accountability plan and adheres to the rules and regulations, RREC is calculated and awarded via the department's computer system at a rate of five days per month. The petitioner earned RREC at the rate of five days per month under the 2013 administrative directive.

On February 1, 2016, the 2013 administrative directive was amended. That amendment, which is reflected in administrative directive 4.2A (2016 administrative directive), provides that "[a]n inmate may earn RREC at the rate of three (3) days per month as an Overall Level 4 inmate, four (4) days per month as an Overall Level 2 or 3 inmate and five (5) days per month as an Overall Level 1 inmate or if the inmate is being supervised in the community on early release supervision throughout the sentenced portion of the inmate's incarceration." Conn. Dept. of Correction, Administrative Directive 4.2A (6) (effective February 1, 2016).

The petitioner had been earning five days of RREC under the 2013 administrative directive. Under the 2016 administrative directive, the petitioner began earning RREC at a rate of three days per month due to his risk classification as an overall level 4 inmate. On February 1, 2018, the petitioner's classification changed to an overall level 3 inmate, thereby allowing him to earn RREC at a rate of four days per month. The petitioner earned approximately forty-six fewer days of RREC than he would have received from March 1, 2016, to February 1, 2018, if the 2013 administrative directive had been applied to him during that time period. From February 1, 2018, until the time of the habeas proceedings, the petitioner earned approximately fifty-eight

fewer days of RREC pursuant to the 2016 administrative directive.

Accordingly, by virtue of the application of the 2016 administrative directive to the petitioner, he earned approximately 104 fewer days of RREC from the time the 2016 administrative directive was applied to him until the time of the habeas proceedings than he otherwise would have under the 2013 administrative directive. He will remain ineligible to earn five days of RREC per month, which he had been earning pursuant to the 2013 administrative directive, until and unless he reaches the classification of an overall level 1 inmate.

On December 21, 2020, the petitioner filed a petition for a writ of habeas corpus, alleging that "the retroactive application of this [2016] administrative [directive] violates the prohibition against ex post facto laws contained in the [United States] constitution because it dictates a longer period of incarceration and postpones his parole eligibility date to a date later than was originally projected."[2] The petitioner filed a motion for summary judgment on March 25, 2022, arguing that no genuine issue of material fact existed that the application to him of the 2016 administrative directive violated the ex post facto clause and that he was entitled to judgment as a matter of law.

In response, the respondent filed a motion to dismiss on April 29, 2022, pursuant to Practice Book § 23-29 (1) and (2), arguing that the undisputed facts do not support the petitioner's claim for relief and that, because those undisputed facts demonstrate that the 2016 administrative directive is not a law for purposes of the ex post facto clause, the petitioner failed to state a claim upon

[2] At the September 29, 2022 hearing on the motion for summary judgment and motion to dismiss, the petitioner withdrew the second claim in his petition, which challenged the calculation of his parole eligibility date by the Board of Pardons and Paroles.

which habeas relief can be granted. The respondent also argued that the habeas court lacked subject matter jurisdiction over the petition.

On December 20, 2022, the habeas court issued a memorandum of decision granting the petitioner's motion for summary judgment and denying the respondent's motion to dismiss. The court reasoned that the 2016 administrative directive is a law within the meaning of the ex post facto clause and that the application of the 2016 administrative directive to the petitioner violated the ex post facto clause because it was retroactively applied to the petitioner to create a sufficient risk of prolonging his incarceration. The court determined that no genuine issue of material fact existed and that the petitioner was entitled to judgment as a matter of law. It therefore granted the petitioner's motion for summary judgment and denied the respondent's motion to dismiss. The respondent subsequently filed a petition for certification to appeal, which the habeas court granted. This appeal followed.

Our review of the respondent's claims that the habeas court improperly granted the petitioner's motion for summary judgment and denied the respondent's motion to dismiss are subject to plenary review. "On review from the granting of a motion for summary judgment, our task is to determine whether the court correctly determined that the moving party was entitled, as a matter of law, to summary judgment on the basis of the absence of any genuine issues of material fact requiring a trial. Because this inquiry requires a legal determination, our review is plenary." *Lawrence* v. *Commissioner of Correction*, 125 Conn. App. 759, 762, 9 A.3d 772 (2010), cert. denied, 300 Conn. 936, 17 A.3d 474 (2011); see also Practice Book § 23-37.

Regarding the court's denial of the respondent's motion to dismiss, Practice Book § 23-29 provides in

relevant part that "[t]he judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; [or] (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ." "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *McMillion* v. *Commissioner of Correction*, 151 Conn. App. 861, 869–70, 97 A.3d 32 (2014).

We turn our attention to the ex post facto question at the center of the motion for summary judgment and the motion to dismiss. Specifically, the respondent argues, among other things, that the habeas court improperly concluded that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause. We agree.

The following legal principles are relevant to our resolution of the ex post facto claim raised by the respondent. The constitution of the United States provides in article one, § 10, that "[n]o State shall . . . pass any . . . ex post facto Law . . . ."[3] U.S. Const., art. I, § 10, cl. 1. The plain text of this clause clearly states that the prohibition, which is named using the Latin phrase for "after the fact," applies only to laws. "The ex post facto prohibition forbids the Congress and

[3] The constitution of the United States, article one, § 9, prohibits Congress from passing ex post facto laws. "So much importance did the [C]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 195 n.9, 842 A.2d 567 (2004), quoting *Weaver* v. *Graham*, supra, 450 U.S. 28 n.8.

the [s]tates to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. . . . Through this prohibition, the [f]ramers sought to assure that legislative [a]cts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Weaver* v. *Graham*, supra, 450 U.S. 28–29.

In The Federalist, No. 44, James Madison opined that "ex-post-facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist, No. 44, p. 351 (J. Hamilton ed. 1865). Alexander Hamilton reasoned in The Federalist, No. 84, that prohibitions on ex post facto laws were necessary by arguing that "[t]he creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." The Federalist, No. 84, supra, p. 629.

In the 1798 decision of *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the United States Supreme Court observed that "[t]he prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws . . . inflicting . . . punishment." Id., 389. The court described four categories of laws that violate the ex post facto clause: (1) "[e]very *law* that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) "[e]very *law* that aggravates a crime, or makes it greater than it was, when committed"; (3) "[e]very *law* that changes the punishment, and inflicts a greater punishment, than the

law annexed to the crime, when committed"; and (4) "[e]very *law* that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." (Emphasis added.) Id., 390.

"It is well established that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." (Internal quotation marks omitted.) *State* v. *Banks*, 321 Conn. 821, 845, 146 A.3d 1 (2016). "[I]n an ex post facto analysis, a court must first determine whether the challenged law is a penal statute . . . ." *Beasley* v. *Commissioner of Correction*, 50 Conn. App. 421, 431, 718 A.2d 487 (1998), aff'd, 249 Conn. 499, 733 A.2d 833 (1999); see also *Abed* v. *Commissioner of Correction*, 43 Conn. App. 176, 182, 682 A.2d 558 ("[w]e have long held that an act ex post facto relates to crimes only; it is emphatically the making of an innocent action criminal" (emphasis omitted; internal quotation marks omitted)), cert. denied, 239 Conn. 937, 684 A.2d 707 (1996).

In determining whether the court in the present case improperly concluded that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause, we next examine § 18-98e, the statute creating the RREC program and authorizing the respondent, in his sole discretion, to award RREC up to a maximum of five days per month, and the language of the administrative directive at issue. Section 18-98e (a) provides in relevant part that any person sentenced to a term of imprisonment for eligible crimes "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, *at the discretion of the Commissioner of Correction* . . . ."[4] (Emphasis added.) The

[4] General Statutes § 18-98e (b) provides that "[a]n inmate may earn risk reduction credit for adherence to the inmate's offender accountability plan,

petitioner does not challenge the application to him of § 18-98e but, rather, challenges the application to him of the 2016 administrative directive, which was issued unilaterally by the respondent pursuant to subsection (f) of § 18-98e. That subsection provides in relevant part that "[t]he commissioner shall adopt policies and procedures to determine the amount of credit an inmate may earn toward a reduction in his or her sentence and to phase in the awarding of retroactive credit . . . ." General Statutes § 18-98e (f). Notably, according to § 18-98e (f), the policies adopted by the respondent reflect the RREC that an "inmate *may* earn"; in other words, RREC is not guaranteed and is awarded at the discretion of the respondent.

The 2016 administrative directive, a copy of which was appended to the petitioner's motion for summary judgment, describes in paragraph 1 the general policy of the RREC program in stating that RREC "may be awarded or rescinded at any time prior to discharge at the discretion of the Commissioner or designee in the interest of public safety." Administrative Directive 4.2A (1) (effective February 1, 2016). Paragraph 4 of the 2016 administrative directive describes the general principles and guidelines underlying the 2016 amendment, stating, "[t]he basic principles of RREC is for the Department of Correction to provide an incentive to inmates and have the ability to earn credit based on an

for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner, provided (1) good conduct and obedience to institutional rules alone shall not entitle an inmate to such credit, and (2) the commissioner or the commissioner's designee may, in his or her discretion, cause the loss of all or any portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. If an inmate has not earned sufficient risk reduction credit at the time the commissioner or the commissioner's designee orders the loss of all or a portion of earned credit, such loss shall be deducted from any credit earned by such inmate in the future."

inmate's overall risk level. Inmates who choose to be in compliance and participate in available programs and activities, coupled with good conduct and obedience to departmental, unit and/or program rules shall earn RREC as noted in this directive. Programs shall be offered providing inmates with valuable tools to be better prepared for reintegration into the community. RREC could affect an inmate's discharge date if in compliance. However, refusal to participate in programs or failure to abide by Departmental, Unit and/or Program rules may result in the inmate not earning RREC, forfeiture of RREC and ineligibility to earn RREC. In addition, RREC may be rescinded and/or an inmate may be excluded from earning RREC at any time at the discretion of the Commissioner or designee." Administrative Directive 4.2A (4) (effective February 1, 2016).

Paragraph 6, which is titled "Credit Earned," details the number of days of RREC an inmate may earn per month based on the overall risk classification level of the inmate. Administrative Directive 4.2A (6) (effective February 1, 2016). The final paragraph, entitled "Exceptions," which provides that "[a]ny exceptions to the procedures in this Administrative Directive shall require the prior written approval of the [respondent]"; Administrative Directive 4.2A (18) (effective February 1, 2016); further demonstrates the amount of discretion that is given to the respondent. The 2016 administrative directive states that it was approved by the respondent who signed the directive.

Also appended to the petitioner's memorandum of law in support of his motion for summary judgment is a notice from the respondent, titled "RREC Notice to Offender Population." The notice states that "[e]ffective February 1, 2016 the earning of Risk Reduction Earned Credit (RREC) will be aligned with an [offender's] overall risk [classification] level. Connecticut General Statute[s] Section 18-98e states that the earning of RREC

will be based on an offender's adherence to their offender accountability plan, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the [respondent]. RREC shall be earned in the following manner as long as an offender complies with their offender accountability plan and follows all institutional policies and procedures . . . ." The notice then details the amount of maximum RREC that may be earned per month based on an inmate's overall risk level.

It is undisputed that the 2016 administrative directive is an internal policy within the department that was issued and adopted by the respondent in his sole discretion pursuant to § 18-98e (f) to determine the amount of RREC inmates may earn. The 2016 administrative directive is a discretionary internal policy that provides inmates with notice detailing the respondent's current position regarding the rate at which inmates "may earn RREC" according to the inmate's overall security risk level. It is not subject to approval by the legislature, has not been promulgated as a regulation pursuant to General Statutes § 4-168, and it does not grant by its terms any entitlement of inmates to RREC. Nothing in the 2016 administrative directive indicates that the respondent cannot deviate from it.

Our decisions in *Beasley* and *Abed* significantly bear upon the petitioner's ex post facto claim.[5] In *Beasley*

[5] In *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 196 A.3d 789 (2018), our Supreme Court agreed with the claim of the petitioner in that case that the retroactive application to him of a 2013 amendment to General Statutes (Rev. to 2013) § 54-125a violated the ex post facto clause. That amendment eliminated, by virtue of his status as a violent offender, the RREC awarded to him pursuant to § 18-98e from the calculation of his initial parole eligibility date, thereby requiring him to complete 85 percent of his definite sentence before becoming parole eligible. The court reasoned that " 'it is unconstitutional to apply a statute that alters, to the defendant's disadvantage, the terms under which eligibility for [parole] is calculated, if that statute was enacted after the date of the underlying offense' "; id., 473; and further stated that "it cannot reasonably be argued that the 2013 amendment to General Statutes (Rev. to 2013) § 54-125a (b) (2) does not

v. *Commissioner of Correction*, supra, 50 Conn. App. 421, this court analyzed a claim that an administrative directive promulgated by the respondent, which operated so as to restrict statutory good time eligibility for inmates classified in administrative segregation, violated the ex post facto clause of the United States constitution. This court rejected that claim. See id., 433.

The petitioners in *Beasley* conceded that the decision in *Abed* v. *Commissioner of Correction*, supra, 43 Conn. App. 176, controlled the resolution of the issue and, if applied, would require their argument to fail, but they

alter the calculation of when [the petitioner] is eligible for parole . . . . It clearly does so by eliminating risk reduction credit from that calculation. Indeed, the petitioner has consistently earned the maximum number of risk reduction credits that were available to him, and the respondent has provided no reason to believe either that the petitioner will be denied risk reduction credit in the future or that any credit that he earns or already has earned is likely to be revoked. In such circumstances, it strikes us as quite speculative to conclude that the petitioner's release date will not be adversely affected by retroactively applying the 2013 amendment to him." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 478.

Breton is not applicable to the present case. First, *Breton* involved a statute governing parole eligibility, which pursuant to "firmly established" precedent is "part of the law annexed to the crime for ex post facto clause purposes." (Internal quotation marks omitted.) Id., 472. The present case, however, involves an administrative directive that does not satisfy the preliminary hurdle of being subject to the ex post facto clause prohibition because it does not constitute a law within the meaning of that clause. Second, in *Breton*, the 2013 statutory amendment undisputedly was being applied retroactively to the petitioner, and our Supreme Court reasoned that such retroactive application presented a significant risk that the petitioner's parole eligibility date would be adversely affected. In the present case, however, the 2016 administrative directive does not revoke any RREC credits that the petitioner already had earned pursuant to the 2013 administrative directive and, as a result, the effect of the 2016 administrative directive on the ultimate length of the petitioner's sentence is less clear than the effect of the statutory amendment on the parole eligibility date of the petitioner in *Breton*. In any event, we do not address the issue of whether the application of the 2016 administrative directive to the petitioner in the present case created a significant risk of increasing the measure of punishment because the preliminary hurdle that the administrative directive constitutes a law within the meaning of the ex post facto clause has not been satisfied.

argued that *Abed* should be reversed. *Beasley* v. *Commissioner of Correction*, supra, 50 Conn. App. 427. This court concluded that *Abed* remained good law in Connecticut and rejected the petitioners' ex post facto claim. See id.

In so doing, this court reasoned that, "[i]n *Abed* v. *Commissioner of Correction*, supra, 43 Conn. App. 178 . . . the [respondent] had adopted a new directive that authorized a segregated classification for prison gang inmates who were considered a safety threat to other inmates and to prison staff. Once classified in this manner, the inmate became ineligible to earn statutory good time pursuant to the directive. . . . The petitioner in *Abed*, who had been incarcerated prior to the adoption of this directive, challenged the directive on ex post facto grounds. . . . Our Supreme Court has held that an act *ex post facto* relates to *crimes* only; it is, emphatically, the making of an innocent action criminal. . . . There is nothing in [the *Abed*] directive . . . that attempts to criminalize an otherwise lawful act. . . . The ex post facto clause does not prevent prison administrators from adopting and enforcing reasonable regulations that are consistent with prison administration, safety and efficiency." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 427–28.

In concluding that the habeas court properly determined that the directive did not violate the ex post facto clause of the United States constitution, the court in *Beasley* reasoned that, "as in *Abed*, the challenged directive was not a penal statute and cannot be said to be punitive in nature. The habeas court found, and we agree, that the purpose for the rule precluding inmates from being eligible to earn statutory good time while classified in administrative segregation was not to punish but to aid in controlling the inmate population. Pursuant to the commissioner's authority, such administrative rules are explicitly permitted." Id., 432.

Federal courts, and in particular the United States Court of Appeals for the Second Circuit, that have considered similar ex post facto claims also have made clear that administrative directives that are not subject to legislative approval are not classified as laws for purposes of the ex post facto clause. See *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 42, 231 A.3d 297 (in general, we look to federal courts for guidance in resolving issues of federal law), cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020). In *Connelly* v. *Lantz*, 366 Fed. Appx. 194 (2d Cir.), cert. denied, 562 U.S. 950, 131 S. Ct. 126, 178 L. Ed. 2d 247 (2010), the Second Circuit rejected an inmate's claim that the application to him of an administrative directive of the respondent concerning community release violated the ex post facto clause by succinctly reasoning both that he did not raise the issue in his complaint and that, "in any event, the ex post facto clause does not apply to the [d]epartment's guidelines or administrative directives." Id., 195.

