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CONNECTICUT APPELLATE REPORTS

Vol. 227

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

GARY RYDER *v.* JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(AC 46128)

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

Syllabus

The plaintiff appealed from the judgment of the trial court, rendered after a jury trial, for the defendant bank. Following certain litigation over two mortgages on the plaintiff's property, the parties executed a settlement and release agreement and a loan modification agreement. After the defendant commenced a foreclosure action against the plaintiff, claiming that he had defaulted on the modified loan, the plaintiff initiated the underlying action against the defendant, claiming, inter alia, breach of the loan modification agreement and settlement agreement, to which the defendant asserted the special defense of setoff. The jury returned its verdict, pursuant to which it found for the plaintiff on the count of his complaint alleging breach of the settlement agreement, and it awarded damages in the amount of $350,000. The jury also found that the defendant had proven that, due to the plaintiff's ongoing default in his loan obligations, the plaintiff was indebted to the defendant for more than $4 million. The jury subtracted the amount of the indebtedness from the damages award on the interrogatories form. The jury, however, returned a verdict for the plaintiff. Following clarifying instructions from the court, the jury returned a defendant's verdict on all counts of the complaint consistent with its responses to the interrogatories. The plaintiff filed various postverdict motions, which the court denied. *Held*:

1. This court declined to review the plaintiff's claims that the trial court improperly denied his motions to set aside the verdict and for judgment notwithstanding the verdict as those claims were unpreserved: the plaintiff never sought to challenge the legal sufficiency of the defendant's setoff defense by filing a motion to strike in accordance with the rules of practice and failed to distinctly raise his claim that the setoff defense was invalid prior to the submission of the case to the jury; moreover, the plaintiff failed to preserve his claim that the defendant's material breach of the settlement agreement necessarily discharged his obligations under the loan modification agreement by failing to submit a written request to charge or proposed jury interrogatories on the issue and by agreeing to the submission of interrogatories to the jury that plainly allowed it to find both that the defendant materially breached the settlement agreement and that the plaintiff was indebted to the defendant pursuant to his loan obligations; furthermore, because the plaintiff's trial counsel neither objected to questions about the debt posed by the defendant's counsel nor moved to strike the plaintiff's

responses as to the amount of the debt, his claim that the court improperly concluded that his testimony as to the amount he owed the defendant was a judicial admission was unreviewable.

2. This court declined to review the plaintiff's unpreserved claim that the trial court improperly precluded him from presenting evidence relevant to the damages he incurred after he transferred title to the property to a trust; the record did not reflect that the plaintiff distinctly raised this claim in opposition to the defendant's motion in limine seeking to preclude the plaintiff from presenting evidence of such damages or at any other point during the trial.

3. The trial court did not abuse its discretion in denying the plaintiff's motions to set aside the verdict as inadequate and for additur; because there was a reasonable basis in the evidence for the jury's verdict and there was no evidence of mistakes or partiality, this court deferred to the jury's judgment.

4. The plaintiff could not prevail on his claim that the trial court improperly denied his postverdict motion to consolidate the underlying action with the defendant's related foreclosure action against him: after the defendant initiated the foreclosure action, the plaintiff initiated the underlying action instead of asserting his breach of contract claims in a counterclaim in the foreclosure action; moreover, the court properly considered the belated nature of the plaintiff's motion to consolidate as well as the futility of doing so after a verdict had been returned and after the plaintiff's motion for a new trial had been denied.

Argued March 12—officially released August 6, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the jury before *Clark*, *J.*; verdict for the defendant; thereafter, the court *Clark*, *J.*, denied the plaintiff's motions to set aside the verdict, for judgment notwithstanding the verdict, and for additur; judgment for the defendant; subsequently, the court, *Genuario*, *J.*, denied the plaintiff's motion to consolidate, and the plaintiff appealed to this court. *Affirmed.*

Ridgely Whitmore Brown, for the appellant (plaintiff).