Similarly, in *Barna* v. *Travis*, 239 F.3d 169 (2d Cir. 2001), in determining that there was no merit to a claim that a change in New York's parole procedures violated the ex post facto clause, the Second Circuit reasoned that the ex post facto clause "does not apply to guidelines that do not create mandatory rules for release but are promulgated simply to guide the parole board in the exercise of its discretion. . . . Such guidelines are not laws within the meaning of the ex post facto clause." (Citation omitted; internal quotation marks omitted.) Id., 171; see also *DiNapoli* v. *Northeast Regional Parole Commission*, 764 F.2d 143, 145–46 (2d Cir.) (federal parole guidelines, promulgated to assist parole commission in its exercise of discretion and under which commission remained free to recommend parole date above or below guidelines while retaining discretion to revise or modify guidelines at any time, did not constitute

laws within meaning of ex post facto clause), cert. denied, 474 U.S. 1020, 106 S. Ct. 568, 88 L. Ed. 2d 553 (1985); see also *Warren* v. *Baskerville*, 233 F.3d 204, 207 (4th Cir. 2000) ("change in an administrative policy that was in effect at the time of [the underlying] offenses does not run afoul of the prohibition against ex post facto laws"), cert. denied, 534 U.S. 831, 122 S. Ct. 76, 151 L. Ed. 2d 41 (2001); *Pindle* v. *Poteat*, 360 F. Supp. 2d 17, 20 (D.D.C. 2003) ("[m]ost courts of appeals addressing the question have held that [p]arole [c]ommission guidelines, which simply provide guides for the exercise of discretion, cannot be considered laws for [the] purpose of the [e]x [p]ost [f]acto [c]lause of the Constitution" (internal quotation marks omitted)).

The petitioner argues that "actions of administrative agencies are not exempt from ex post facto scrutiny." He cites *Ross* v. *Oregon*, 227 U.S. 150, 33 S. Ct. 220, 57 L. Ed. 458 (1913), for the principle that the ex post facto clause is a restraint upon legislative power and has with uniformity been regarded "as reaching every form in which the legislative power of a [s]tate is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the [s]tate exercising delegated legislative authority." Id., 162–63. The Supreme Court in *Ross* determined that article one, § 10, of the federal constitution[6] does not apply to judicial decisions because the ex post facto clause, "according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts"; id., 161; and that "the ruling here in question was by an instrumentality of the [s]tate, but as its purpose was, not to prescribe a new

[6] The constitution of the United States, article one, § 10, provides in relevant part: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

law for the future . . . it is quite plain that the ruling was a judicial act and not an exercise of legislative authority." Id., 163.

Ross does not bear the weight placed on it by the petitioner because it involved a challenge to a judicial decision rather than a legislative enactment. The court in *Ross* was not asked to decide, nor did it decide, whether an administrative directive that is not subject to legislative approval constitutes an ex post facto law. Additionally, the broad principle in *Ross* regarding the applicability of the ex post facto clause to various forms of delegated legislative authority does not alter our conclusion.

The description set forth by our Supreme Court in *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 950 A.2d 1220 (2008), of the separation of powers within our criminal justice system is helpful to consider. In *Washington*, our Supreme Court explained that, "[w]ith respect to our criminal justice system, we have recognized that there are duties and responsibilities that are dedicated to each of our three branches of government. We have acknowledged the legislature's authority to define crimes and the appropriate penalties for them. . . . We have recognized that the judicial branch is charged with the responsibility of adjudicating criminal charges and ultimately determining the sentence of incarceration, if any, to be imposed. . . . Finally, we have recognized the executive branch's responsibility of managing our correctional institutions, parole system and the administration of prisoners' sentences, including transfers among facilities and the application of sentence credits." (Citations omitted.) Id., 828. This description, coupled with the designation in § 18-98e (f) to the respondent of the discretionary authority to unilaterally adopt policies regarding RREC, which policies are not subject to approval by the legislature, demonstrate that the respondent's adoption of the

2016 administrative directive is an executive branch function taken as part of his responsibility to oversee the correctional system.

Neither the petitioner nor the habeas court cited any law on point, nor are we aware of any, establishing that the 2016 administrative directive has the force or effect of law because it involves an instrumentality of the state exercising delegated legislative authority. Rather, in support of his argument that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause, the petitioner cites cases wherein courts have held that certain rules made by agencies pursuant to the federal Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., and therefore subject to legislative approval, implicate the ex post facto clause.

For example, he cites the decision of the United States Court of Appeals for the Seventh Circuit in *Rodriguez* v. *United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979), which concerned whether the ex post facto clause was violated by the retroactive application to a federal prisoner sentenced under 18 U.S.C. § 4205 (b) (2) of an administrative regulation of the parole commission that denied him any meaningful consideration for parole. Id. In determining that the ex post facto clause was applicable to the administrative regulation at issue, the court reasoned: "The first part of this inquiry, whether the regulation involved here is equivalent to a statute for purposes of the [ex post facto] clause, need not detain us long. When Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the clause. What Congress cannot do directly, it cannot do by delegation. . . . The [Parole Commission and Reorganization] Act expressly authorizes the commission to adopt rules and regulations as are necessary to carry out a

national parole policy. 18 U.S.C. § 4203 (a) (1). Legislative rules adopted by the commission pursuant to statutory power have the force and effect of law." (Citations omitted; internal quotation marks omitted.) *Rodriguez* v. *United States Parole Commission*, supra, 173.

That regulations adopted by an agency pursuant to the rule-making authority delegated to it by Congress may constitute a law for purposes of the ex post facto clause is not dispositive in the present case, as the 2016 administrative directive is not a regulation subject to the requirements of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., which requires legislative approval before having the force and effect of law.[7] Rather, the 2016 administrative directive was created for the internal management of correctional institutions and to provide inmates with notice as to the respondent's current policy on how he chooses to exercise his statutory discretion to award RREC of up to five days per month.

Although the 2016 administrative directive is not an administrative regulation subject to legislative approval, the petitioner cites multiple cases involving the applicability of the ex post facto clause to such administrative regulations. For example, he argues that "[i]t does not matter that it was an administrative directive, rather than a statutory amendment, because case law establishes that administrative rules are not exempt from [the] ex post facto clause protections." He contends that *Garner* v. *Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000), "makes explicitly clear that administrative directives can be subject to ex post facto protections." A careful reading of *Garner* undermines the petitioner's reliance on it.

[7] In *Pierce* v. *Lantz*, 113 Conn. App. 98, 965 A.2d 576, cert. denied, 293 Conn. 915, 979 A.2d 490 (2009), this court observed that "[a]dministrative directives are created for the internal management of the correctional institutions and are not regulations that are subject to the UAPA requirements." Id., 104–105.

The inmate in *Garner*, following his escape from prison while serving a life sentence for murder, committed another murder and thereafter was sentenced to a second life term. Id., 247. He challenged on ex post facto grounds the retroactive application to him of an amendment to rule 475-3-.05 (2), which had been adopted by Georgia's State Board of Pardons and Paroles in the exercise of its statutorily delegated authority to determine the interval at which inmates serving life sentences would be reconsidered for parole and which lengthened the time interval between proceedings to reconsider an inmate's eligibility for parole after an initial consideration had taken place following an inmate's having served seven years of incarceration. Id., 246–49. The United States Supreme Court reversed the judgment of the United States Court of Appeals for the Eleventh Circuit, which held that the retroactive application of the change in the law was necessarily an ex post facto violation, and remanded the case for consideration of the relevant question of "whether the amended Georgia [r]ule creates a significant risk of prolonging [the inmate's] incarceration." Id., 251.

Importantly, *Garner* does not state whether the rule at issue in that case was subject to approval by the Georgia legislature. As the habeas court in the present case recognized in its decision, *Garner* contains "no mention, let alone any discussion, of whether the ex post facto clause is *inapplicable* to administrative regulations." (Emphasis in original.) We note that *Garner*'s holding that, under certain circumstances, rules adopted by a state's Board of Pardons and Paroles can implicate the ex post facto clause, does not inform our analysis of whether, in the present case, the unilaterally adopted, discretionary administrative directive of the respondent implicates the ex post facto clause.

We also are not persuaded by the habeas court's reliance on *Secretary, Dept. of Public Safety & Correctional Services* v. *Demby*, 390 Md. 580, 890 A.2d 310

(2006), to support its conclusion that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause. *Demby* concerned a challenge on ex post facto grounds by several inmates who previously had been eligible for special project credits for "double celling," or, in other words, sharing a cell with another prisoner, but were later precluded from obtaining such credits pursuant to an amendment to a regulation. Id., 584–90. In concluding that the ex post facto clause was applicable to the amendment, the court in *Demby* noted that "[t]he amendment in question here is clearly a regulation pursuant to the definition of regulation in the [Maryland] Administrative Procedure Act"; id., 606; and reasoned that, because the regulation was not merely interpretive in nature but, rather, was substantive, it had "the force of law," which "is evident in the fact that the adoption of the amendments immediately prohibits various categories of inmates from receiving special housing credits for double celling." (Internal quotation marks omitted.) Id., 608.

Demby, however, is inapposite because it concerns a regulation adopted pursuant to Maryland's Administrative Procedure Act, and, as noted in *Demby*, "under the Maryland APA, an agency's organizational rules, procedural rules, interpretive rules and statements of policy all must go through the same procedures as required for legislative rules." (Emphasis omitted; internal quotation marks omitted.) Id., 607 n.13. The administrative directive challenged in the present appeal is not subject to such approval procedures.

The petitioner also contends that "[w]hether an agency regulation can be deemed legislative in nature depends on whether the regulation imposes a substantive rule, rather than merely providing interpretive guidance." He cites the decision of the United States Court of Appeals for the Tenth Circuit in *Smith* v. *Scott*, 223 F.3d 1191 (10th Cir. 2000), for the principle that "an

agency regulation which is legislative in nature is encompassed by [the ex post facto clause] because a legislative body cannot escape the [c]onstitutional constraints on its power by delegating its lawmaking function to an agency." (Internal quotation marks omitted.) Id., 1193–94. The petitioner further contends, citing *Prater* v. *United States Parole Commission*, 802 F.2d 948 (7th Cir. 1986), that the constitutional prohibition against ex post facto laws "applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority . . . ." Id., 953–54.

The petitioner's argument is consistent with the reasoning of the habeas court wherein it determined, citing *United States* v. *Ellen*, 961 F.2d 462 (4th Cir.), cert. denied, 506 U.S. 875, 113 S. Ct. 217, 121 L. Ed. 2d 155 (1992), that the answer to the question of "under what circumstances is an administrative directive subject to the ex post facto clause" is dependent "on whether it is a substantive or legislative rule as opposed to an interpretive guide." In *Ellen*, the United States Court of Appeals for the Fourth Circuit noted that, "[w]hen Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the [ex post facto clause]. . . . The reason for applying the [c]lause to such legislative rules is straightforward: Congress should not be allowed to do indirectly what it is forbidden to do directly. . . . But when an agency promulgates an interpretive rule, the [e]x [p]ost [f]acto [c]lause is inapplicable. [I]nterpretive rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties. . . . Unlike legislative rules, which ha[ve] the force of law . . . interpretive rules are statements of enforcement policy. They are . . . merely guides, and not laws: guides may be discarded

where circumstances require; laws may not." (Citations omitted; internal quotation marks omitted.) Id., 465.

In concluding that the manual at issue was not a law within the meaning of the ex post facto clause, the Fourth Circuit reasoned that it did not "purport to [create new] law or [impose new] rights or duties . . . and it was not promulgated through the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., through which all legislative rules must pass." (Citation omitted; internal quotation marks omitted.) Id., 466. Employing similar reasoning, the Seventh Circuit in *Prater* explained that "[t]he rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws. . . . The legislature should not be allowed to do indirectly what it is forbidden to do directly. Thus if Congress authorizes an agency to make rules governing procedure before the agency . . . and the agency does so, the rules are as if made by Congress; Congress could have made them, if it had had time. But if the Justice Department issues guidelines for the enforcement of a federal statute that it administers . . . this is the performance of an interpretive function that every law enforcement agency has; it is not the enactment of a law. . . . If the law is unchanged and no legislative regulations are promulgated, a mere change in enforcement methods, priorities, or policies, written or unwritten—a change within the scope of the executive branch's discretion in enforcing the laws passed by Congress—does not activate the prohibition against ex post facto laws." (Citations omitted.) *Prater* v. *United States Parole Commission*, supra, 802 F.2d 953–54.

The Seventh Circuit in *Prater* reasoned that the guidelines at issue in that case "are interpretive rather than legislative. They are not the exercise of delegated authority (e.g., to make rules of procedure); they are statements of enforcement policy. They are . . . merely guides, and not laws: guides may be discarded where circumstances require; laws may not." (Internal quotation marks omitted.) Id., 954.

The decision in *Prater*, which we are not obligated to follow, is inconsistent with precedent in other circuit courts of appeals including that of the Second Circuit. Even if we assume, arguendo, that the rubric underlying *Ellen* and *Prater* is applicable in the present case, the result would not change. The 2016 administrative directive was not adopted by the respondent in the exercise of authority delegated to him by the legislature to promulgate rules subject to the notice and comment procedures under the UAPA. It is not a regulation subject to legislative approval; rather, it is merely a notice regarding how the respondent chooses to exercise his unilateral discretion to award RREC, if at all.

For the foregoing reasons, we determine that the court improperly determined that the 2016 administrative directive fell within the ambit of the ex post facto clause. On the basis of this legal determination, we conclude that the petitioner was not entitled to judgment as a matter of law, and, thus, the court improperly granted the motion for summary judgment.

We now turn to the respondent's claim that the court improperly denied the motion to dismiss. The respondent sought dismissal of the habeas petition on two grounds: that the habeas court lacked subject matter jurisdiction over the petition; see Practice Book § 23-29 (1); and that the petitioner failed to state a claim upon which habeas relief could be granted. See Practice Book § 23-29 (2). In denying the motion to dismiss, the

court stated that "[t]his court has jurisdiction . . . ." The court, however, in denying the motion to dismiss, also implicitly rejected the alternative ground on which the respondent sought dismissal: the failure of the petition to state a claim upon which habeas corpus relief could be granted.

We agree with the respondent that the court improperly denied the motion to dismiss. The question arises, however, as to whether the court properly should have granted the motion to dismiss on the basis of subsection (1) or (2) of Practice Book § 23-29. In adjudicating this issue, we recognize that we have not always spoken consistently concerning the subtle distinctions between a habeas court's lack of subject matter jurisdiction and the failure of a habeas petition to state a claim upon which relief can be granted.

As explained by our Supreme Court in *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 239 A.3d 272 (2020), "[s]ubject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Internal quotation marks omitted.) Id., 463.

Although it is true that we have referred to a habeas court as having a "limited" jurisdiction, the principles articulated in *Wolfork* should apply with equal force in habeas proceedings. "With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas

action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Citations omitted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

"[T]he presence or absence of an affirmative, enforceable right is not relevant [however] . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished has occurred. Critical to relief under the [e]x [p]ost [f]acto [c]lause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. . . . [T]he primary focus of an ex post facto claim is the probability of increased punishment. To establish a cognizable claim under the ex post facto clause, therefore, a habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Citations omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 375, 163 A.3d 597 (2017).

Our jurisprudence has, at times, conflated the concepts of a lack of subject matter jurisdiction and the failure to state a claim upon which relief can be granted. Our Supreme Court, however, held in *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012), that "the failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court." Id., 579. The court

in *In re Jose B.* reasoned that "[t]his conclusion is consistent with the rule that every presumption is to be indulged in favor of jurisdiction . . . is consistent with the judicial 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 . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . ." (Citations omitted; internal quotation marks omitted.) Id. That same presumption in favor of jurisdiction applies equally to habeas courts. See, e.g., *Stafford* v. *Commissioner of Correction*, 207 Conn. App. 85, 94, 261 A.3d 791 (2021) (it is well established that, in determining whether court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged).

In the present case, the petitioner alleges a violation of the ex post facto clause, arguing that the 2016 administrative directive creates a genuine risk that he will be incarcerated longer than he would have been under the 2013 administrative directive. His failure to demonstrate that the administrative directive is a "law" within the meaning of the ex post facto clause simply means that he has not stated a claim upon which relief can be granted. It does not alter the fact that habeas courts have subject matter jurisdiction to adjudicate ex post facto claims in which a petitioner asserts that punishment for the offense he committed has increased as a result of a subsequent change in the law.

Because the ex post facto clause applies only to laws and the 2016 administrative directive is not a law within the meaning of the clause, the petitioner's claim is legally insufficient. Accordingly, the habeas court improperly failed to grant the motion to dismiss on the ground that the petition failed, pursuant to Practice Book § 23-29 (2), to state a claim upon which habeas corpus relief could be granted.[8]

[8] Additionally, because we conclude that the 2016 administrative directive does not constitute a law within the meaning of the ex post facto clause,

The judgment is reversed and the case is remanded with direction to render judgment denying the petitioner's motion for summary judgment and granting the respondent's motion to dismiss for failure to state a claim upon which relief may be granted.

In this opinion the other judges concurred.

BLACK ROCK GARDENS, LLC *v.* HENRY BERRY (AC 46942)

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

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The defendant filed a special motion to dismiss pursuant to the anti-SLAPP statute (§ 52-196a), arguing that the plaintiff violated his first amendment rights, right of association, and right to petition the government by filing a fraudulent and frivolous summary process action to evict him. The trial court denied the motion, and the defendant appealed to this court. The plaintiff filed a motion to dismiss the defendant's appeal, claiming that the trial court's denial of the defendant's special motion to dismiss was not an appealable final judgment. *Held* that this court lacked subject matter jurisdiction over the defendant's appeal, and, accordingly, the appeal was dismissed: the defendant failed to assert a colorable claim that would entitle him to an immediate review of the trial court's denial of his special motion to dismiss pursuant to § 52-196a because none of the allegations in the plaintiff's complaint was based on the defendant's exercise of his right of free speech, to petition the government, or of association, as the complaint made clear that the summary process action was predicated solely on the defendant's alleged failure to pay rent owed to the plaintiff and the fact that the written lease agreement between the parties had lapsed and had not been renewed, and the complaint did not contain any allegations about things the defendant said or communicated or about other actions that would otherwise implicate the defendant's right of free speech, to petition the government, or of association, as those terms were understood under § 52-196a;

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we need not address the respondent's additional claims that that directive did not violate the ex post facto clause because it was not applied retroactively, and, furthermore, it did not create a sufficient risk of increasing the petitioner's measure of punishment. See, e.g., *State* v. *Banks*, supra, 321 Conn. 846 n.10.

moreover, the defendant's allegation that the summary process action was motivated by a complaint he had filed against the plaintiff with the state's Commission on Human Rights and Opportunities did not transform the action into a claim that was based on the defendant's exercise of his right of free speech, to petition the government, or of association, as required by § 52-196a.

Considered December 6, 2023—officially released March 26, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Bridgeport, Housing Session, where the court, *Cirello, J.*, denied the defendant's special motion to dismiss, and the defendant appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal. *Appeal dismissed.*

Matthew M. Hausman, in support of the motion.

Henry Berry, self-represented, in opposition to the motion.

Opinion

CLARK, J. The defendant, Henry Berry, appeals from the trial court's denial of a special motion to dismiss that he filed pursuant to Connecticut's anti-SLAPP statute, General Statutes § 52-196a,[1] in a summary process action brought against him by the plaintiff, Black Rock Gardens, LLC. Before this court is the plaintiff's motion to dismiss the defendant's appeal in which the plaintiff claims that the defendant has not appealed from a final judgment. Specifically, the plaintiff claims that the defendant has failed to assert a colorable claim to the protections afforded by the anti-SLAPP statute and, consequently, pursuant to *Smith* v. *Supple*, 346 Conn. 928, 952, 293 A.3d 851 (2023), this court lacks subject matter jurisdiction over the appeal. For the reasons

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

that follow, we agree with the plaintiff and dismiss the defendant's appeal.

We begin with the relevant facts and procedural history of this case. On July 28, 2023, the plaintiff commenced the underlying summary process action against the defendant. In its complaint, the plaintiff alleges that it is the owner of premises located at 293 Ellsworth Street, Apartment 8D, in Bridgeport and that the defendant failed to make full rental payments beginning in August, 2022, and thereafter. The plaintiff alleges that the defendant no longer has the right or privilege to occupy the premises and that the lease agreement between the parties has lapsed by its terms and has not been renewed. The complaint requests a judgment for immediate possession of the premises and forfeiture of the defendant's possessions and personal effects within the premises.

On August 1, 2023, the defendant filed his answer denying the allegations against him and checked off or wrote in a host of special defenses on Judicial Form JD-HM-5, titled "Summary Process (Eviction) Answer to Complaint,"[2] including, inter alia, that rent had been paid; that no rent is due under Connecticut law because of the plaintiff's "failure to do whatever is necessary to put and keep the premises in a fit and habitable condition"; that the eviction was being brought because the defendant had contacted his landlord and/or public officials to complain about his apartment; and that he should not be evicted because "[there was a] violation of contract and statute regarding entry into the apartment and [the plaintiff] has failed to remedy multiple violations; [there was a] violation of the covenant of quiet enjoyment; the plaintiff and [its] employees engage

[2] See Summary Process (Eviction) Answer to Complaint, Judicial Branch Form JD-HM-5, available at https://www.jud.ct.gov/webforms/forms/hm005.pdf (last visited March 14, 2024).

in or allow harassment and infliction of emotional distress; the plaintiff has submitted fraudulent and/or misrepresented documents in various legal actions of the defendant; the plaintiff's actions are retaliation; [and] the plaintiff has made false statements with respect to material facts, circumstances, and incidents."

On August 7, 2023, the defendant filed a motion to dismiss the summary process action for, inter alia, insufficiency of process and insufficiency of service of process. On August 21, 2023, the court, *Cirello, J.*, denied the defendant's motion on the basis that "[t]he service of the notice to quit, the quit date, the service of the writ [of] summons and complaint, and the return date on file with the court were all timely made under relevant law."

On September 1, 2023, the defendant proceeded to file a special motion to dismiss pursuant to § 52-196a in which he argued that the plaintiff "violated his first amendment rights, right of association, and right to petition the government using the guise of a largely fraudulent and frivolous summary process to evict the defendant from his apartment rented from the plaintiff." He alleged that "[d]ocuments relating directly to the summary process contain false information; and also the motives, purposes, and malice of the summary process action evidence that the action was undertaken with improper, malicious, and retaliatory purposes to intentionally harass, threaten, and disturb the defendant— e.g., [to] upset his right of quiet enjoyment, [to] coerce him to leave the apartment, [and to] create conditions of precarious habitability." The special motion to dismiss also appears to have claimed that the defendant had previously filed a complaint against the plaintiff with Connecticut's Commission on Human Rights and Opportunities (CHRO) alleging age discrimination. He claimed

that the "plaintiff's summary process is not only retaliatory in violation of Connecticut statutes including landlord-tenant statutes, but notably with regard to this special motion to dismiss, a retaliatory, hostile, threatening action against the defendant for petitioning the government—namely, CHRO—by a complaint of age discrimination . . . ."

On September 14, 2023, the plaintiff filed an opposition to the defendant's special motion to dismiss in which it argued that "[t]his was the third motion to dismiss filed by the defendant (who has since filed several more), and is filed under a statute that does not apply to summary process actions alleging nonpayment of rent or lapse of time." The plaintiff argued, inter alia, that the present action has nothing to do with what the defendant said or may have said in public or private and nothing to do with public participation.

On September 20, 2023, a hearing on the special motion to dismiss was held in conjunction with numerous other motions to dismiss that the defendant had filed.[3] The court denied the defendant's motion at the conclusion of arguments. On September 25, 2023, the defendant appealed from the court's denial of that motion.

The question before us is whether the trial court's denial of the defendant's special motion to dismiss under the anti-SLAPP statute is an appealable final judgment. To answer that question, we begin with the relevant statutory provisions. Section 52-196a (b) provides: "In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the

[3] The docket reveals that the defendant had filed a host of court submissions by the September 20, 2023 hearing date, including at least five other motions to dismiss.

United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

Section 52-196a (e) (3) instructs that "[t]he court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim."

Our Supreme Court recently decided three companion cases addressing the issue of whether a trial court's denial of a special motion to dismiss under the anti-SLAPP statute constitutes an appealable final judgment. See *Smith* v. *Supple*, supra, 346 Conn. 929; *Pryor* v. *Brignole*, 346 Conn. 534, 536–37, 292 A.3d 701 (2023); *Robinson* v. *V. D.*, 346 Conn. 1002, 1007, 293 A.3d 345 (2023). In *Smith*, the principal case of the three companion cases, our Supreme Court examined the relevant statutory text, legislative history, and analogous laws from other jurisdictions; see *Smith* v. *Supple*, supra, 938–60; and concluded that our "anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits . . . ." Id., 949. It further concluded that, in cases in which a defendant can assert a colorable claim that a trial court's denial of a special motion to dismiss under that statute has placed that particular right at

risk, an immediate appeal may be taken pursuant to the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983).[4] *Smith* v. *Supple*, supra, 960.

The issue before us, therefore, is limited to whether the defendant in the present case has asserted a *colorable* claim to the protections afforded by our state's anti-SLAPP statute, as required to obtain an immediate review of the trial court's denial of his special motion to dismiss. See, e.g., *Pryor* v. *Brignole*, supra, 346 Conn. 545. To that end, "we must determine whether the defendant has asserted a colorable claim that his actions, as alleged in the [plaintiff's] complaint, are based on his right of free speech, to petition the government, or of association." *Robinson* v. *V. D.*, supra, 346 Conn. 1008.

We conclude that the defendant has failed to assert a colorable claim to the protections afforded by our anti-SLAPP statute because none of the allegations in the plaintiff's complaint is based on the defendant's exercise of his right of free speech, to petition the government, or of association. In particular, a review of the complaint makes clear that the defendant's summary process action was predicated solely on the defendant's alleged failure to pay rent owed to the plaintiff and that the written lease agreement between the parties had lapsed and had not been renewed. The complaint contains no allegations about things the defendant said or communicated or about other actions that would otherwise implicate the defendant's right of free speech, right to petition the government, or right of association,

[4] It is well settled that "[t]he subject matter jurisdiction of our appellate courts is limited by statute to appeals from final judgments . . . ." (Internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745, 150 A.3d 1109 (2016). In *Curcio*, however, our Supreme Court held that "[a]n otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, [and] (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31.

as those terms are understood under the statute.[5] The defendant's allegation that the plaintiff's summary process action was motivated by a prior CHRO complaint that he filed against the plaintiff does not transform the plaintiff's summary process action into a claim that is "based on" the defendant's exercise of his right of free speech, to petition the government, or of association, as required by § 52-196a (b). On the contrary, in determining whether a party has presented a colorable claim that entitles him to the right to avoid litigation under our anti-SLAPP statute, our Supreme Court has confined its analysis to whether the specific allegations made in the complaint were based on the defendant's protected speech or conduct. See *Robinson* v. *V. D.*, supra, 346 Conn. 1008 ("we must determine whether the defendant has asserted a colorable claim that his actions, *as alleged in the plaintiffs' complaint*, are based on his right of free speech, to petition the government, or of association" (emphasis added)); *Smith* v. *Supple*, supra, 346 Conn. 962 ("we conclude that the defendants have asserted a colorable claim that the conduct *alleged in the complaint* falls within the meaning of the phrase 'right of

[5] " 'Right of free speech' means communicating, or conduct furthering communication, in a public forum on a matter of public concern . . . ." General Statutes § 52-196a (a) (2).

" 'Matter of public concern' means an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." General Statutes § 52-196a (a) (1).

" 'Right to petition the government' means (A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body, (B) communication that is reasonably likely to encourage consideration or review of a matter of public concern by a legislative, executive, administrative, judicial or other governmental body, or (C) communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial or other governmental body . . . ." General Statutes § 52-196a (a) (3).

" 'Right of association' means communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ." General Statutes § 52-196a (a) (4).

association' " (emphasis added)); *Pryor* v. *Brignole*, supra, 346 Conn. 545 ("[t]he existence of the previously cited case law affords the defendants with at least a superficially well founded claim that *the conduct alleged in the plaintiff's complaint*—namely, [the defendant's] sending letters to 'various news outlets and persons' concerning the arrest and prosecution of an attorney—could be considered conduct furthering communication in a public forum on a matter of public concern" (emphasis added)). Our Supreme Court has not sought to determine a plaintiff's motivation for bringing claims that are, on their face, not based on a defendant's protected speech or conduct.[6]

In the present case, none of the allegations in the plaintiff's complaint is based on the defendant's exercise of his right of free speech, to petition the government, or of association. We therefore conclude that the defendant has failed to assert a colorable claim that would entitle him to an immediate review of the trial court's denial of his special motion to dismiss. Consequently, this court lacks subject matter jurisdiction over the defendant's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

[6] We note that the law affords the defendant a direct mechanism to challenge the summary process action on the basis of retaliation by the plaintiff. General Statutes § 47a-33 provides: "In any action for summary process under this chapter or [General Statutes §] 21-80 it shall be an affirmative defense that the plaintiff brought such action solely because the defendant attempted to remedy, by lawful means, including contacting officials of the state or of any town, city, borough or public agency or filing a complaint with a fair rent commission, any condition constituting a violation of any of the provisions of chapter 368o, or of chapter 412, or of any other state statute or regulation or of the housing or health ordinances of the municipality wherein the premises which are the subject of the complaint lie. The obligation on the part of the defendant to pay rent or the reasonable value of the use and occupancy of the premises which are the subject of any such action shall not be abrogated or diminished by any provision of this section."

PATRICIA A. MCDONNELL *v.* NORMAN A. ROBERTS II ET AL. (AC 45261)

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

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, their alleged legal malpractice in connection with their representation of the plaintiff during her prior marital dissolution proceedings. The plaintiff, who initially was self-represented, commenced the action in June, 2020. In September, 2020, the defendants served a set of interrogatories and requests for production on the plaintiff and also filed a request to revise the complaint. In October, 2020, the defendants filed a motion for a judgment of nonsuit based on the plaintiff's failure to respond to their request to revise. In November, 2020, the defendants filed another motion for a judgment of nonsuit on the ground that the plaintiff had failed to respond to their interrogatories and requests for production. In December, 2020, an attorney, M, filed an appearance on behalf of the plaintiff and requested a thirty day continuance to respond to the defendants' requests to revise and for discovery. The trial court granted the request. In February, 2021, the defendants again moved for a judgment of nonsuit in light of the plaintiff's failure to file a revised complaint and to respond to their discovery requests. The plaintiff did not file an objection to that motion. In March, 2021, the trial court issued an order in connection with the February, 2021 motion for a judgment of nonsuit, indicating that the plaintiff had thirty days to file a revised complaint and responses to the defendants' discovery requests or the defendants could file another motion for a judgment of nonsuit that would be granted by the trial court. In April, 2021, the plaintiff filed a revised complaint but did not file a notice of compliance with discovery. In May, 2021, the defendants filed another motion for a judgment of nonsuit, as the plaintiff had failed to respond to discovery pursuant to the trial court's March, 2021 order. The plaintiff filed a notice of compliance with discovery in June, 2021, which the defendants asserted was deficient. The following month, the defendants again filed a motion for a judgment of nonsuit on the ground that the plaintiff had failed to fully respond to discovery pursuant to the trial court's March, 2021 order. The plaintiff did not file an objection to the motion, which the trial court granted, and the court rendered a judgment of nonsuit against the plaintiff. In September, 2021, the plaintiff filed a motion to open and set aside the judgment of nonsuit, claiming that there was a bona fide reason for her failure to respond to the defendants' discovery requests. After the defendants filed an objection, arguing that the plaintiff could not establish that a good cause of action existed at the time the

nonsuit was rendered or that she was prevented from prosecuting the action due to mistake, accident or other reasonable cause as required by the applicable statute (§ 52-212), M filed an affidavit in support of the plaintiff's motion to open the judgment of nonsuit, in which he asserted that the plaintiff did have good cause under multiple counts and that he had had various medical and veterinary appointments. The trial court denied the plaintiff's motion to open, and the plaintiff appealed to this court. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open and set aside the judgment of nonsuit: the trial court did not err in concluding that the plaintiff failed to establish reasonable cause for her noncompliance with discovery under the second prong of the test set forth in § 52-212 because, contrary to the plaintiff's assertion, the trial court did not find that her reasons for failing to prosecute were insufficient to constitute reasonable cause but, rather, concluded that she had not adequately substantiated her proffered reasons, as the affidavit she submitted in connection with her motion offered only general references to M's various medical and other issues, without any specific dates, circumstances or other substantiation as to what prevented him from fully complying with the trial court's March, 2021 order; moreover, although the plaintiff claimed that the trial court improperly applied the law because the rule of practice (§ 17-43) requires an affidavit to set forth particularized circumstances only if a plaintiff is nonsuited for failure to appear, not for failure to comply with discovery, she did not provide any legal authority for that proposition, and a specific explanation was required to sustain her burden of demonstrating reasonable cause for noncompliance.

Argued December 5, 2023—officially released March 26, 2024

Procedural History

Action to recover damages for, inter alia, the defendants' alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Windham, where the court, *Lynch*, *J.*, granted the defendants' motion for a judgment of nonsuit and rendered judgment thereon; thereafter, the court, *J. Fischer*, *J.*, denied the plaintiff's motion to open and set aside the judgment of nonsuit, and the plaintiff appealed to this court. *Affirmed.*

Brian S. Mead, with whom was *Curran R. Mead*, for the appellant (plaintiff).

Karen L. Allison, with whom, on the brief, was *Ryan V. Nobile*, for the appellees (defendants).

Opinion

CRADLE, J. In this action, the plaintiff, Patricia A. McDonnell, appeals from the trial court's denial of her motion to open and set aside the judgment of nonsuit rendered in favor of the defendants, Norman A. Roberts II, the Law Offices of Norman A. Roberts, LLC, and GraberRoberts, LLC. The plaintiff claims that the court abused its discretion in denying her motion to open and set aside the judgment of nonsuit on the grounds that the court erred in finding that she failed to show that a good cause of action existed at the time of the judgment of nonsuit and that she was prevented by mistake, accident or other reasonable cause from prosecuting the action. We affirm the judgment of the court.

The following undisputed factual and procedural history is relevant to our review of the plaintiff's claims on appeal. On June 1, 2020, the plaintiff, who was then self-represented, commenced this action against the defendants, alleging legal malpractice, reckless misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., stemming from the defendants' representation of her in her prior marital dissolution action. On September 8, 2020, the defendants served on the plaintiff a set of interrogatories and requests for production. On September 15, 2020, the defendants filed a request to revise, to which the plaintiff did not respond. On October 19, 2020, the defendants filed a motion for nonsuit based on the plaintiff's failure to respond to their request to revise. On November 12, 2020, the defendants filed another motion for nonsuit on the ground that the plaintiff failed to respond to the defendants' September 8, 2020 interrogatories and requests for production. The defendants' motions were scheduled for a hearing on December 23, 2020. On December 21, 2020, Attorney Brian Mead filed an

appearance on behalf of the plaintiff, and, on December 22, 2020, the plaintiff, through Mead, requested a thirty day continuance, until January 23, 2021, to respond to the defendants' request to revise and outstanding discovery requests. The court, *Auger*, *J.*, granted the plaintiff's request.

On February 23, 2021, the defendants again moved for a judgment of nonsuit against the plaintiff for "her failure to file a revised complaint within the time permitted by Practice Book § 10-37 and for her failure to respond to discovery within the requirements of Practice Book § 13-6 et seq." The plaintiff did not file an objection. On March 12, 2021, the defendants filed a proposed scheduling order, noting that the defendants' counsel could not reach the plaintiff's counsel. On March 25, 2021, the court, *Lynch*, *J.*, issued an order in response to the February 23, 2021 motion for nonsuit, providing that, "[w]ithin thirty days after the issuance of this order, the plaintiff shall file a revised complaint and responses to the defendants' interrogatories and requests for production. If the defendants do not receive compliance by that date, they may file a motion for a judgment of nonsuit referring to this order. Absent the filing of a revised complaint and proof of compliance with outstanding discovery on file before the motion appears on this short calendar, the motion may be granted by the court and judgment may enter."