Brian D. Rich, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Gary Ryder, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, JPMorgan Chase Bank, National Association. On appeal, the plaintiff claims that the court improperly (1) denied his motions to set aside the jury's verdict and for judgment notwithstanding the verdict "to the extent that the verdict awarded no damages to the plaintiff," (2) precluded the plaintiff from presenting evidence relevant to the damages incurred after November, 2014, when he transferred title to the property to a trust, (3) denied his motions to set aside the verdict as inadequate and for additur, and (4) denied his postjudgment motion to consolidate the underlying action with the defendant's related foreclosure action against the plaintiff. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as the jury reasonably could have found them, and procedural history are relevant to the plaintiff's claims on appeal. In January, 2003, the plaintiff executed a mortgage on his property in Greenwich (property) in favor of Washington Mutual Bank, FA (Washington Mutual) to secure an adjustable rate note in the principal amount of $2.45 million (first mortgage). In March, 2003, the plaintiff executed a mortgage in favor of the defendant to secure future advances pursuant to a home equity line of credit agreement and disclosure statement with a $300,000 limit (second mortgage). Thereafter, the plaintiff filed two lawsuits related to the loans, one against Washington Mutual in the United States District Court for the District of Connecticut and the other against the defendant in the United States District Court for the District of Columbia. In the Connecticut action, Washington Mutual filed a counterclaim to foreclose the first mortgage. The defendant subsequently acquired the first mortgage from Washington

Mutual and was substituted as the defendant and counterclaim plaintiff in the Connecticut action.

In November, 2011, the parties executed a settlement and release agreement along with a loan modification agreement. Pursuant to the settlement agreement, the parties released all of their respective claims in the federal actions, the plaintiff agreed to withdraw both actions by December 15, 2011, and the defendant agreed to release the second mortgage on the property. Pursuant to the loan modification, the maturity date of the note is November 1, 2051, the new principal balance was $2.9 million, with interest beginning to accrue as of November 1, 2011, at the rate of 1 percent until November 1, 2014, when the rate increased to 5.1 percent (modified loan). Although the plaintiff performed his obligations under the settlement agreement, the defendant did not release the second mortgage on the plaintiff's property until April 21, 2014. On November 3, 2014, the plaintiff conveyed the property to SFK Trust, LTD (SFK Trust) by virtue of a deed recorded in the Greenwich land records.

In October, 2018, the defendant commenced a foreclosure action against the plaintiff, claiming that he had defaulted on the modified loan. In February, 2019, the plaintiff initiated the underlying action against the defendant. In the operative seven count complaint, the third amended complaint, the plaintiff alleged that the defendant: (1) breached the loan modification agreement by failing to pay the real estate taxes to the town of Greenwich in a timely manner (first count); (2) breached the settlement agreement by (a) failing to release the lis pendens in a timely manner (second count), (b) failing to release the second mortgage until April 21, 2014 (third count), (c) attempting to enforce the second mortgage in violation of General Statutes § 36a-648 (fourth count), (d) improperly increasing his monthly mortgage payment, principal, interest, and

taxes (fifth count), and (e) claiming that his outstanding debt was greater than $2.9 million (sixth count); and (3) improperly induced him to execute the settlement agreement by falsely representing that his outstanding debt was $2.9 million even though it since has claimed that his outstanding debt is greater than $2.9 million (seventh count).

The defendant denied the material allegations in the complaint and asserted, as a special defense, that "[a]ny and all damages to which the plaintiff would otherwise be entitled must be offset by the debt owed to the defendant related to the ongoing default in his loan obligations." The plaintiff filed a reply in which he, inter alia, denied the allegations in the defendant's special defense of setoff.[1] The defendant subsequently filed a motion in limine, seeking to preclude evidence of any damages claimed by the plaintiff after he conveyed the subject property to the SFK Trust in November, 2014, as he was no longer the owner of the subject property. The court granted the motion in limine, without prejudice, on May 20, 2022.

Thereafter, the case was tried to a jury over the course of several days in June and July, 2022, with the court, *Clark*, *J.*, presiding. At trial, the plaintiff was represented by Attorneys Richard P. Silverstein and John Ferranti. On June 28, 2022, the first day of evidence, the court addressed certain preliminary matters, indicating that, if necessary, it would revisit its ruling concerning the time period for which evidence of damages could

[1] We note that the parties used "setoff" and "offset" interchangeably in their pleadings and during the proceedings before the trial court in reference to the defendant's special defense. Although we refer to that defense as a "setoff" in this opinion, there is no meaningful distinction between the two terms. See, e.g., *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16, 18, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995) ("[t]he right of setoff (also called offset) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A" (internal quotation marks omitted)).

be introduced. The court also noted the defendant's request to charge the jury as to its setoff defense and stated that, at that time, it did not believe that it would be appropriate to instruct the jury as to the defendant's claimed setoff, as the foreclosure case was a separate action, and it could be prejudicial to combine the claims made therein with those in the plaintiff's case. The plaintiff's counsel agreed.