On April 23, 2021, the plaintiff filed a revised complaint but did not file a notice of compliance with discovery. On May 24, 2021, the defendants filed another motion for a judgment of nonsuit for failure to respond to discovery pursuant to the court's March 25, 2021 order. The defendants attached exhibits and an affidavit in support of the motion. On June 1, 2021, the plaintiff filed a notice of compliance with discovery, which the defendants asserted was deficient.

On July 9, 2021, the defendants filed a motion to strike counts two, three, and four of the revised complaint.[1] The plaintiff did not respond.

On July 22, 2021, the defendants filed yet another motion for a judgment of nonsuit for failure to fully respond to discovery pursuant to the court's March 25, 2021 order. The motion alleged that the responses to the outstanding discovery request, due on April 24, 2021, and sent by the plaintiff on May 25, 2021, were substantially deficient. The plaintiff did not file an objection to the defendants' motion. On August 23, 2021, the court, *Lynch, J.*, granted the defendants' July 22, 2021 motion and rendered a judgment of nonsuit against the plaintiff.

On September 13, 2021, the plaintiff filed a motion to open and set aside the judgment of nonsuit, which is the subject of this appeal, asserting that there was a bona fide reason for her failure to respond to the defendants' discovery requests.[2] On September 22, 2021,

[1] Counts two, three, and four of the revised complaint alleged reckless misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress, respectively.

[2] The motion states in relevant part: "[T]here exists a bona fide reason the plaintiff's counsel was unable to respond to the defendants' requests. . . .

"In support of the plaintiff's request [to set aside the judgment of nonsuit], counsel offers the following information. Over the past two months, the undersigned counsel [has] had numerous medical and dental appointments which have prohibited counsel from responding to the defendants' motion for nonsuit. The appointments have resulted in oral surgery, colonoscopy, and removal of several precancerous lesions and [counsel] is scheduled for an orthopedic appointment on . . . [September] 17, 2021, to address a torn tendon in counsel's left (dominant) hand. In addition to the medical problems, two weeks prior to the motion, counsel discovered that his family's nine and one-half year old German Shepherd had developed degenerative myelopathy and anaplasmosis. The [animal] required several trips to the veterinary and continues to require treatment. Due to [the dog's] size, counsel's wife needs counsel's assistance to transport the animal to the veterinary hospital. In addition . . . the hurricane took out the power . . . for three days immediately prior to the motion being heard . . . .

"The defendant[s] would not be prejudiced by reopening the dismissal due to the fact the [defendants have] recently filed a motion to strike and a second set of interrogatories.

"Wherefore the undersigned counsel respectfully requests that the court set aside the nonsuit and provide counsel with forty-five days to answer or

the defendants filed an objection to the plaintiff's motion to open the judgment of nonsuit, arguing that the plaintiff could not establish that a good cause of action existed at the time the nonsuit was rendered or that she was prevented from prosecuting the action due to mistake, accident or other reasonable cause as required by General Statutes § 52-212. The defendants argued, inter alia, that the plaintiff could not establish a good cause of action because her claims against the defendants were filed beyond the applicable three year statute of limitations. The defendants also noted that the plaintiff continues to be in noncompliance with the court's March 25, 2021 discovery order. The following day, the plaintiff's counsel filed an affidavit in support of the motion to open the judgment of nonsuit. The affidavit substantially mirrored the plaintiff's motion to open the judgment of nonsuit and concluded by stating, "[i]t is counsel's contention that the plaintiff has good cause under multiple counts."

On January 10, 2022, the court, *J. Fischer*, *J.*, held a hearing on the plaintiff's motion to open the judgment of nonsuit. At the hearing, Mead reiterated the reasons stated in the plaintiff's motion to open for her noncompliance with the court's March 25, 2021 order and asserted that the plaintiff "has a viable case and viable claims . . . ." In response to the defendants' contention that the plaintiff's claims were filed beyond the statute of limitations, Mead disagreed, asserting for the first time that Governor Ned Lamont's Executive Order No. 7G, which was issued on March 19, 2020, extended all statutes of limitations.[3] The court, ruling from the bench, denied the plaintiff's motion to open. The court

object to said interrogatories and request for production and respond to the defendants' motion to strike."

[3] Although, at the hearing, Mead referenced "Executive Order No. 8," the plaintiff's appellate brief clarifies that the correct executive order is Executive Order No. 7G.

first noted that the motion to open filed by the plaintiff did not contain an assertion that there was a good cause of action. The court concluded that, "under the totality of the circumstances, there's no good cause here for this. . . . I haven't had one affidavit, one bill, one thing that supports what you've said, Counsel. So, based on the totality of the circumstances, the fact that there's, you know, no argument about—no argument presented to the court until this moment about the good cause of action—and there have been four earlier motions for nonsuit—the court finds that, under the totality of the circumstances, the motion should be denied." This appeal followed.

On March 24, 2022, the plaintiff filed a motion for articulation asking the trial court to articulate the legal and factual basis "of there was no good cause found" and "of the totality of the circumstances which supports the court's decision." The motion was sent in error to Judge Lynch, who issued an articulation on April 14, 2022, that related to her August 23, 2021 order rendering the judgment of nonsuit. The plaintiff subsequently filed a motion for review with this court, asking that the "articulation rendered by Judge Lynch be vacated and removed from both the Appellate and Superior Court records." This court granted review and ordered Judge Fischer to articulate the basis of his decision denying the plaintiff's motion to open[4] but denied the plaintiff's request to vacate the April 14, 2022 articulation issued by Judge Lynch.

[4] Specifically, this court ordered Judge Fischer "to articulate the factual and legal basis of [his] January 20, 2022 decision denying the plaintiff's motion to open and set aside the judgment of nonsuit, with particular reference to: (1) whether the court considered the affidavit filed by the plaintiff's counsel on September 23, 2021, in reaching its decision; and (2) whether the court reached the second prong of the test to open nonsuit judgments, i.e., that the plaintiff's noncompliance with discovery was due to a reasonable cause."

On June 16, 2022, the court, *J. Fischer*, *J.*, issued a written articulation of its decision denying the motion to open. The articulation explained that the court found that "the plaintiff's motion to open the judgment did not set forth any showing that [she] had a good cause of action, which was mentioned only later in the plaintiff's affidavit[5]—*which came after* the defendant[s] raised that issue in [their] objection. It consists only of a bald statement that the plaintiff 'has good cause under multiple counts.' This, considering the pending and unopposed motion to strike, leaves doubt about the existence of said cause of action." (Emphasis in original; footnote added.) The articulation further explained that the "court found no reasonable cause for the plaintiff's noncompliance with discovery because the affidavit sets forth no particularized circumstance as to why there had not been compliance with the court's order. Aside from the period immediately before the court's ruling, the affidavit offers only general references to various medical and other issues of the plaintiff's counsel without any specific dates, circumstances, or any other substantiation as to what kept him from fully complying with the order since March 25, 2021. As such, it lacks any 'particularities' as required by Practice Book § 17-43 and this court found it to be entirely unpersuasive, especially in the context of the history of noncompliance with the court's explicit order."

The plaintiff appeals from the denial of the motion to open the judgment of nonsuit. "In ruling on a motion to open a judgment of nonsuit, the trial court must exercise sound judicial discretion, which will not be disturbed on appeal unless there was an abuse of discretion. . . . In reviewing the trial court's exercise of its discretion, we make every presumption in favor of its action. . . . [When a] plaintiff [does] not appeal from

[5] The court clarified in its articulation that it "review[ed] the plaintiff['s] counsel's affidavit and it was considered in this court's decision."

the [underlying] judgment of nonsuit . . . [he or] she is . . . limited to challenging the court's exercise of discretion in denying the motion to open." (Citation omitted; internal quotation marks omitted.) *Francis* v. *CIT Bank, N.A.*, 219 Conn. App. 139, 146–47, 293 A.3d 984 (2023).

"The power of a court to set aside a judgment of nonsuit is conferred by . . . § 52-212, which provides in relevant part: '(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . .' " Id., 146. Practice Book § 17-43 substantially mirrors the language of § 52-212 (a).[6] In

[6] Practice Book § 17-43 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. The judicial authority shall order reasonable notice of the pendency of such written motion to be given to the adverse party, and may enjoin that party against enforcing such judgment or decree until the decision upon such written motion. . . ."

essence, " '[t]here is a two-pronged test for setting aside a judgment rendered after a nonsuit. . . . There must be a showing (1) that a good cause of action, the nature of which must be set forth, existed at the time judgment was rendered, and (2) that the plaintiff was prevented from prosecuting the action because of mistake, accident or other reasonable cause.' . . . 'Since the conjunctive "and" meaning "in addition to" is employed between the parts of the two prong test, both [prongs] must be met.' " (Citations omitted.) *Estela* v. *Bristol Hospital, Inc.*, 165 Conn. App. 100, 108, 138 A.3d 1042, cert. denied, 323 Conn. 904, 150 A.3d 681 (2016). With these principles in mind, we turn to the plaintiff's arguments in support of her claim that Judge Fischer abused his discretion in denying her motion to open the judgment of nonsuit.[7]

[7] The plaintiff, in her appellate brief, also claims (1) that her failure to file timely objections and responses to the defendants' first two motions for nonsuit is moot because Governor Lamont's Executive Order No. 7G suspended statutes of limitations with regard to malpractice actions and court filing deadlines at that time; (2) that this court erred in sending the plaintiff's motion for articulation to Judge Lynch instead of Judge Fischer; and (3) that the court, *Lynch, J.*, abused its discretion in granting the defendants' motion for nonsuit. These claims merit little discussion.

First, as to the effect of Executive Order No. 7G in the present case, the plaintiff argues that her reasons for failing to timely respond to the defendants' first two motions for nonsuit are moot because the governor's Executive Order No. 7G excused her from responding during that period. Even if the plaintiff's failure to respond to the first two motions for nonsuit was excused under Executive Order No. 7G, which expired on March 1, 2021; see Executive Order No. 10A, § 5 (February 8, 2021); the plaintiff still needed to establish reasonable cause for failing to comply with the court's later March 25, 2021 order directing her to file responses to the defendants' interrogatories and requests for production. In other words, whether Executive Order No. 7G excused the plaintiff's failure to respond to the defendants' first two motions for nonsuit has no bearing on the court's denial of her motion to open because the plaintiff does not argue that Executive Order No. 7G excused her failure to comply with the court's March 25, 2021 order.

As to the plaintiff's second claim, that this court erred in sending the plaintiff's motion for articulation to Judge Lynch instead of Judge Fischer, she specifically argues that this court's "decision not to strike Judge Lynch's articulation from the trial court record is in essence [improperly] adding to the record" and "effectively changes [Judge Fischer's] reasoning in the

On appeal, the plaintiff makes several arguments challenging the court's finding, under the second prong of the test of § 52-212 and Practice Book § 17-43, that there was no reasonable cause for her noncompliance with discovery. First, the plaintiff argues that the existence of "circumstances beyond her control" constitutes reasonable cause for her failure to comply with discovery. This argument is unavailing. The court never made a finding that the plaintiff's reasons for failing to prosecute were insufficient to constitute reasonable cause. Instead, it concluded that the plaintiff had not adequately substantiated her proffered reasons, finding that "the affidavit offers only general references to various medical and other issues . . . without any specific dates, circumstances, or any other substantiation . . . .

decision." The plaintiff's argument is belied by a review of Judge Lynch's articulation, which simply sets forth the plaintiff's history of noncompliance with the defendants' discovery requests, a history that is readily gleaned from a review of the trial court file. The plaintiff's argument is further belied by Judge Fischer's articulation, which expressly addresses the articulation request filed by the plaintiff as to Judge Fischer's order denying the motion to open, and the plaintiff's failure to satisfy her burden under § 52-212. Because it is clear from the record that Judge Lynch's articulation had no impact on Judge Fischer's articulation, the plaintiff's contention that this court's failure to strike it from the record constituted an improper addition of information is unavailing.

Finally, we note that the plaintiff's attorney expressly abandoned the plaintiff's third claim, that Judge Lynch abused her discretion in granting the defendants' motion for nonsuit, at oral argument before this court. Specifically, the plaintiff's counsel stated that the plaintiff did not raise a claim on appeal challenging Judge Lynch's ruling. He clarified that the plaintiff "raised . . . strictly the motion to open before Judge Fischer." We therefore decline to consider the plaintiff's briefed arguments in support of this abandoned claim, including her argument that the May 24, 2021 motion for nonsuit was never heard and was thus effectively denied. We also decline to review the plaintiff's contention that this matter should have been resolved by "a discovery dispute hearing" instead of by a judgment of nonsuit. Although she raises this argument in support of her claim that Judge Fischer abused his discretion in denying her motion to open, it instead supports a challenge to the judgment of nonsuit. See *Francis* v. *CIT Bank, N.A.*, supra, 219 Conn. App. 146–47 ("[i]n the present case, the plaintiff did not appeal from the judgment of nonsuit, and, thus, she is presently limited to challenging the court's exercise of discretion in denying the motion to open").

As such, it lacks any 'particularities' as required by Practice Book § 17-43 . . . ." The court's conclusion is consistent with prior decisions of this court. See, e.g., *Farren* v. *Farren*, 162 Conn. App. 51, 63, 131 A.3d 253 (2015) ("[w]e will not require the court to accept an unauthenticated document that . . . may be based entirely on self-reported statements by the party moving to open the default judgment"), cert. denied, 320 Conn. 933, 134 A.3d 622, and cert. denied, 320 Conn. 933, 134 A.3d 623, cert. denied, 580 U.S. 917, 137 S. Ct. 296, 196 L. Ed. 2d 215 (2016); *Searles* v. *Schulman*, 58 Conn. App. 373, 377, 753 A.2d 420 ("[a]lthough the plaintiff in her motion to open . . . stated that she was unable to attend the scheduled . . . conference because of out of state medical 'appointments,' there is nothing in the record verifying the appointments or indicating why these appointments could not be rescheduled"), cert. denied, 254 Conn. 930, 761 A.2d 755 (2000). Because the plaintiff failed to provide sufficient substantiation that her proffered reasons were connected to her repeated failures to meet the court set deadlines, her argument is unavailing.

The plaintiff also challenges the court's finding that she did not adequately substantiate her reasons for noncompliance with discovery as an improper application of the law. In Judge Fischer's articulation, he explained that the "court found no reasonable cause for the plaintiff's noncompliance with discovery because the affidavit sets forth no particularized circumstance as to why there had not been compliance with the court's order." The plaintiff contends that the court's use of the phrase "particularized circumstance" reflects a misapplication of the law because Practice Book § 17-43 requires an affidavit to set forth particularized circumstances only if the plaintiff *failed to appear*.[8] The

[8] General Statutes § 52-212 (c) provides that "[t]he complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly

plaintiff contends that, because she was nonsuited for her failure to comply with discovery—not for failure to appear—she was not required to set forth with particularity her reasons for failing to comply with discovery. The plaintiff has cited no legal authority, nor are we aware of any, that stands for the proposition that a court may not, in ruling on a motion to set aside a judgment of nonsuit for failure to comply with discovery, require a specific explanation as to the reason for the delinquent party's noncompliance. Such an explanation is essential to sustaining one's burden of demonstrating reasonable cause for noncompliance. Accordingly, the plaintiff's argument fails. See *Baris* v. *Southbend, Inc.*, 68 Conn. App. 546, 554, 791 A.2d 713 (2002) (affirming trial court's denial of plaintiff's motion to open judgment of nonsuit rendered due to plaintiff's failure to answer discovery request because he had "ignored his obligation to present his reason for the delay with any degree of particularity").

In light of the court's finding that the plaintiff did not meet her burden of showing reasonable cause and the plaintiff's unconvincing arguments to the contrary, the court did not err in concluding that the plaintiff failed to establish reasonable cause for her noncompliance with discovery under the second prong of the test of § 52-212 (a) and Practice Book § 17-43. Because the failure of the plaintiff to meet either prong is fatal to her motion to open; *Karanda* v. *Bradford*, 210 Conn. App. 703, 714, 270 A.3d 743 (2022); we need not address the plaintiff's arguments as to the first prong. For the foregoing reasons, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to open and set aside the judgment of nonsuit.

The judgment is affirmed.

In this opinion the other judges concurred.

set forth the reason why the plaintiff or defendant failed to appear." Practice Book § 17-43 (a) mirrors this language.