Despite the court's initial concerns, however, it permitted the plaintiff's alleged default on the modified loan and the issue of setoff to be raised at trial. During trial, the plaintiff testified that he stopped making payments as required under the loan modification agreement in 2014 because he believed "there was no agreement anymore because it had been breached in so many different ways . . . ." Nevertheless, on cross-examination, he admitted that he owed the defendant approximately $3 million for the principal amount of the loan and for the property taxes that the defendant paid to the town of Greenwich.

At the conclusion of the plaintiff's case on July 1, 2022, which was a Friday, the defendant moved for a directed verdict, arguing, among other things, that the plaintiff's admission of his indebtedness had established the defendant's setoff defense. The trial court deferred ruling on the motion for a directed verdict and briefly discussed the charging conference scheduled for the following week. The court invited counsel to submit any revised requests to charge or proposed verdict forms, noting that the "plaintiff's request was very basic, [while the] defense's request was robust. And, obviously, now we have some evidence." The court issued a written order that same day, which stated: "Consistent with the discussion on the record during the trial on July 1, 2022 . . . [t]he parties shall review the working draft of the court's jury charge that was presented to counsel at the beginning of evidence and

which has since been emailed to counsel by caseflow. Counsel shall submit any proposed edits to the draft charge by Tuesday, July 5, 2022, at 1:00 p.m. . . . The parties shall be prepared to engage in a charging conference on Wednesday, July 6, 2022, with the court."

At the beginning of the day on July 6, 2022, the court explained that the parties had provided the court with proposed edits to the charge, and that the court would defer any ruling on the defendant's motion for a directed verdict until the conclusion of the case or after a verdict. Thereafter, the defendant presented a single witness, and the plaintiff offered no rebuttal.

After releasing the jury, the court held a charging conference. After reviewing several of the parties' suggested edits, the following exchange occurred between the court and the parties' counsel:

"The Court: I think that goes through all of the edits. I know we didn't solve all of them. But you noted, Attorney Ferranti, you thought you might have some other—a couple other—some other points that we might not have touched on there.

"[Attorney Ferranti]: No, I—we touched on them, thank you—

"The Court: Okay.

"[Attorney Ferranti]: —for asking, Your Honor.

"[The Defendant's Counsel]: Your Honor, I don't believe we addressed the offset edit. . . .

"The Court: Oh, the offset, I'm sorry. So, the offset, yes, there was an effort to add in, I . . . think given the evidence that some instruction on the offset is appropriate. . . . I took the liberty of taking the language proffered by [the defendant] and making some softening. . . . So, I'll pass . . . that out to . . . counsel. I do think given the evidence that the special

defense is appropriate and that the offset—charge as to the offset is appropriate . . . . So, I . . . think it's something like that and then, you know, it's a matter of whether the jury finds that there is evidence.

"[Attorney Silverstein]: Isn't this a subject of different litigation currently pending?

"The Court: I'm sorry?

"[Attorney Silverstein]: Isn't that three million the subject of litigation currently pending in this courthouse?

"The Court: The—I think there certainly is an active foreclosure case.

"[Attorney Silverstein]: Right, which claims that my client is three million in arrears. How does that, which is a separate and distinct action, get to be argued in this court and then again in the other case?

"The Court: Well, there's a variety of ways that it can, and it still could be, and either way, could end up being relevant to that case. But I think in this case, there is a—it is a special defense that was claimed. There is evidence associated with a potential offset and therefore, I believe, it's appropriate for the jury to consider whether or not one should apply to any verdict that they would issue. There is no counterclaim in this case, so we don't have the foreclosure case, and this case is one claim. So, what the offset would potentially do here could be, depending upon whatever damages there are, it could reduce or eliminate them for sure, but I don't think that forecloses any action or defenses associated with the foreclosure action.

"[Attorney Ferranti]: Your Honor, I do have—

"The Court: Yeah.