LOIS PATRICK *v.* 111 CLEARVIEW DRIVE, LLC, ET AL. (AC 45450)

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

Syllabus

The plaintiff sought to quiet title to certain real property to which the defendant held title. B Co. had previously commenced a tax foreclosure action involving the property against, inter alia, J and H. During the pendency of the foreclosure action, the plaintiff filed multiple motions with the court attempting to intervene, alleging that she had acquired a two-thirds interest in the property on the death of J by descent as J's heir, and a one-third interest in the property by quitclaim deed from the heirs of H. A judgment of foreclosure by sale was rendered in the foreclosure action. The court thereafter denied the plaintiff's motion to intervene on behalf of her two-thirds interest in the property as untimely and dismissed her motion to open the foreclosure judgment on behalf of her one-third interest in the property as moot. Her additional attempts to litigate her alleged interest in the property were also unsuccessful, including an appeal to this court from the trial court's denial of her motion to reargue and reconsider the order approving the foreclosure sale. The plaintiff then commenced the present quiet title action. The defendant filed a motion to strike the plaintiff's complaint as legally insufficient. The trial court granted the motion to strike and rendered judgment dismissing the action for lack of subject matter jurisdiction after determining, sua sponte, that the plaintiff was collaterally attacking the foreclosure judgment. *Held:*

1. The trial court properly dismissed the plaintiff's action on the ground that it lacked subject matter jurisdiction to adjudicate her claims because they constituted an attempt to collaterally attack a prior judgment and were, therefore, moot and nonjusticiable:

a. The plaintiff could not prevail on her claim that, because she was unsuccessful in intervening in the foreclosure action on behalf of her two-thirds interest in the property, she was denied a constitutionally protected right to be heard prior to the deprivation of that property, which would entitle her to challenge the validity of the foreclosure judgment: in the foreclosure action, the plaintiff did not appeal from the denial of her motion to intervene and did not appeal from that decision when she appealed from the court's order denying her motion to reconsider its approval of the foreclosure sale, and, even if she had appealed after the foreclosure judgment had been rendered, her appeal likely would have been dismissed as moot, as allowing the plaintiff to challenge the foreclosure judgment in a new action when she failed to appeal from the denial of her motion to intervene in the foreclosure action was

what made her collateral attack improper; accordingly, the trial court's decision to not allow the plaintiff to collaterally attack the foreclosure judgment did not deprive the plaintiff of her due process rights, as she had sufficient process available in the form of an appeal from the denial of her motion to intervene in the foreclosure action.

b. The plaintiff could not prevail on her claim that, because H never received proper notice of the foreclosure action, the foreclosure judgment did not have preclusive effect against a collateral attack as to H's one-third interest in the property because that judgment was null against a party who was not properly served: even if it is assumed that H was not properly served in the foreclosure action, the plaintiff already sought to advance her claim relating to the alleged lack of personal jurisdiction over H in that action in her motion to open the foreclosure judgment and subsequent motion to reconsider, and, although a judgment rendered without jurisdiction is subject to direct or collateral attack, a litigant cannot utilize both processes; moreover, in the present case, the court denied the plaintiff's motion to open the foreclosure judgment, the plaintiff did not seek to intervene based on her one-third interest in the property, and she did not appeal from the dismissal of her motion to open in the foreclosure action; accordingly, because the plaintiff had an opportunity to challenge the foreclosure judgment directly by way of an appeal from the judgment dismissing her motion to open, her attempt to utilize the present action as a substitute for such an appeal was procedurally impermissible.

2. The plaintiff could not prevail on her claim that the trial court improperly failed to adjudicate whether she was an omitted party from the foreclosure action pursuant to statute (§ 49-30); there was no need for B Co. to bring an omitted party action pursuant to § 49-30 to foreclose the plaintiff's purported interests in the property because the plaintiff, albeit unsuccessfully, had already attempted to challenge the foreclosure judgment on the basis of those interests, and, once those attempts failed and the plaintiff did not timely appeal from the court's orders rejecting her claims, she became bound by the foreclosure judgment, and, therefore, there was no reason to resort to § 49-30.

Argued September 14, 2023—officially released March 26, 2024

Procedural History

Action seeking to quiet title to certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch, J.*, granted the named defendant's motion to strike the complaint and rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellant (plaintiff).

Jason P. Gladstone, for the appellee (named defendant).

Opinion

ELGO, J. This appeal arises from the dismissal of a quiet title action. The plaintiff, Lois Patrick, initiated the action against the defendant 111 Clearview Drive, LLC,[1] alleging that she has an interest in certain real property located in Bridgeport, as to which the defendant holds title. After a hearing on the defendant's motion to strike the plaintiff's amended complaint, the trial court dismissed the action for lack of subject matter jurisdiction after determining, sua sponte, that the plaintiff was making an improper collateral attack on a prior judgment. On appeal, the plaintiff claims that the court (1) improperly concluded that it lacked subject matter jurisdiction to adjudicate the quiet title action because the plaintiff was collaterally attacking an underlying foreclosure action, and (2) failed to adjudicate whether the plaintiff may be considered an omitted party under General Statutes § 49-30. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On August 29, 2016, Benchmark Municipal Tax Services, Ltd. (Benchmark), recorded a notice of lis pendens on the Bridgeport land

[1] Also named as defendants in the operative complaint were Khurram Ali; Benchmark Municipal Tax Services, Ltd.; city of Bridgeport; Water Pollution Control Authority for the City of Bridgeport; Department of Social Services; and Aquarion Water Company of Connecticut. A motion for default for failure to appear was granted against the defendants Department of Social Services and Aquarion Water Company of Connecticut. A motion for default for failure to plead was granted against the defendants Benchmark Municipal Tax Services, Ltd., city of Bridgeport, and Water Pollution Control Authority for the City of Bridgeport. Khurram Ali did not file an appellate brief or otherwise participate in this appeal. Accordingly, we refer to 111 Clearview Drive, LLC, as the defendant in this opinion.

records for the property known as 44 Wentworth Street (property).[2] On September 26, 2016, Benchmark commenced a tax foreclosure action involving the property against Erma Jean Roundtree (Erma Jean), Eunice H. Roundtree (Eunice), and others not relevant to this quiet title action. See *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6059553-S (*Benchmark* action and/or *Benchmark* judgment). The plaintiff was not a named party in the *Benchmark* action. A judgment of foreclosure by sale was rendered in the *Benchmark* action on December 12, 2016. After the judgment was opened, a second judgment of foreclosure by sale was rendered on December 4, 2017, and the court ordered a sale date of May 5, 2018. The sale of the property proceeded as scheduled, with Khurram Ali emerging as the successful bidder. The court approved the sale on August 28, 2020, and Ali conveyed the property to the defendant on February 6, 2021, by quitclaim deed. During and after the pendency of the *Benchmark* action, the plaintiff filed multiple motions with the court in an attempt to intervene, asserting an ownership interest in the property. The plaintiff claimed that she had acquired a two-thirds interest in the property on October 29, 2017, upon the death of Erma Jean by descent as Erma Jean's only heir, and a one-third interest in the property by quitclaim deed on April 17, 2021, from the heirs of Eunice, who died on June 5, 2020. The court denied the plaintiff's motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed the plaintiff's May 10, 2021 motion to open and vacate the *Benchmark* judgment on behalf of the one-third interest in the property as moot.[3] The plaintiff

[2] We note the well established principle that a court "may take judicial notice of the file in another case, whether or not the other case is between the same parties . . . ." (Citation omitted; internal quotation marks omitted.) *Rogalis, LLC* v. *Vazquez*, 210 Conn. App. 548, 556, 270 A.3d 120 (2022).

[3] On April 6, 2018, after acquiring the two-thirds interest in the property from Erma Jean, the plaintiff filed motions to intervene and to open and

made additional attempts to litigate her alleged interest in the property, all of which were unsuccessful.[4]

The plaintiff commenced this quiet title action in May, 2021, and, in July, 2021, filed a revised complaint in accordance with General Statutes § 47-31[5] regarding her alleged interests in the property. The defendant filed a motion to strike,[6] alleging that "the plaintiff has failed to state a legally sufficient revised complaint and [was]

vacate the *Benchmark* judgment. Those motions were denied as untimely under General Statutes § 52-325 (a) on May 1, 2018, and the plaintiff did not appeal those determinations. On May 10, 2021, after obtaining Eunice's one-third interest in the property by quitclaim deed, the plaintiff filed a motion to open and vacate the *Benchmark* judgment. That motion was dismissed as moot "[p]er oral record" on June 2, 2021. On June 16, 2021, the plaintiff filed a motion to reconsider the court's dismissal of the motion to open and vacate the judgment. The court issued an order on June 16, 2021, stating that it had "reviewed this motion for reconsideration and [was] not changing its ruling on the underlying motion." The plaintiff did not appeal that order.

[4] The plaintiff's additional attempts to challenge the *Benchmark* judgment included the following. On August 31, 2020, the plaintiff filed a request to stay the proceedings until a legal representative could be appointed to represent the interests of Eunice, who died on June 5, 2020. That request was dismissed on September 16, 2020. The plaintiff filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because the plaintiff was not a party to the underlying action. On September 16, 2020, the plaintiff filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, the plaintiff filed an appeal with this court, which was dismissed on January 13, 2021, for lack of standing as the plaintiff was not a party to the underlying action.

[5] General Statutes § 47-31 (a) provides in relevant part: "An action [to settle title or claim an interest in real property] may be brought by any person claiming title to, or any interest in, real . . . property . . . against any person who may claim to own the property . . . or to have any interest in the property . . . for the purpose of determining such . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property."

[6] A motion to strike is governed by Practice Book § 10-39, which provides in relevant part that it is to "be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted; or (2) the legal sufficiency of any prayer for relief in any such complaint . . . ."

barred" from pursuing her claim on five grounds.[7] The accompanying memorandum of law in support of the motion to strike argued, inter alia, that the plaintiff's two-thirds interest in the property, purportedly acquired as Erma Jean's heir, was "moot" due to a failure to "successfully appeal the [*Benchmark*] judgment . . . ."The plaintiff filed a memorandum of law in opposition to the motion to strike, in which she rebutted each of the five grounds alleged in the defendant's motion to strike. The plaintiff also proffered that the prior foreclosure judgment in the *Benchmark* action had not foreclosed the one-third interest in the property that she received by quitclaim deed because the predecessor in interest, Eunice, had "not been properly served" in that action and, thus, was an omitted party.

On January 18, 2022, the court held a hearing on the motion to strike. During that hearing, the court inquired if the defendant's allegation that the court no longer had subject matter jurisdiction over the property due to the transfer of title following the approval of the foreclosure sale was, in fact, an argument that the plaintiff's quiet title action was a collateral attack on the judgment. The defendant's counsel answered affirmatively. The plaintiff's counsel responded by stating that the present quiet title action was not a collateral attack "because [the *Benchmark* judgment is not] effective against somebody who wasn't properly served."

In a memorandum of decision issued on March 7, 2022, the court dismissed this action as "an improper

[7] In its motion to strike, the defendant enumerated five grounds that allegedly defeated, as a matter of law, the plaintiff's quiet title action: "(1) [General Statutes] § 49-15; (2) the failure to redeem the real property; (3) . . . the death of a mortgagor subsequent to the service of process is of no moment in resetting law days . . . (4) the heirs and devisees do not need to be substituted as parties after good service on the original mortgagor; [and] (5) . . . the plaintiff's failure to open or set aside the judgment within the statutorily allotted time."

collateral attack on the foreclosure judgment." Citing to *Rider* v. *Rider*, 200 Conn. App. 466, 479, 239 A.3d 357 (2020), the court stated that the plaintiff " 'must resort to direct proceedings to correct perceived wrongs. . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal.' " The court also raised concerns regarding subject matter jurisdiction, citing *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006), for the proposition that "[a] court lacks discretion to consider the merits of a case over which it is without [subject matter] jurisdiction . . . ." (Internal quotation marks omitted.) Id., 533. In response, the plaintiff filed a motion to reargue the dismissal of the quiet title action, which the court denied, and this appeal followed.

"A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 735, 166 A.3d 832, cert. dismissed, 327 Conn. 926, 171 A.3d 59 (2017), and cert. denied, 327 Conn. 926, 171 A.3d 60 (2017).

The court characterized the quiet title action as "an improper collateral attack on the [*Benchmark*] judgment" and justified its dismissal by citing *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 248, 232 A.3d 1279 (2020), stating: "A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. . . . The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." (Citation omitted.) Accordingly, the

court concluded that it lacked subject matter jurisdiction over the quiet title action because the collateral attack rendered the action nonjusticiable.

Our review of the record focuses on whether the court's determination that it lacked subject matter jurisdiction was legally and logically correct. In this regard, we are mindful that "[i]t is well established that this court may rely on any grounds supported by the record in affirming the judgment of a trial court." *State* v. *Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008).

On appeal, the plaintiff claims that the court improperly concluded that it lacked subject matter jurisdiction to adjudicate the quiet title action. Before addressing the plaintiff's specific claims, we set forth the relevant legal principles regarding the trial court's subject matter jurisdiction.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *CHFA-Small Properties, Inc.* v. *Elazazy*, 157 Conn. App. 1, 14, 116 A.3d 814 (2015).

As a court of general jurisdiction, the Superior Court is competent to entertain quiet title actions. Quiet title actions are governed by § 47-31 (f), which provides in relevant part: "The court shall hear the several claims and determine the rights of the parties . . . and render judgment determining the questions and disputes and

quieting and settling the title to the property." See also, e.g., *CHFA-Small Properties, Inc.* v. *Elazazy*, supra, 157 Conn. App. 14 (trial court had subject matter jurisdiction over quiet title action). Accordingly, the Superior Court has subject matter jurisdiction to adjudicate quiet title actions generally.

A court, however, "may have subject matter jurisdiction over certain types of controversies in general, but may not have jurisdiction in any given case because the issue is not justiciable." (Internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine." (Internal quotation marks omitted.) Id. With these principles in mind, we consider the plaintiff's claims.

I

The plaintiff challenges the court's propriety in dismissing the quiet title action after determining that the action was an improper collateral attack on the *Benchmark* judgment.[8] The plaintiff argues that, because she

[8] We note the unusual procedural posture of this case, to the extent that the court was presented with a motion to strike that raised an argument that the court lacked subject matter jurisdiction. Jurisdictional issues are more properly raised in a motion to dismiss. Nevertheless, a party may raise an issue of subject matter jurisdiction at any time. Further, although the defendant's motion to strike questioned whether the court had subject matter jurisdiction to consider the plaintiff's quiet title action, the motion did not explicitly argue that the quiet title action constituted a collateral attack on the *Benchmark* judgment. During the hearing on that motion, the court sua sponte raised that question, and it did not thereafter request that the parties brief the issue before ultimately dismissing the case. However, the plaintiff has not raised on appeal a claim of procedural error as a basis for reversal. Further, the defendant did raise the issue of mootness in its memorandum of law in support of the motion to strike, arguing that the plaintiff's two-thirds interest in the property was moot due to her failure to successfully appeal from the *Benchmark* judgment. Although the defendant's framing of the issue did not mention the phrase "collateral attack," the defendant's argument was substantively the same as the court's analysis.

As was discussed in *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247, mootness implicates justiciability. For a case to be justicia-

was unsuccessful in intervening in the *Benchmark* action on behalf of her two-thirds interest in the property from Erma Jean, she was denied a constitutionally protected right to be heard prior to the deprivation of property, which would entitle her to now challenge the validity of that judgment. The plaintiff also argues that there is no collateral attack on the prior judgment regarding the one-third interest in the property that she acquired from Eunice's heirs because a judgment cannot be effective if it is rendered against a party who was never properly served. Because the plaintiff had opportunities to challenge the *foreclosure* judgment directly by way of an appeal in the *Benchmark* action, her quiet title action that was premised on her claimed interests in the property constitutes an impermissible collateral attack on the *Benchmark* judgment.

As an initial matter, we examine whether the court properly categorized the plaintiff's quiet title action as a collateral attack. "A collateral attack is an attack upon a judgment, decree or order offered in an action or proceeding other than that in which it was obtained, in support of the contentions of an adversary in the action or proceeding . . . ." (Emphasis omitted; internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, supra, 174 Conn. App. 737.

Here, the second prayer for relief in the plaintiff's amended complaint in the quiet title action specifically

ble, "practical relief to the complainant" must be available as the result of an adjudication. (Internal quotation marks omitted.) Id. In *Peck*, this court affirmed the trial court's dismissal as nonjusticiable because the plaintiff failed to appeal a prior order; id., 252; and, as a result, "the court [could] offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." Id., 248. As a result, "[a] court properly may dismiss a case that constitutes an improper collateral attack on a judgment"; id., 247; if "the court . . . [can] afford no remedy," which renders the matter moot and nonjusticiable. Id., 252. Here, the issue of mootness was raised by the defendant, and, because mootness and justiciability are questions of law, and the plaintiff failed to raise an argument on appeal of procedural error, we proceed to the merits of the claim.

asks the court to "[vacate] the foreclosure judgment in [the *Benchmark* action] . . . ." Initiating a new action with the goal of vacating a prior judgment from a different action is, by definition, a collateral attack on a judgment.[9]

Our Supreme Court has noted that "collateral attacks on [final judgments] are disfavored . . . [because the] law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . [A] litigant . . . must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Citations omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016). The court further explained that "collateral attacks are strongly disfavored . . . because such belated litigation undermines the important principle of finality." (Internal quotation marks omitted.) Id., 786.

Although collateral attacks are strongly disfavored, the fact that an action constitutes a collateral attack does not warrant automatic dismissal of the action. Exceptions exist in rare cases in which "a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 771. Additionally, "[i]f a court has never acquired jurisdiction over a defendant [by proper service of process] . . . any judgment ultimately entered is void and subject to vacation or collateral attack." (Internal quotation marks omitted.) *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 713, 927 A.2d 312, cert.

[9] Black's Law Dictionary defines the phrase "collateral attack" as, inter alia, "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." Black's Law Dictionary (11th Ed. 2019) p. 329.

denied, 284 Conn. 927, 934 A.2d 243 (2007). Furthermore, "[a] court properly may dismiss a case that constitutes an improper collateral attack on a judgment"; *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248; if "the court . . . [can] afford no remedy," which renders the matter moot and nonjusticiable. Id., 252. The issue thus becomes whether the plaintiff's collateral attack on the *Benchmark* judgment is permitted as one of the rare exceptions, or if the dismissal of this quiet title action was appropriate because the court could not afford a remedy, because the plaintiff failed to "resort to direct proceedings to correct perceived wrongs . . . ." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 771.