"[Attorney Ferranti]: —concerns on the fourth paragraph—I'm sorry, the third paragraph, halfway down. 'Importantly, before you consider any setoff that the defendant may be entitled to, the plaintiff must prove all of his damages claims by a preponderance of the evidence.' It seems a little confusing. It seems to me somebody might read this—the jury might read this and say, he's gotta prove count one, count two, count three, count four.

"The Court: Uh-huh.

"[Attorney Ferranti]: Certainly, the plaintiff must prove damages. I'm not sure about 'all [of] his damages claims.' They might read that as all the counts.

"The Court: Right. Well, part of the practical nature of this, which goes to the verdict forms, which is how this is—where does this appear and how does it apply, and is it to the macro or is it to each count. You know, because there could be certainly some confusion in the calculation—the question.

"[Attorney Silverstein]: Your Honor, it would seem to me that if you're going to allow them, and I know they [pleaded] offsets setoff, to have this charge, again, I'm wondering why it is that what my client gave up is not damages. It's as if you're—you're removing what he did from the contract and focusing only on what [the defendant's] responsibilities were. My client under the contract had responsibilities that he fulfilled to his detriment. In other words, he couldn't revive those lawsuits, but yet you're telling us that those aren't damages. I just can't understand the logic of how a contract where one party—

"The Court: Okay. Attorney Silverstein, we're not going to keep arguing that same point. This—to the extent—let's assume you can't understand, okay.

"[Attorney Silverstein]: I can't understand it.

"The Court: And we'll just move on. The issue of the offset in this case, among many other pieces of evidence, comes from the fact that there was an obligation on your client to pay the mortgage and apparently from his testimony and corroboration, there—payments have not been made since 2014. So, if he hasn't made the payments, and I understand his position is there was no longer a contract, which sort of begs the question of, well then how are you seeking to enforce a contract, but I'll leave that aside for the moment. How is that not a potential offset? So, he didn't do—you said he did everything he was supposed to do. The evidence does not appear to be so in that regard. So, if he didn't pay the mortgage, and how is that not a potential offset to his damages attempting to assert the damages associated with the enforcement of the mortgage.

"[Attorney Silverstein]: Can I answer that?

"The Court: So, that has nothing to do with the foreclosure of the prior settlement agreement or evidence that doesn't exist in this case of the negotiation, what the parties actually valued it as, et cetera. It goes to, from alleged breach forward, what were the actions, and are there any offsets to those actions, which in this case, a lack of payment of a mortgage for eight years strikes me as something the jury could value.

"[Attorney Silverstein]: . . . [W]ell, then what Your Honor is saying is that when my client became aware of the breach, that he still had to fulfill all the obligations even in light of the fact that [he] was aware that they had breached the contract. Once he becomes aware of that, from my understanding of contracts law, years ago, that's just not the case. His . . . responsibilities don't go on under that breached contract forever. It just—that's not how it works. Once he—

"The Court: Okay, thank you.

"[The Defendant's Counsel]: Your Honor, even if that legal interpretation or proposition was correct—

"[Attorney Silverstein]: It is correct.

"[The Defendant's Counsel]: —[The plaintiff] sat on the stand and said he owes [the defendant] at least three million dollars. So, even if Attorney Silverstein's comments are legally correct, which I think there's some—I don't think they're correct. [The plaintiff] has testified, and the jury has heard, that he owes [the defendant] at least three million dollars, plus, by the way, the unpaid taxes, which I didn't even include in my draft language here. So, that's the evidence before the jury, and I understand Your Honor's softening of my proposed language and the reasons behind it. But the plaintiff in this case testified quite explicitly that he owes the defendant at least three million dollars. So, I think there's a compelling argument to be made that the jury should be affirmatively charged that it must offset the damages based on his testimony, which Your Honor's revised draft is a little short of that, but that's what I believe is appropriate in this case based on his undisputed testimony.

"The Court: Anything further, Attorney Ferranti?

"[Attorney Ferranti]: Not on that subject. Thank you, Your Honor." The court then briefly discussed the interrogatories and verdict form before adjourning for the day.

The next morning, the court began by noting that it had given counsel updated copies of the draft verdict forms and the jury charge and that they had discussed the jury interrogatories prior to opening court. Following closing arguments, the court took a recess before reviewing the verdict form, interrogatories and charge with the parties. At that time, Attorney Ferranti commented on the interrogatories pertaining to the setoff

defense as to the first count of the plaintiff's complaint, which provided: "Subtract the amount entered in response to question 6 ['What is the amount plaintiff owes the defendant due to his ongoing default in his loan obligations?'] from the amount entered in response to question 4 ['Calculate the total amount of damages, if any, entered in response to 3a-3d above']. If the difference is a positive number, enter it below, and you may enter a verdict for the plaintiff in this amount. If the difference is zero or a negative number, you must enter a verdict in favor of the Defendant." (Emphasis omitted.) Attorney Ferranti, reading from the interrogatories, stated: "If the difference is zero, you must enter a verdict . . . in favor of the defendant, is fine. I do believe a negative number would still be valid because it would be a setoff even though it doesn't [rise] above what is owed, that number should be subtracted from what is owed. So, I would take exception to that. I think it should [read], '[I]f the difference is zero, then you must enter a verdict in favor of the defendant.' If not, I think we're stuck with what that number is." The court acknowledged that point and proceeded to bring in the jury.

The court charged the jury regarding the plaintiff's claims and the defendant's special defense of setoff. The court provided the agreed upon interrogatories that required the jury to answer whether the defendant had proven that the plaintiff owed it moneys "due to his ongoing default in his loan obligations," and, if so, to determine the amount of that debt. The interrogatories also directed the jury to subtract the debt amount from any award of damages to the plaintiff and, if the difference was zero or a negative number, to enter a verdict in favor of the defendant.

As to the defendant's setoff special defense, the court instructed the jury as follows: "To the extent you find that the plaintiff has proven liability and damages for

any of his claims, you must then consider whether any amount to which you have decided the plaintiff is entitled must be offset by any debt that you may [find] is owed to [the defendant] related to the plaintiff's ongoing loan obligations. As I mentioned earlier, [the defendant] has affirmatively asserted this as a special defense. As I have mentioned, [the defendant] has the burden of proving its special defense by a fair preponderance of the evidence. The plaintiff does not have to disprove it. In Connecticut, a setoff may be legal in nature. A party may be entitled to a setoff to enforce the simple but clear natural equity in a given case. In this case, [the defendant] is claiming a setoff relating to [the plaintiff's] alleged ongoing default of his loan obligations, which are the subject of this case.

"As applied to here, if you determine that [the defendant] is entitled to recover any moneys unpaid by [the plaintiff], but due and owing to [the defendant], then any possible award of damages that you feel has been sufficiently proven by the plaintiff may be reduced by this amount. Importantly, before you consider any setoff that the defendant may be entitled to, the plaintiff must prove all of his damages claims by a preponderance of the evidence. Once you have determined, what, if any damages have been sufficiently established, you must determine whether the defendant is entitled to a setoff which will reduce any potential award of damages to the plaintiff. . . .

"In this case you have heard other evidence related to the mortgage payment status and the taxes paid on the property in question. It is for you to determine the ultimate value of any setoff, if applicable, and then to apply such setoff [in] the amount that you find is proven to exist in this case. Therefore, to the extent that you enter any verdict in favor of the plaintiff, I direct you to offset such amount by the amount, if any, that you

find applicable to this case based on the facts as you find them."

As to the plaintiff's damages, the court instructed the jury in relevant part that, "if you determine that the plaintiff has proven both liability and damages by a preponderance of the evidence in this action, then you may only award amounts for damages incurred related to the property while [the plaintiff] was actually in title of the property, i.e., before November 3, 2014, and may not award damages for any alternate time period."

After the jury exited the courtroom, the court inquired of counsel, "Exceptions, objections, concerns?" Although the defendant's counsel took some exceptions to the charge, Attorney Ferranti simply responded, "No, Your Honor. Thank you."

On July 11, 2022, the jury returned a verdict along with answers to the interrogatories, which the courtroom clerk read for the record. Pursuant to the interrogatories, the jury found in favor of the plaintiff on the third count of his complaint but for the defendant on the remaining counts. Specifically, the jury found that the defendant had breached the settlement agreement by failing to release the second mortgage until April, 2014, and that the plaintiff had proven that the defendant's material breach had caused him to suffer damages in the amount of $350,000 due to the inability to refinance the loan and the loss of a potential sale of the property. The jury also found that the defendant had proven that, due to his ongoing default in his loan obligations, the plaintiff is indebted to the defendant in the amount of $4,023,338.21 "per [Defendant's] Exhibit GG," which was a payoff statement for the plaintiff's loan obligations under the modified loan agreement, and that it had subtracted that amount from the $350,000 damages award on the interrogatories form. On the verdict form, however, the jury found for the

plaintiff in the amount of $350,000. After the clerk read the verdict and the answers to the jury interrogatories, all of which the jury confirmed, the following exchange occurred between the court and the jury foreperson:

"The Court: . . . I just want to note, I did not hear when the clerk was reading the interrogatories the response to number seven in the damages. . . . I did not hear number seven, it says subtract the amount entered in response to question six from the amount entered in response to question four. If the difference is a positive number, enter it below. And . . . you may enter a verdict for the plaintiff in this amount. If the difference is zero or a negative number, you must enter a verdict in favor of the defendant. And there is an amount there and that amount is negative [$3,673,338.21]. I did not hear that amount referenced when you read the interrogatory previously, Mr. Clerk, and I just want to ask the jury, did you answer number seven in section three to that amount, that the negative number of [$3,673,338.21]?

"[The Jury Foreperson]: We did enter that amount.

"The Court: Thank you. And with that confirmation, what I'd like to do is just ask you to just step into the jury room for a minute and so I can clarify this with counsel and then just bring you right back out. Okay. So, it'll just be a minute, folks."

After the jury exited the courtroom, the court discussed the apparent inconsistency between the clear instructions on the interrogatories and the verdict form with respect to count three. Specifically, the court's review of the forms determined that the jury had failed to properly follow the instruction for the third count. As such, the acceptance of the verdict was halted, and the court engaged in a discussion on the record with counsel outside the presence of the jury.

"The Court: So the problem . . . is the instruction was if they came to zero or negative to issue that as a defendant['s] verdict. . . . Right, wrong, or indifferent, that was the instruction. So, in their verdict they carried over the [$350,000] and do not appear to have applied the setoff. So, my thought given that is that . . . I need to—and they did not sign the interrogatories, which we have to address too. But I believe I may need to give them an instruction to reread that section and to reconsider what, if any, number they're going to put in the verdict to count three in the verdict form. Because I think their verdict, at this point, is inconsistent with what they wrote in the interrogatories. Attorney Ferranti.

"[Attorney Ferranti]: I don't necessarily disagree, Your Honor.

"The Court: Attorney Rich?

"[The Defendant's Counsel]: I agree entirely, Your Honor. It is inconsistent upon its terms and that it needs to be corrected.

"The Court: Okay. Of course, like every other day in this case, now we approach a witching hour so we're right at one. I think we could accomplish this relatively quickly. I could give them instruction to review it again, to sign it again, to make any correction in the verdict form that needs to be made, and we'll see if the problem is then absent waiving it, [the clerk] has—would have to read it all again.

* * *

"So why don't we do this, why don't I bring them back, let [them] know that I have to give them—I'm going to give them the quick instruction, and then I want them to take lunch, come back, review, sign off on everything, check their math and so forth, and correct it as needed to the extent [there are] any [changes to]

the verdict form, you just initial where he makes the correction, and we'll take it up at two."

At that point, the jury returned, and the court instructed them as follows. "Based upon the interrogatories you answered and the verdict you gave, there's an inconsistency, and I need you to correct that, however you choose to correct it, and then we'll deal with that. . . . In other words, there's no damages if it's zero or a negative number. That was the instruction. On the verdict, you still had it with a plaintiff's verdict of $350,000, which appears to conflict with the math on the interrogatory which would appear to have been a negative number. So, what I'm going to ask you to do is two things. One, you—to review the interrogatories, specifically, that one, number seven, in—in—in subsection three. And, to the extent that is . . . a positive number and you need—there was some other error you need to correct, make that correction, and then you fill out the verdict form accordingly. To the extent it is . . . a negative number or zero, then there would . . . be a defendant['s] verdict, not the [$350,000]. So, you'd correct that on the jury form, initial that correction, and then hit the right box. . . . So, what I'm going to have the clerk do is give you back the verdict forms, you make whatever corrections you need to based upon that instruction and based upon your findings, write them out, sign the interrogatories. If there's any change to the numbers that currently exist in here, cross it out, initial and put the new number in."