Our review of that question of law is plenary. We therefore examine the record to determine whether the court's dismissal of the quiet title action as an improper collateral attack was legally and logically correct. We address separately each of the plaintiff's claimed interests in the property.

A

We first address the plaintiff's claim with respect to her two-thirds interest in the property that she purportedly acquired by descent from Erma Jean.

In support of her quiet title action, the plaintiff filed a revised complaint as is required by § 47-31 (b). The revised complaint asserts that Erma Jean's two-thirds interest in the property passed to the plaintiff on October 29, 2017, as the sole heir and equitable owner of the interest upon Erma Jean's death. By the time that the plaintiff received this interest, a judgment of foreclosure by sale had already been rendered on December 12, 2016. A second judgment of foreclosure by sale was then rendered on December 4, 2017. The plaintiff first moved to intervene in the *Benchmark* action on April 6, 2018, and simultaneously filed a motion to open and

vacate the *Benchmark* judgment. The court denied those motions and noted in the denial of the motion to intervene that the "petition is not timely under [General Statutes] § 52-325 (a), which authorizes intervention after a notice of lis pendens is filed (in this case, filed on August 29, 2016, in the Bridgeport land records) and the application to intervene is filed 'prior to the date when the judgment or decree in such action is rendered.' This motion to intervene was filed on April 5, 2018, more than fifteen months after the entry of judgment of foreclosure by sale." The plaintiff did not appeal from the judgment of dismissal of her motion to intervene. Instead, the plaintiff filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because the plaintiff was not a party to the underlying *Benchmark* action. On September 16, 2020, the plaintiff filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, the plaintiff filed an appeal with this court, which dismissed the appeal on January 13, 2021, for lack of standing as the plaintiff was not a party to the underlying *Benchmark* action.

The plaintiff now argues that, by denying the motion to intervene in the *Benchmark* action, the "court denied [her] the right to protect her interest in the property," amounting to a fundamental denial of due process under the fourteenth amendment to the United States constitution. The plaintiff states that she "was not a party to the underlying foreclosure action, was not allowed to intervene and was not allowed to appeal." The plaintiff further argues that, "[b]ecause [she] was not allowed to intervene in the [*Benchmark*] action, she should be allowed to question the validity of the [*Benchmark*] judgment" through this quiet title action. We are not persuaded.

"[T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 771. Here, a direct appeal was the proper channel to test the validity of the court's May 1, 2018 denial of the plaintiff's motion to intervene in the *Benchmark* action. Contrary to the plaintiff's assertion, nothing prevented her from appealing that decision. The law is clear that, if "[a]n unsuccessful applicant for intervention . . . can make a colorable claim to intervention as a matter of right [then] on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 204, 990 A.2d 853 (2010). This court also has stated that "[m]ost post-judgment appeals filed by would-be intervenors will be moot because the relief sought, i.e., intervention into the underlying action, cannot be granted once the action has gone to judgment. . . . [T]o avoid potential mootness problems, would-be intervenors who have a colorable claim to intervention as a matter of right should appeal immediately from the denial of their motion to intervene." *Wallingford Center Associates* v. *Board of Tax Review*, 68 Conn. App. 803, 806 n.3, 793 A.2d 260 (2002).

In the *Benchmark* action, the plaintiff did not timely appeal from the denial of her motion to intervene. Nor did she appeal from that decision when she appealed from the court's order denying her motion to reconsider its approval of the sale of the property. Even if she had

appealed after the judgment of foreclosure had been rendered, her appeal likely would have been dismissed as moot for the reasons we articulated in *Wallingford Center Associates*. See id. That being the case, allowing the plaintiff to now "question the validity" of the *Benchmark* judgment in a new action, when the plaintiff failed to appeal from the denial of her motion to intervene, is precisely what makes this collateral attack improper. "A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . The recurrent theme in our collateral attack cases is that the availability of an appeal is a significant aspect of the conclusiveness of a judgment. . . . Consequently, a party who fails to appeal from [a] . . . decision may not use a different action as a substitute for that appeal to achieve a de novo determination of a matter upon which they failed to take a timely appeal. . . . A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. . . . The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." (Citations omitted; internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247–48.

For these reasons, the trial court's decision to not allow the plaintiff to collaterally attack the *Benchmark* judgment in this action on the basis of Erma Jean's two-thirds interest in the property does not deprive the plaintiff of her due process rights. The plaintiff had sufficient process available to her in the form of an appeal from the denial of her motion to intervene in the *Benchmark* action. Similarly, the availability of that appeal, which she did not pursue, means that the limited exceptions to the prohibitions on collateral attacks do not apply to any challenge to the judgment based on Erma Jean's two-thirds interest in the property. The trial court's dismissal for lack of subject matter jurisdiction

based on the two-thirds interest in the property that the plaintiff acquired from Erma Jean was appropriate because the matter was moot, and thus nonjusticiable, as "the court can offer no practical relief to the party collaterally attacking the prior judgment . . . ." *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248.

B

The plaintiff also asserts that she acquired a one-third interest in the property via a quitclaim deed on April 17, 2021, from Eunice's heirs. She further alleges that Eunice never received proper notice of the foreclosure action. The plaintiff thus argues that the *Benchmark* judgment does not have preclusive effect against a collateral attack as to Eunice's one-third interest in the property because a prior judgment is null against a party who was not properly served.

The plaintiff's argument is not without merit. Although strongly disfavored, not all collateral attacks are impermissible. This court has noted that "[s]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of in personam jurisdiction over that party. . . . If a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack." (Internal quotation marks omitted.) *Angiolillo* v. *Buckmiller*, supra, 102 Conn. App. 713.

If we take the facts alleged in the complaint as true, it follows that, if Eunice never received proper service of the foreclosure action, any judgment rendered in that action would be null as to her. The plaintiff's implied argument follows that, as the holder of Eunice's one-third interest in the property acquired by quitclaim deed from Eunice's heirs, she stands in Eunice's shoes and can assert that the judgment is null as to her also, and,

thus, properly may collaterally attack the *Benchmark* judgment. We are not persuaded.

The problem with the plaintiff's argument is that she already sought to advance her claim based on the alleged lack of personal jurisdiction over Eunice in the *Benchmark* action in her May, 2021 motion to open and subsequent motion to reconsider. Thus, although a judgment rendered without jurisdiction is subject to direct or collateral attack, a litigant cannot utilize both processes. Indeed, when, as in the present case, "the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [she] did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so." (Emphasis omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 772.

The court in the *Benchmark* action approved the sale on August 28, 2020, and the plaintiff acquired her one-third interest in the property from Eunice's heirs on April 17, 2021. On May 10, 2021, although the plaintiff had not been made a party to the foreclosure action, the plaintiff's counsel filed a motion to open and vacate the judgment of foreclosure by sale, asserting that Eunice was never served. In support of her motion to open, the plaintiff included an affidavit from Bernice Roundtree, the sister of Eunice, averring that Eunice was living in a nursing facility in Bridgeport in August, 2016, and that Eunice had not lived at the property after 2014. On June 2, 2021, the motion was dismissed as moot "[p]er oral record . . . ." On June 16, 2021, the plaintiff's counsel filed a motion to reconsider that dismissal, and on the same day the court entered an order stating that the court "reviewed this motion for reconsideration and is not changing its ruling on the underlying motion." The plaintiff neither sought to intervene

based on her one-third interest in the property from Eunice, nor appealed from the dismissal of her motion to open in the *Benchmark* action. Accordingly, because the plaintiff had an opportunity to challenge the foreclosure judgment directly by way of an appeal from the judgment dismissing her motion to open in the *Benchmark* action, her attempt to use the underlying quiet title action as a substitute for that appeal is procedurally impermissible. See *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248 ("a party who fails to appeal from [a] . . . decision may not use a different action as a substitute for that appeal to achieve a de novo determination of a matter upon which they failed to take a timely appeal" (internal quotation marks omitted)).

We therefore conclude that the court properly dismissed the quiet title action because the plaintiff's claims based on both her two-thirds interest and her one-third interest in the property constitute impermissible collateral attacks on the *Benchmark* judgment and are, therefore, moot and nonjusticiable.

II

The plaintiff's final argument is that the court's sua sponte dismissal denied her an opportunity to advance an omitted party argument pursuant to § 49-30, which could offer relief without disturbing the *Benchmark* judgment. The plaintiff argues that § 49-30 applies because "[n]o omitted party action has been brought to foreclose out [her] interest in the property," which was acquired "as heir to [Erma Jean's] estate and as the successor in interest to [Eunice's] interest . . . ." The plaintiff's claim warrants little discussion.

Section 49-30 provides in relevant part: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in . . . such real

estate . . . has been omitted or has not been foreclosed . . . because of improper service of process or for any other reason . . . [s]uch omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

There was no need for Benchmark to bring an omitted party action to foreclose the plaintiff's purported interests in the property because the plaintiff, albeit unsuccessfully, had already attempted to challenge the *Benchmark* judgment on the basis of those interests. Once those attempts failed and the plaintiff did not timely and properly appeal from the court's orders rejecting her claims, she became bound by the *Benchmark* judgment. Thus, there is no reason to resort to § 49-30.

The judgment is affirmed.

In this opinion the other judges concurred.

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111 CLEARVIEW DRIVE, LLC *v.* LOIS PATRICK ET AL.
(AC 45702)

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

Syllabus

The plaintiff property owner sought, by way of a summary process action, to recover possession of certain real property occupied by the defendants. A tax foreclosure action related to the property had previously been brought against, inter alia, J and H. The defendants were not named in the foreclosure action. The defendant L filed multiple motions in the foreclosure action attempting to intervene, claiming that she had acquired a two-thirds interest in the property upon J's death and that, after the court rendered a judgment of foreclosure by sale, she had acquired the remaining one-third interest in the property from the heirs

of H. The court in the foreclosure action denied L's motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed L's motion to open and vacate the foreclosure judgment on behalf of the one-third interest in the property as moot. The property was subsequently sold and, after the sale was approved by the court in the foreclosure action, the buyer conveyed the property to the plaintiff. L subsequently commenced a quiet title action regarding the property, which was dismissed by the court as an improper collateral attack on the foreclosure judgment. The plaintiff initiated the present summary process action while the quiet title action was pending before the trial court, seeking immediate possession of the property. After the trial court dismissed the quiet title action for lack of subject matter jurisdiction, and while the appeal from that dismissal was pending before this court, the plaintiff filed a motion in limine in the present action seeking to exclude from the trial of the summary process action any evidence that contradicted or collaterally attacked the foreclosure judgment or the quiet title action. The court granted the motion in limine, and, during the subsequent trial in the summary process action, the court sustained the objections of the plaintiff's counsel to exhibits and evidence associated with the foreclosure action. The court subsequently rendered judgment for possession of the property for the plaintiff, and the defendants appealed to this court. *Held* that the defendants could not prevail on their claim that the trial court improperly granted the plaintiff's motion in limine, this court having concluded that it was legally and logically correct for the trial court to grant the motion in limine because the record dispositively established that the defendants' evidence of an ownership interest in the property was irrelevant as a matter of law: although the defendants claimed that the trial court improperly relied on the doctrine of collateral estoppel when it granted the motion in limine, the record did not support that assertion, as the trial court stated several times during the trial that the motion in limine was related to a collateral attack on a prior judgment; moreover, as explained further in the companion case of *Patrick* v. *111 Clearview Drive, LLC* (224 Conn. App. 401), the trial court correctly determined that the only purpose of the evidence was to support nonjusticiable claims and, therefore, the defendants' challenge to the foreclosure judgment was improper because the court could offer no practical relief to the defendants; furthermore, for the reasons discussed in *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 418–19, the defendants' claim that L retained an ownership interest in the property as an omitted party from the foreclosure action pursuant to statute (§ 49-30) was without merit, as § 49-30 was not relevant given that L attempted to directly attack the foreclosure judgment in the foreclosure action but was unsuccessful in those efforts.

Argued September 14, 2023—officially released March 26, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Fairfield, Housing Session, where the court, *Hon. William Holden*, judge trial referee, granted the plaintiff's motion in limine to preclude certain evidence; thereafter, Justin Patrick and Julian Patrick were substituted for the defendants John Doe and John Doe; subsequently, the matter was tried to the court, *Hon. William Holden*, judge trial referee; judgment for the plaintiff, from which the named defendant et al. appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellants (named defendant et al.).

James R. Winkel, for the appellee (plaintiff).

Opinion

ELGO, J. In this summary process action, the defendants Lois Patrick, Justin Patrick, and Julian Patrick[1] appeal from the judgment of possession rendered by the trial court in favor of the plaintiff, 111 Clearview Drive, LLC. On appeal, the defendants claim that the trial court improperly granted the plaintiff's motion in limine, which precluded them from presenting certain evidence to support their claim that Lois was an omitted party in the related foreclosure action of *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6059553-S (*Benchmark* action and/or *Benchmark* judgment), and thus maintained a legitimate and legally

[1] The operative complaint named Lois Patrick, John Doe, John Doe, Jane Doe, and Jane Doe as defendants. The court subsequently granted motions to substitute Justin Patrick and Julian Patrick as defendants for John Doe and John Doe. A motion for default for failure to appear was granted against defendants Jane Doe and Jane Doe. For purposes of clarity, we refer to the defendants individually by first name and collectively refer to Lois Patrick, Justin Patrick, and Julian Patrick as the defendants.

viable interest in the property in question. We affirm the judgment of the trial court.

Patrick v. *111 Clearview Drive, LLC*, 224 Conn. App. 401, A.3d (2024), is a companion case that we also release today. The facts, procedural history, and legal analysis relevant to resolving the two cases are substantially similar. The relevant facts and procedural history are as follows: "On August 29, 2016, Benchmark Municipal Tax Services, Ltd. (Benchmark), recorded a notice of lis pendens on the Bridgeport land records for the property known as 44 Wentworth Street (property).[2] On September 26, 2016, Benchmark commenced a tax foreclosure action involving the property against Erma Jean Roundtree (Erma Jean), Eunice H. Roundtree (Eunice), and others not relevant to this [summary process] action. See *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, [supra, Superior Court, Docket No. CV-16-6059553-S]. The [defendants were not] named . . . in the *Benchmark* action. A judgment of foreclosure by sale was rendered in the *Benchmark* action on December 12, 2016. After the judgment was opened, a second judgment of foreclosure by sale was rendered on December 4, 2017, and the court ordered a sale date of May 5, 2018. The sale of the property proceeded as scheduled, with Khurram Ali emerging as the successful bidder. The court approved the sale on August 28, 2020, and Ali conveyed the property to [the plaintiff] on February 6, 2021, by quitclaim deed. During and after the pendency of the *Benchmark* action, [Lois] filed multiple motions with the court in an attempt to intervene, asserting an ownership interest in the property. [Lois] claimed that she had acquired a two-thirds

[2] "We note the well established principle that a court 'may take judicial notice of the file in another case, whether or not the other case is between the same parties . . . .' . . . *Rogalis, LLC* v. *Vazquez*, 210 Conn. App. 548, 556, 270 A.3d 120 (2022)." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 404 n.2.

interest in the property on October 29, 2017, upon the death of Erma Jean by descent as Erma Jean's only heir, and a one-third interest in the property by quitclaim deed on April 17, 2021, from the heirs of Eunice, who died on June 5, 2020. The court denied [Lois'] motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed [her] motion to open and vacate the *Benchmark* judgment on behalf of the one-third interest in the property as moot.[3] [Lois] made additional attempts to litigate her alleged interest in the property, all of which were unsuccessful.[4]

"[Lois] commenced [a] quiet title action in May, 2021, and, in July, 2021, filed a revised complaint in accordance with General Statutes § 47-31[5] regarding her

[3] "On April 6, 2018, after acquiring the two-thirds interest in the property from Erma Jean, [Lois] filed motions to intervene and to open and vacate the *Benchmark* judgment. Those motions were denied as untimely under General Statutes § 52-325 (a) on May 1, 2018, and [Lois] did not appeal those determinations. On May 10, 2021, after obtaining Eunice's one-third interest in the property by quitclaim deed, [Lois] filed a motion to open and vacate the *Benchmark* judgment. That motion was dismissed as moot '[p]er oral record' on June 2, 2021. On June 16, 2021, [Lois] filed a motion to reconsider the court's dismissal of the motion to open and vacate the judgment. The court issued an order on June 16, 2021, stating that it had 'reviewed this motion for reconsideration and [was] not changing its ruling on the underlying motion.' [Lois] did not appeal that order." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 404–405 n.3.

[4] "[Lois'] additional attempts to challenge the *Benchmark* judgment included the following. On August 31, 2020, [Lois] filed a request to stay the proceedings until a legal representative could be appointed to represent the interests of Eunice, who died on June 5, 2020. That request was dismissed on September 16, 2020. [Lois] filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because [she] was not a party to the underlying action. On September 16, 2020, [Lois] filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, [Lois] filed an appeal with this court, which was dismissed on January 13, 2021, for lack of standing as [she] was not a party to the underlying action." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 405 n.4.

[5] "General Statutes § 47-31 (a) provides in relevant part: 'An action [to settle title or claim an interest in real property] may be brought by any person claiming title to, or any interest in, real . . . property . . . against

alleged interests in the property." (Footnotes in original.) *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 403–405. "In a memorandum of decision issued on March 7, 2022, the court dismissed [the quiet title] action as 'an improper collateral attack on the foreclosure judgment.' " Id., 406–407. Lois appealed from that decision, and the resulting opinion by this court is substantially related to the resolution of the defendants' motion in limine claim in this appeal. See id., 407.