Thereafter, the jury submitted two questions to the court: (1) "As a jury, we are unclear why the verdict flips in favor of the defendant even though we found . . . breaches per the interrogatories" and (2) "[i]f the verdict [on the third count] is changed to be in favor of the defendant, will [the plaintiff] still receive an offset

of the damages amount we indicated in the interrogatories (currently showing $350k), from the amount owed to [the] defendant[?]"

After the court read the jury's questions, Attorney Ferranti stated: "That was the exact reason for my exception to jury interrogatory Roman numeral three, six and seven, and it is further compounded by the jury's confusion. It appears that the [plaintiff] wouldn't be able to realize the jury's verdict finding of $350,000 in damages if there is a verdict for the defendant. While the foreclosure action subject of the mortgage and settlement agreement here is a separate action, I don't believe it is a distinct and separate action, Your Honor. The verdict form finding in favor of the defendant would appear to bar the recovery of the $350,000 as a setoff in the foreclosure action. If the jury finds on one hand for $350,000 in damages but is directed to find in favor of the defendant . . . on the verdict form, then the $350,000 seems to be rendered immaterial. It doesn't make sense to me. Is he going to realize—be able to realize that $350,000 in the foreclosure action? And it would appear by the verdict form that he wouldn't, so that would render their—the damages irrelevant."

The court then allowed the defendant's counsel to respond, and the following exchange occurred:

"[The Defendant's Counsel]: If the defendant has proven its offset defense, then the funds have to be offset against any finding in favor of the plaintiff. That appears to be what the jury has done in response to their interrogatories and, you know, I think that the jury should either be directed accordingly or, in light of . . . some possible confusion the jury is having about following Your Honor's instructions, perhaps, Your Honor needs to issue a ruling yourself.

"The Court: Yeah, I think the two, perhaps, pieces of confusion are, are there damages once you do the offset? And—and I think ultimately—so that's number one.

And then number two, if an offset brings it to zero or a negative number, does that necessarily mean it's a defendant's verdict? In other words, we started the interrogatories and found the plaintiff's verdict and as we worked all the way through we get to a defendant's verdict, how does . . . that work is the way I'm kind of reading it. And, I think the answer is that's because I'm telling you how that—that's how it works. So, if you go through the interrogatories and you find that applicable offset that does flip it, essentially, to there being no award of damages and thus a defendant's verdict.

"So, I understand your exception to the, you know, how is this, but I think there is a distinction to be drawn that's been drawn a number of times in this [case], but this is this case.

"[Attorney Ferranti]: Correct.

"The Court: So, I don't believe there's—this necessarily is something that [the defendant] can run into the foreclosure [court] and say, hey, we proved an offset of 4 . . . million dollars, give us that in the foreclosure. I mean, [the defendant has] got to prove his foreclosure case. And I think you can't go to the foreclosure case and say, hey, we proved to a jury in a different case that there's a value of $350,000 somewhere here that needs to be credited, you'd have to prove that in the foreclosure case.[2]

[2] Although not at issue in the present case, we disagree with the trial court's assessment of the import of the jury's findings regarding the $350,000 in damages. "The concept of setoff allows [parties] that owe each other money to apply their mutual debts against each other, thus avoiding the absurdity of making A pay B when B in fact owes A." (Internal quotation marks omitted.) *Mariculture Products Ltd.* v. *Those Certain Underwriters at Lloyd's of London*, 84 Conn. App. 688, 703, 854 A.2d 1100, cert. denied, 272 Conn. 905, 863 A.2d 698 (2004). Given that the defendant utilized the outstanding mortgage debt as a setoff to negate the plaintiff's award in the present case, that setoff necessarily reduced the amount of the plaintiff's outstanding debt to the defendant by the $350,000 that the defendant did not have to pay to the plaintiff. Although the setoff avoids "the absurdity

"[Attorney Ferranti]: I disagree, but . . . . It is a separate action, but it's not distinct. We are talking about the same mortgage, the same settlement agreement, there should be an—an effect, a realization of the $350,000 in damages in the foreclosure because, again, it's separate, but it's not distinct. We're talking—

"The Court: Right. Either party could have chose—tried to consolidate, that didn't happen in this case. . . .

"[The Defendant's Counsel]: Well, Your Honor, just in response to that comment, I think Attorney Ferranti and I agree to some extent that all of these issues are fertile ground in the foreclosure case. . . . But back to this case, I mean, the interrogatories are very clear, if you find this, you must enter a verdict in the favor of—in favor of the defendant. And based on their responses, that's what they found. And I think the jury has to be directed to find in favor of the defendant based on their responses.