The present action was initiated in September, 2021, while the quiet title action was pending before the trial court. The plaintiff initiated a summary process action against the defendants and others living at the property, seeking immediate possession of the property. Lois filed an answer to the complaint, along with special defenses alleging that (1) "[t]he plaintiff does not have good title to the property" and (2) "[t]he defendant [Lois] is the owner of the property." The plaintiff denied the allegations made in the special defenses. After the trial court dismissed the quiet title action for lack of subject matter jurisdiction because it constituted an improper collateral attack on a final judgment, and while the appeal from that dismissal was pending before this court, the plaintiff filed the motion in limine at issue. The motion in limine sought "to exclude certain evidence at the trial of this summary process action . . . [s]pecifically . . . to preclude any evidence . . . that contradicts or collaterally attacks the . . . [*Benchmark* judgment], as well as the . . . [quiet title action]." The court granted the motion on May 25, 2022.

any person who may claim to own the property . . . or to have any interest in the property . . . for the purpose of determining such . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.' " *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 405 n.5.

The court held a trial on the summary process action over the course of two days. During the first day of that trial, on June 15, 2022, Lois' counsel asked the court to respond to her motion for clarification regarding the grant of the plaintiff's motion in limine, specifically, to articulate the scope of what was to be precluded as well as the basis for the exclusion. The court stated that Lois was precluded from presenting evidence attacking the *Benchmark* judgment, the *Benchmark* foreclosure proceedings, "[t]he committee deed by which Ali took title, [and] the quiet title action, as such would constitute an impermissible collateral attack on a final judgment . . . ." The court stated that "the motion in limine stands" over the objection that Lois was an omitted party to the *Benchmark* action.[6]

Accordingly, at the trial on both June 15 and August 3, 2022, the court sustained the objections of the plaintiff's counsel to exhibits and evidence associated with the *Benchmark* action. At the conclusion of the summary process trial, the court rendered judgment for possession of the property in favor of the plaintiff. From that judgment, the defendants now appeal.

As a preliminary matter, we note that the applicable standard of review is dependent upon the characterization of the trial court's ruling. "Evidentiary claims ordinarily are governed by the abuse of discretion standard. . . . That deferential standard, however, does not apply when the trial court's ruling on the motion in limine . . . was based on [a] legal determination . . . ." (Citation omitted; internal quotation marks omitted.)

[6] Upon request of the plaintiff and over the objection of the defendants, the court applied that ruling to Justin and Julian on August 3, 2022. During oral argument before this court, the defendants' counsel acknowledged that Justin and Julian are in privity with Lois and may only have an interest in the property if she has a viable ownership interest. Accordingly, any holding relating to Lois' ownership interest in the property extends to Justin and Julian as well.

Grovenburg v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 68, 165 A.3d 193 (2017). At the trial on June 15, 2022, in response to the defendants' request to clarify the basis of the court's ruling on the motion in limine, the court stated, "what we have here [is] a collateral attack on the judgment of the court." The court's reasoning for granting the motion in limine was thus based on a legal determination that the admission of the proffered evidence would ultimately permit a collateral attack on a final judgment. "Accordingly, the applicable standard of review requires this court to determine whether the trial court was legally and logically correct when it decided, under the facts of the case, to exclude evidence of [the *Benchmark* action and the quiet title action]. . . . Our review, therefore, is plenary." (Citation omitted; internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 68.

On appeal, the defendants claim that the court improperly based its decision to grant the motion in limine on the doctrine of collateral estoppel, which the defendants argue does not apply to this case because (1) they were not parties to the underlying *Benchmark* action, and (2) the quiet title action was on appeal at that time. The defendants thus ask this court to remand the case for further proceedings to allow them to "present evidence supporting their claim that [Lois] was an omitted party in the [*Benchmark*] action . . . ."

Although the defendants assert that the court improperly relied on the doctrine of collateral estoppel when granting the motion in limine, that assertion is not supported by the record. During the June 15, 2022 proceedings, the court stated five separate times that the motion in limine was related to a collateral attack on a prior judgment.[7] Therefore, the record demonstrates that the

[7] The court mentioned collateral estoppel one time during the June 15, 2022 proceedings. The record indicates that this mention was in the context of quoting language from the plaintiff's motion in limine and not as the basis

court's basis for granting the motion in limine was to exclude evidence that would result in an improper collateral attack on the *Benchmark* judgment.

Next, we must determine if the court's decision to grant the motion in limine was legally and logically correct. "The purpose of a motion in limine is to exclude irrelevant, inadmissible and prejudicial evidence from trial . . . ." (Internal quotation marks omitted.) *State* v. *Lo Sacco*, 26 Conn. App. 439, 444, 602 A.2d 589 (1992). It follows that a court properly may determine that evidence proffered by a party is irrelevant when its only purpose is to support a claim that is nonjusticiable. "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires . . . that the determination of the controversy will result in practical relief to the complainant. . . . [J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine." (Internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 247, 232 A.3d 1279 (2020).

The legal analysis contained in parts I and II of the companion case, *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 409–19, is dispositive of the claim presented in this appeal. There is no useful purpose to repeat that legal analysis here. For the reasons explained in that opinion; see id., 409–18; we conclude

for granting that motion. Specifically, the court stated: "I'm reading from the request of the plaintiff: 'introducing testimony seeking to attack the foreclosure judgment or the foreclosure action proceedings, the committee deed by which Ali took title, or the quiet title action as such would constitute an impermissible collateral attack on a final judgment, and it's precluded, and the collateral estoppel . . . would be inequitable given the actions.' " Read in context, it appears that the court was merely quoting and/or paraphrasing the plaintiff's motion in limine, which had included collateral estoppel as an alternative ground on which evidence related to the *Benchmark* action should be excluded.

that the court correctly granted the motion in limine because the only purpose of the evidence was to support nonjusticiable claims. As we explained in that companion opinion, the defendants' challenge to the *Benchmark* judgment was improper because "the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248.

Furthermore, for the reasons discussed in the companion case, the defendants' claim that Lois retains an ownership interest in the property as an omitted party[8] from the *Benchmark* judgment is without merit. See *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 418–19. As we discussed in that opinion, General Statutes § 49-30 is not relevant given that Lois attempted to directly attack the *Benchmark* judgment in the underlying action but was unsuccessful in those efforts. Id. We therefore conclude that it was legally and logically correct for the court to grant the motion in limine because the record dispositively establishes that the defendants' evidence of an ownership interest in the property was irrelevant as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] General Statutes § 49-30 is titled "Omission of parties in foreclosure actions" and provides in relevant part: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in . . . such real estate . . . has been omitted or has not been foreclosed . . . because of improper service of process or for any other reason . . . [s]uch omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 224

ERIC AMADO *v.* COMMISSIONER
OF CORRECTION
(AC 46474)

Cradle, Clark and Prescott, Js.

Argued March 11—officially released March 26, 2024

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Klatt*, *J.*

Per Curiam. The appeal is dismissed.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
v. TYRONE E. OWEN ET AL.
(AC 46786)

Cradle, Clark and Prescott, Js.

Submitted on briefs March 11—officially released March 26, 2024

Appeal by the named defendant et al. from the Superior Court in the judicial district of Fairfield, *Cirello*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

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SUPREME COURT PENDING CASES

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

STATE *v.* KARIN ZIOLKOWSKI, SC 20801
Judicial District of New Haven

Criminal; Whether Defendant's Amnesia Prevented Her From Receiving a Fair Trial; Whether Evidence Was Sufficient to Support Defendant's Convictions for Murder and Second-Degree Arson; Whether Trial Court Erred in Allowing Into Evidence Tweets Purportedly Sent From Defendant's Twitter Account. On the morning of November 14, 2016, the firefighters carried the defendant and the body of her deceased eight-year-old son (victim) out of their burning home. An autopsy of the victim revealed that his death was not caused by smoke inhalation but rather by asphyxia. In addition, the fire marshal determined that the fires in the home were intentionally set. Based in part on this evidence, the defendant was charged with murder and arson in the second degree in violation of General Statutes § 53a-112 (a) (1) (B). Prior to trial, defense counsel requested a competency evaluation pursuant to General Statutes § 54-56d, stating that she was concerned that the defendant would not be able to assist in her own defense because she did not have any memories of the events surrounding the charged crimes. During the subsequent competency hearing, Dr. Nadia Gilbo, a forensic psychiatrist appointed by the court to examine the defendant, opined that the defendant "could fully exercise her cognitive ability" and was thus able to assist in her own defense. Thereafter, Dr. David Lovejoy, a neuropsychologist, testified for the defense and opined that the defendant was not competent to stand trial because her memory deficits created an inability to assist in her own defense. Applying the factors set forth in *State* v. *Gilbert*, 229 Conn. 228 (1994), for determining whether amnesia renders a defendant incompetent to stand trial, the trial court concluded that the defendant's amnesia did not so impact the fairness of the proceedings as to render her incompetent. At trial, the state sought to introduce into evidence three "tweets" purportedly sent from the defendant's Twitter account with the username "I am not Eliza" through the testimony of her aunt, A.G. A.G. testified, inter alia, that the defendant had told her that "I am not Eliza" was her Twitter account. The defendant objected to the admission of the tweets on the basis of lack of authentication. Specifically, the defendant claimed that "anyone else who had a user ID and password" for the Twitter account could have sent the tweets in question. The trial

court overruled the objection, concluding that a "prima facie" showing existed that the tweets were made by the defendant. After the trial, the jury found the defendant guilty of the charged crimes. The defendant directly appealed from the judgment of conviction to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims that her trial was inherently unfair because her amnesia prevented her from assisting in her own defense. In support thereof, she argues that her memory was crucial to the construction and presentation of a defense, and hence, her amnesia had a significant effect on the outcome of the trial. In addition, the defendant claims that her murder conviction should be reversed because the evidence was insufficient to establish (1) the identity of the victim's killer and (2) that she had the specific intent to cause death. She also claims that her second-degree arson conviction should be reversed because the evidence was insufficient to establish (1) that she was responsible for setting the fires and (2) that she specifically intended to commit arson to conceal the crime of murder. Finally, the defendant claims that the trial court erred in overruling her authentication objection to the admission of the tweets purportedly sent from her Twitter account.

STATE OF CONNECTICUT *v.* MARCUS HURDLE, SC 20827
Judicial District of Ansonia-Milford

Criminal; Whether Trial Court Correctly Determined That It Lacked Authority to Award Defendant Presentence Confinement Credit at Sentencing; Whether Plea Agreement Included Presentence Confinement Credit. While the defendant was incarcerated on other convictions, he entered into an agreement with the state to plead guilty to charges of robbery in the first degree and conspiracy to commit robbery in the first degree in exchange for the state's agreement to enter a nolle prosequi on all remaining charges. The trial court canvassed the defendant, who verbally indicated he understood the terms of the agreement. At sentencing, however, the defendant for the first time raised to the court his belief that he was entitled to certain presentence confinement credit. The state responded by saying that presentence credit was not part of the plea agreement and that the court's past practice was to defer to the Department of Correction regarding the calculation of jail credit. The defendant subsequently filed a motion asking the trial court to order that presentence credit be applied to his sentence, or alternatively, to allow him to withdraw his plea. The trial court denied the motion, finding that it did not have the discretion to award presentence confinement

credit pursuant to General Statutes § 18-98d and that there was no evidence that the defendant entered his plea involuntarily or unknowingly for purposes of allowing him to withdraw it. The trial court then imposed the agreed upon sentence. The defendant appealed, and the Appellate Court (217 Conn. App. 453) affirmed the trial court's decision. The Appellate Court first held that the trial court did not have the authority or discretion to account for presentence confinement credit at sentencing because § 18-98d (c) expressly mandates that the Commissioner of Correction is responsible for calculating and applying such credit. The Appellate Court rejected the defendant's argument analogizing a sentencing court's discretion to award presentence credit with its discretion to determine whether sentences will run concurrently or consecutively. The court observed that a sentencing court's authority to determine whether two sentences will run concurrently or consecutively has long been recognized at common law and expressly authorized by § 53a-37 whereas presentence credit is a "creature of statute," such that the legislature could have include statutory language expressly authorizing sentencing courts to calculate and apply presentence credit if it wanted to do so. The Appellate Court also rejected the defendant's reliance on case law such as *James* v. *Commissioner of Correction*, 327 Conn. 24 (2017), to demonstrate the trial court's exercise of discretion to award presentence credit, noting that the sole issue in *James*, a habeas action, was whether the commissioner properly calculated and applied the credit. The court further determined that, although trial courts have expressed differing views in addressing presentence credit issues raised at sentencing, it is the commissioner and not the sentencing court who has the authority to determine a defendant's eligibility for such credit. The Appellate Court additionally held that the trial court did not improperly accept, and later refuse to withdraw, the defendant's guilty plea because the record did not support the defendant's claim that the plea was invalid where there was no "meeting of the minds" on the terms of the plea agreement as to presentence credit. The defendant has been granted certification to appeal from the Appellate Court's decision, and the Supreme Court will decide whether the Appellate Court correctly concluded that (1) the trial court lacked authority to award the defendant presentence confinement credit at the time of sentencing, and (2) the plea agreement did not include presentence confinement credit.

STATE OF CONNECTICUT *v.* KELLY NIXON, SC 20848
Judicial District of New Britain

Criminal; Whether Trial Court Correctly Determined that It Lacked Jurisdiction to Hear Defendant's Motion to Correct

Illegal Sentence Pursuant to *State* v. *Hurdle*, 217 Conn. App. 453 (2023); Whether Defendant Is Entitled to Presentence Confinement Credit or Permitted to Withdraw His Plea. The defendant had pending criminal cases in several jurisdictions. He was originally arrested on October 27, 2020, and was continuously held thereafter. While incarcerated, the defendant was served with an arrest warrant on September 15, 2021, for attempted robbery in the first degree and on June 3, 2021, for burglary in the third degree. As part of a global disposition with the state, the defendant agreed to plead guilty to all charges with concurrent sentences imposed on April 1, 2022. At sentencing, the trial court left the application of any presentence confinement credit to the Department of Correction and sentenced the defendant to ten years of imprisonment followed by five years of special parole. The Department of Correction applied presentence credit to the defendant's sentence for the time served from September 15, 2021 to April 1, 2022, and from June 3, 2021 to April 1, 2022. The defendant subsequently filed a motion with the trial court to correct an illegal sentence, arguing that a central part of the global disposition was that he receive presentence credit for the time served from his original date of arrest, October 27, 2020. Additionally, the defendant believed that he would serve a definite period of ten years imprisonment followed by five years of special parole in exchange for his guilty pleas and that the Department of Correction's application of presentence credit resulted in him serving more than ten years. The motion requested that the trial court order the Department of Correction to apply such presentence credit. The trial court dismissed the motion for lack of jurisdiction, citing *State* v. *Hurdle*, 217 Conn. App. 453, cert. granted, 346 Conn. 923 (2023). In *Hurdle*, the defendant pleaded guilty to certain charges against him and expressed at sentencing his belief that he was entitled to presentence confinement credit. The trial court found that it did not have the authority or discretion to apply presentence credit to his sentence, and the Appellate Court affirmed the trial court's determination on appeal. The Supreme Court granted the *Hurdle* defendant's petition for certification to appeal the Appellate Court's decision and will decide, *inter alia*, whether the Appellate Court correctly concluded that the trial court lacked authority to award the defendant presentence confinement credit at the time of sentencing. The defendant here appealed the trial court's dismissal to the Appellate Court, challenging *Hurdle*, and the Supreme Court transferred the appeal to its own docket pursuant to Practice Book § 65-2. The Supreme Court will decide the defendant's claims of whether (1) *State* v. *Hurdle* was wrongly decided, such that the trial court

improperly dismissed the defendant's motion to correct his illegal sentence, and (2) the defendant is entitled to receive presentence confinement credit if the plea bargain explicitly included it, or alternatively, whether he is allowed to withdraw his plea.

THOMAS NAPOLITANO *v.* ACE AMERICAN INSURANCE COMPANY et al., SC 20922
Judicial District of Hartford

Contracts; Whether Notice of Cancellation of Workers' Compensation Insurance Policy Was Definite, Certain, and Unambiguous Such That Policy Was Effectively Cancelled Under General Statutes § 31-348. The plaintiff, Thomas Napolitano d/b/a Napolitano Roofing, had a workers' compensation insurance policy issued by the defendant, ACE American Insurance Company (ACE). On March 28, 2018, ACE sent the plaintiff notice that a charge would be imposed if he did not provide certain records needed to complete an audit. On April 5, 2018, ACE sent the plaintiff two notices. The first, titled "Noncooperation of Audit Current Coverage," stated that he had not complied with the records request and that his failure to comply would result in cancellation of his policy if the audit was not conducted prior to the effective date of cancellation. The second, titled "Workers Compensation and Employers Liability Policy Cancellation," stated that the policy "is cancelled in accordance with its terms as of the effective date of cancellation indicated," which was April 25, 2018. On April 10, 2018, an agent for the plaintiff's insurance producer informed him that his tax returns had been received and that he was compliant at that time. On April 16, 2018, an agent for ACE emailed the plaintiff that he still had audit documents missing, but the plaintiff did not respond. On May 29, 2018, one of the plaintiff's employees was injured in the course of his employment and filed a workers' compensation claim. ACE denied the claim and refused to defend or indemnify the plaintiff because the policy had been terminated prior to the date of loss. The plaintiff brought this action seeking a declaratory judgment that the cancellation of the policy was ineffective and damages against ACE for, among other things, breach of contract for refusing to defend or indemnify him under the policy. The plaintiff moved for summary judgment, claiming that the second April 5 notice did not cancel the policy because it was not "certain and unequivocal" when read with the other notices. Pursuant to General Statutes § 31-348, a workers' compensation insurance policy is not effectively cancelled until fifteen days after notice is filed with the chairperson of the Workers' Compen-

sation Commission, and, under *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440 (2001), the notice must be certain and unequivocal. The trial court granted the motion and awarded the plaintiff damages. The defendant appealed. The Appellate Court (219 Conn. 110) reversed, holding that the trial court erred in rendering summary judgment for the plaintiff because the second April 5 notice cancelled the policy. The Appellate Court found that the requirements of § 31-348, including that the notice be certain and unequivocal, were met because the second April 5 notice expressly stated that the effective date of cancellation was April 25, 2018, and it was filed with the chairperson of the Workers' Compensation Commission at least fifteen days prior to the date of cancellation. The Appellate Court noted that the plaintiff's subjective understanding as to when the policy was cancelled was irrelevant. The plaintiff sought certification to appeal, which the Supreme Court granted as to the question of whether the Appellate Court correctly concluded that the second April 5 notice constituted a definite, certain, and unambiguous notice of cancellation that effectively cancelled the plaintiff's workers' compensation insurance policy under § 31-348.

KAYLA SUPRYNOWICZ et al. *v.* NARENDA B. TOHAN, SC 20992
Judicial District of Hartford

Torts; Wrongful Life; Whether Trial Court Properly Struck Plaintiffs' Claims as Sounding in Wrongful Life; Whether Trial Court Properly Struck Plaintiffs' Claims for Not Alleging "Extraordinary Damages"; Whether Connecticut Law Should Recognize Wrongful Life Claims. The plaintiff Kayla Suprynowicz was born to parents who received fertility services from the defendant, a reproductive endocrinologist, and believed that only the sperm of Kayla's father was used in the process. As an adult, Suprynowicz took a 23 and Me DNA genetic test that revealed that, even though her father had a European background, her biological father had a South Asian background. Suprynowicz came to the conclusion, based on her test results, the circumstances underlying her birth, and the "striking resemblance" between her and the defendant, that the defendant was likely her biological father and had used his own sperm in providing fertility services to her parents. Months after Suprynowicz received her test results, she was contacted by the plaintiff Reilly Flaherty. Flaherty had taken a 23 and Me test as well, the results of which indicated that Suprynowicz was his half-sister. Flaherty was also born to parents who received fertility services from the defendant and similarly came

to the conclusion that the defendant was likely his biological father and had used his own sperm in providing fertility services to his parents. The plaintiffs brought this action against the defendant, claiming in relevant part that the defendant had been negligent in using his sperm while providing fertility services to their parents. They further alleged that they suffer "mental anguish and physical injury" as a result, and Suprynowicz additionally alleged that she has a genetic cerebral condition and mast cell activation disorder that limits her earning capacity. The defendant filed a motion to strike the plaintiffs' negligence claims because the defendant did not owe a duty of care to the plaintiffs or, in the alternative, the claims sounded in wrongful life, which is a cause of action not recognized in Connecticut and based on the theory that a child would not have been born but for the defendant's negligence. The trial court agreed with the defendant, considering his duty argument but granting the motion on the basis of his wrongful life argument. The trial court determined that the plaintiffs' claims properly sounded in wrongful life rather than ordinary negligence, despite their argument to the contrary. It then noted the lack of Connecticut appellate authority for wrongful life claims and concluded that, even if it were to apply the laws of the jurisdictions that have recognized such claims, the plaintiffs' claims were not viable because their alleged damages did not rise to the level of "condition[s] that impose extraordinary expenses upon the parents and the child." The trial court further answered "[t]he question . . . whether Connecticut does or should recognize a cause of action for wrongful life that is free of the limits imposed by . . . [the aforementioned other jurisdictions] . . . in the negative." The trial court rendered judgment on the stricken complaint, and the plaintiffs filed this appeal in the Appellate Court, which was transferred to the Supreme Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. The Supreme Court will decide (1) whether the trial court properly struck the plaintiff's claims as sounding in wrongful life rather than negligence, (2) whether the trial court properly struck the plaintiffs' claims for failing to allege "extraordinary damages," and (3) whether Connecticut law should recognize a wrongful life cause of action.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys'

Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-K: April 2024 HIPAA Compliance and Reimbursement Updates/ Updates to Person Centered Medical Homes/Human Breast Milk Donation/Addition of Select Laboratory Codes to the Family Planning Clinic Fee Schedule

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after April 1, 2024, SPA 24-K will amend Attachment 4.19-B of the Medicaid State Plan to incorporate various April 2024 federal Healthcare Common Procedural Coding System (HCPCS) updates (additions, deletions, and description changes) to the physician office and outpatient medical equipment devices and supplies (MEDS), and behavioral health clinic fee schedules. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category. DSS is making these changes to ensure the fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Secondly, SPA 24-K will amend Attachment 4.19-B of the Medicaid State Plan to update the list of procedure codes eligible for the Person-Centered Medical Home (PCMH) Program add-on payment. Several procedure codes billed under the PCMH program will no longer be eligible for the PCMH add-on payment effective March 31, 2024. Identified procedure codes that were end-dated because they were either no longer a valid billing code according to the federally recognized Current Procedural Terminology (CPT) manual or based on the description of the procedure code, were determined to no longer meet the eligibility criteria for the PCMH add-on payment. Additionally, select procedure codes for evaluation/management visits and depression screenings will be eligible for the PCMH add-on payment. For a complete list of eligible procedure codes for the PCMH add-on payment, please visit https://www.huskyhealthct.org/providers/PCMH/pcmh_postings/PCMH_Codes_Enhanced_Reimbursemnt.pdf. DSS is making these changes to ensure that eligible procedure codes are billable and complies with program eligibility.

Third, SPA 24-K will amend Attachment 4.19-B of the Medicaid State Plan to incorporate the addition of select laboratory procedure codes to the family planning clinic fee schedule, which will allow family planning clinics to implement respiratory tests for COVID-19 and Influenza. This changes is being implemented to expand access to these services.

Lastly, as required by Section 17b-277c of the Connecticut General Statutes, SPA 24-K will amend Attachment 4.19-B of the Medicaid State Plan to provide coverage of outpatient human donor breast milk for infants, under one year old, who are active on Connecticut Medicaid and meet medical necessity as defined by the clinical

criteria established by DSS. Specifically, procedure code T2101 (human breast milk processing, storage, and distribution) will be added to the medical/surgical supplies fee schedule in order to allow coverage from enrolled milk banks accredited by the Human Milk Banking Association of North America (HMBANA). DSS is making this changes to comply with state law referenced above and enable coverage of outpatient human donor breast milk.

Fee schedules are published at: http://www.ctdssmap.com. Select ''Provider'', then select ''Provider Fee Schedule Download''; after accepting the terms and conditions, follow the prompts: Terms and Conditions, and go to the applicable fee schedule.

Fiscal Impact

The HIPAA updates to the physician office and outpatient fee schedule are estimated to have little to no financial impact since utilization of the added codes is likely to shift utilization from existing codes on the physician office & outpatient schedule. The deleted procedure codes had minimal paid amounts.

The HIPAA updates to the behavioral health clinic fee schedule are estimated to have little to no financial impact, since utilization of the added codes is likely to shift utilization from existing codes on the Behavioral Health Clinic schedule. The deleted procedure code, J0576-effective 1/1/24 through 3/31/24, had no paid amounts in SFY24 to date.

It is estimated that the HIPAA updates to Medical Equipment Devices and Supplies (MEDS) will increase annual aggregate expenditures by approximately $9,356 in SFY 2024, and $57,820 in SFY 2025.

It is estimated that the removal of select procedure codes and the addition of others to the eligibility for the PCMH Add-On payments will have a gross fiscal impact of $2,039 in SFY 2024, and $12,599 in SFY 2025.

It is anticipated that the addition of select laboratory codes to the family planning clinic fee schedule will increase Medicaid expenditures. The estimated gross increase in Medicaid program is $4,419 in SFY 2024, and $26,713 in SFY 2025.

DSS estimates that adding coverage of human donated breast milk is estimated to increase annual aggregate expenditures by approximately $59,400 in SFY 2024, and $364,420 in SFY 2025.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-K: April 2024 HIPAA Compliance and Reimbursement Updates/Updates to Person Centered Medical Homes/Human Breast Milk Donation/Addition of Select Laboratory Codes to the Family Planning Clinic Fee Schedule''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **April 10, 2024**.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-G Changes to Pharmacy Reimbursement for Alcohol Prep Pads and Blood Glucose Test Strips

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after April 1, 2024, this SPA 24 will amend Attachment 4.19-B of the Medicaid State Plan to make updates to the payment methodologies described below:

When provided by a pharmacy, (a) the rate for blood glucose testing strips will be WAC (Wholesale Acquisition Cost) with no dispensing fee and (b) alcohol prep pads will be capped at a maximum reimbursement amount of $6.00 per 100 prep pads with no dispensing fee.

DSS is making both of these changes in order to achieve reimbursement parity between the same items when provided through the medical equipment, devices and supplies (MEDS) benefit and the pharmacy benefit. Access to both products will still be available through either the Pharmacy Prescription (POS) or MEDS benefit.

Fiscal Impact

DSS estimates that this SPA will decrease annual aggregate expenditures by approximately fiscal impact of $(403,315) in State Fiscal Year (SFY) 2024, $(2,492,485) in SFY 2025 and $(2,567,260) in SFY 2026.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to these supplies for which rates are being reduced or payment is being restructured in a manner that could affect access, as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below. In this SPA, DSS does not anticipate that this SPA will have any negative impact on access because these changes will simply ensure that the maximum reimbursement for these items is the same when provided through both the MEDS and pharmacy benefits.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-G**: Changes to Pharmacy reimbursement for Alcohol Prep Pads and Blood Glucose Test Strips''**

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than **April 25, 2024**.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-0008: Interim Payments to Providers Affected by the Change Healthcare Cybersecurity Incident

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective retroactive to February 22, 2024 and through dates of service no later than June 30, 2024, this SPA will amend Section 7 of the Medicaid State Plan by adding a new Section 7.4-C to make interim payments as described below. This SPA does not change any underlying covered services or payment methodology, which continue to be governed by the applicable provisions of the Medicaid State Plan in effect at the time services were provided.

This SPA is being submitted in accordance with the CMS Center for Medicaid and Children's Health Insurance Program (CHIP) (CMCS) Informational Bulletin (CIB) dated March 15, 2024 and posted to the CMS website at this link: https://www.medicaid.gov/sites/default/files/2024-03/cib031524.pdf. The purpose of this SPA is to enable the state to make interim payments to providers whose ability to submit Medicaid claims were disrupted by the recent cybersecurity incident at Change Healthcare, a unit of UnitedHealth Group. Pursuant to the CIB, the state will provide interim payments to affected providers to maintain continuity of care to members without interruption. This SPA does not change any covered services or payment methodology, which continue to be governed by the applicable provisions of the Medicaid State Plan in effect at the time services were provided.

Effective retroactively to February 22, 2024, and effective for affected services provided on or before June 30, 2024, Medicaid providers that can demonstrate to the state with proper documentation that their ability to process and submit Medicaid claims was disrupted by the Change Healthcare cybersecurity incident (the incident) can request to receive interim payments for covered Medicaid services in accordance with this section. These payments will be in amounts representative of each applicable claims cycle, as set forth below under ''Interim Payment'' for services that were not otherwise paid as a result of the incident.

Eligible Provider Types

Eligible provider types include, but are not limited to the providers providing services and billing under each of the following Medicaid State Plan benefit categories within section 1905(a) of the Social Security Act unless specified otherwise below, each of which is defined in more detail in the applicable section of Attachments 4.19-A, 4.19-B, or 4.19-D:

- Inpatient Hospital (section 1905(a)(1)),
- Outpatient Hospital (section 1905(a)(2)(A)),
- Federally Qualified Health Centers (section 1905(a)(2)(C)),
- Home Health (section 1905(a)(7)), including all applicable subcategories of 42 C.F.R. § 440.70 (i.e., nursing services, home health aide services, therapy services, and medical equipment, devices and supplies),
- Clinic Services (section 1905(a)(9)),
- Rehabilitation Services (section 1905(a)(13)(C)),
- Early and Periodic Screening Diagnostic and Treatment (EPSDT) (section 1905(a)(4)(B), specifically the School-Based Child Health (SBCH) benefit,
- Outpatient Prescription Drugs (Pharmacy) (section 1905(a)(12)),
- Physician Services (section 1905(a)(5)),
- Other Licensed Practitioner (section 1905(a)(6)), including all categories covered in Attachment 3.1-A of the Medicaid state plan (e.g., nurse practitioner, behavioral health clinician, podiatrist, naturopath, psychologist, acupuncturist, etc.),
- Dentist (section 1905(a)(10)),
- Hospice (section 1905(a)(18)),
- Intermediate Care Facility for Individuals with Intellectual Disabilities (section 1905(a)(15)), and
- Any other benefit category covered by the state under the Medicaid State Plan or section 1915(c) waiver and for which the provider demonstrates to the state that it was affected by the incident as detailed above.

Interim Payment

Medicaid providers are currently reimbursed via biweekly claim cycles with one three-week claim cycle occurring each quarter. Interim payments will be calculated in accordance with the methodology outlined below.

1. For biweekly claim cycles the payment amounts will be estimated for each impacted provider using the average biweekly claim cycle payment amount reimbursed between July 1, 2023, through February 29, 2024.
2. For three-week claim cycles the payment amounts will be estimated for each impacted provider using the average three-week claim cycle payment amount reimbursed between July 1, 2023, through February 29, 2024.
3. For each claims cycle during the effective dates of this section for which the provider is requesting an interim payment, the interim payments will be calculated as: (a) the estimated average biweekly or three-week claim cycle payment amounts, as applicable to the claims cycle minus (b) the amount that was actually paid in the impacted claim cycle.

Interim payments will be made for services provided through June 30, 2024, for as long as the provider is impacted by the incident.

Reconciliation

The payments authorized under this section are not advanced payments or prepayments prior to services furnished by providers. These interim payments will be

reconciled to the final payment amount the provider was eligible to receive under the Medicaid state plan for its applicable provider type reimbursement during the timeframe for which it was receiving interim payments under this provision based on the actual covered services performed by the provider for Medicaid members. The reconciliation will be completed no later than September 30, 2024, except that, on a case-by-case basis, a provider may request an extension of time from the state and subject to the state's approval but no later than December 31, 2024 to complete the reconciliation due to extenuating circumstances documented by the provider and provided further that the provider demonstrates that it is taking reasonable efforts to expedite the reconciliation.

If the reconciliation results in discovery of an overpayment to the provider, the state will attempt to recoup the overpayment amounts within ninety (90) days and will return the federal share within the timeframe specified in 42 C.F.R. §§ 433.316 and 433.320 regardless of whether the state actually recoups the overpayment amount from the provider, unless an exception applies under 42 C.F.R. part 433, subpart F.

If the reconciliation results in an underpayment to the provider, the state will make an additional payment to the provider in the amount of the underpayment within 90 days.

Assurances

The state will follow all applicable program integrity requirements relating to interim payments to providers and the associated reconciliation process. The state will ensure that all providers receiving payments under this interim methodology will continue to furnish applicable services to Medicaid beneficiaries during the interim payment period and that access to such services is not limited.

As described above, the purpose of this SPA is to provide financial support to Medicaid providers so that they can continue to provide essential care for Medicaid enrollees.

Fiscal Impact

DSS anticipates that this SPA will not have a significant impact on annual aggregate expenditures in State Fiscal Year (SFY) 2024 and SFY 2025 because this SPA authorizes interim payments intended to make providers whole relative to the level of funding currently budgeted and those payments will then be reconciled to actual services provided.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-0008: Interim Payments to Providers Affected by the Change Healthcare Cybersecurity Incident''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **April 25, 2024**.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in February 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Ahmetovic, Amela of Torrington, CT
Bayraktar, Faith Furkan of Manassas, VA
Dauscher, Brendan Charles of Huntington Station, NY
Dugan, Lucia Danielle of Washingtonville, NY
Duggins, Breyonnia Monae of West Haven, CT
Dunbar, Molly Caroline of Astoria, NY
Emlein, Maye Carolyn of Portland, ME
Erickson, Jesse Camille of Prospect, CT
Giggi, Ryan Hale of Avon, CT
Hedly, Morgan Elizabeth of Fall River, MA
Johnson, Caroline Whalen of Darien, CT
Kennedy, Taylor Joyce of Hartford, CT
Lipsitz, Jonathan Cole of Weston, CT
Lopez Cedeno, Neyci V. of Fresh Meadows, NY
Messick, John William of New York, NY
Miskovsky, Ashley R. of Holbrook, NY
Murphy, Matthew Jake of West Hartford, CT
Najman, Natassia Tan of Ridgefield, CT
Noel, Richard William of Phoenix, AZ
Palermo, Taino James of Cranston, RI
Stringer, Stephen James of Waldwick, NJ
Wade, Justin Donald of Paramus, NJ
Zumbado, Miranda of Bronx, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in February 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Beck, Michael Stuart of Westport, CT
Clarke, Keith of Ridgefield, CT
Corey, Sean Douglas of Litchfield, CT
Elman, Howard Ian of New York, NY
Fardelmann, Katey Lynn of Southport, CT
Fluskey, Jr., Robert Joseph of East Amherst, NY
Gordon, Stephen Louis of Greenwich, CT
Iola, Samuel Irvine of Dallas, TX
Nagy, Tibor of New York, NY
Reavis, Brett Taylor of Edmond, OK

Rothschild, Gideon of New Hartford, CT
Salter, Aaron James of New Haven, CT

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of February 21, 2024:

Harry P. Greenbaum	Point 72, LP
Benjamin Mikhli	RVI Group

Certified as of February 26, 2024:

Richard Allison	Hudson Bay Capital Management, LP

Certified as of February 27, 2024:

Vanessa M. Guerrero	Yale University

Certified as of February 28, 2024:

SuJin Cho	Purdue Pharma, LP

Hon. Elizabeth A. Bozzuto
Chief Court Administrator