"The Court: Any[thing] further, Mr. Ferranti?

"[Attorney Ferranti]: No, Your Honor. . . .

"The Court: So, just to recap, my intention would be to answer the first question, basically, that, as I instructed you, once you apply the offset, it is possible that . . . any damages found [can], in fact, be entirely offset as appears to be the case here. And, you know, as I told them before, they are to follow my instructions on the law and this is one of those, they have to follow my instructions with respect to how to apply the offset. In number two, my answer would be the verdict has not changed, the verdict is a result of you going all the

of making" the defendant pay the plaintiff $350,000 when the plaintiff in fact owes the defendant more than $3 million, the plaintiff still is entitled to realize the practical effect of that setoff, most likely by reducing the amount of the debt due in the foreclosure case, assuming that the doctrines of collateral estoppel or res judicata apply to this issue in that case—a question on which we express no opinion.

way through the interrogatories. And, per my instruction on the law, if you go all the way through the interrogatories and, after they answered number seven, you come to a zero or a negative number, I'm directing you, as a matter of law, to find a defendant's verdict. So, that I would send them back in and direct them to correct their verdict with respect to count number three consistent with my charge.

"[Attorney Ferranti]: With all due respect, I—I disagree with that, Your Honor. I—I would suggest that the court strike answer seven from Roman numeral three on the jury interrogatory and the corresponding and the same question on the verdict form in favor of the defendant.

"[The Defendant's Counsel]: Your Honor, we've already been through this. Of course, we went through the charging conference, we can't change the jury interrogatories now after we've already directed the jury that way. Even if it was merited, I don't think that would be appropriate, but it's not merited in this particular case, there's just simply no basis to do that, to undo what Your Honor has already told the jury it must do in this case.

"[Attorney Ferranti]: Perhaps it's a mistrial on that count.

"The Court: Okay. That motion is denied, and we will complete our process. So, let's bring in the jury." (Footnote added.)

When the jury returned, the court answered the jury's questions as follows: "[I]n this case, there is a special defense of offset. So, I've instructed you how to apply the offset if you found an offset . . . . So, from the clarity standpoint in the interrogatories it walks you through if you find damages then you go to the offset, if you find an offset you do the math. If the math is a

zero or a negative number it then must be, must be, a defendant's verdict. And that is the application of the law as I've given it to you. . . . So, you must apply that offset how it works. With respect to your second question with respect to [the change], my answer to you is it doesn't change anything. If you go all the way through [the interrogatories] it either is or it isn't a plaintiff's verdict. If you apply an offset and it's zero or negative it isn't [a plaintiff's verdict], it is a defendant's verdict. So, it's not changing anything, it's just going all the way through the interrogatories. So, what I'm going to do at this point based upon what you put in the interrogatories and these questions, to avoid any confusion, I'm going to instruct you to apply the offset as you have and to do the math as you have, and in doing so to render a verdict for the defendant [on] that count.

"So, you would just make the correction and essentially cross off the [$350,000] and make that a defendant's verdict there, sign the . . . interrogatories forms that's still fine because you have the—the negative number, you've done that properly. Just sign the interrogatories form. All you have to do is make the correction on the verdict form, just initial that. But that would be as I'm instructing you on the law, that's how you apply the offset in this case. Okay. So, I'm instructing you to go back and do that. If you have any other questions or that wasn't clear, we'll be waiting here for your knock." After the jury exited the courtroom, the court asked counsel whether they had any comments or concerns based on its instruction, and Attorney Ferranti responded, "Nothing that hasn't already been stated, Your Honor." Shortly thereafter, the jury returned a defendant's verdict on all counts of the complaint consistent with their responses to the interrogatories, and the court accepted the jury's verdict.

The defendant renewed its oral motion for a directed verdict by filing a written motion and supplemental

brief in support of its motion for a directed verdict, seeking to eliminate the jury's award of $350,000 on the ground that there was insufficient evidence to support it. The plaintiff filed a motion to set aside the verdict and for judgment notwithstanding the verdict, in which he claimed that, as a matter of law, the $4,023,338.21 setoff against the $350,000 damages award was improper because (1) the defendant's material breaches of the settlement agreement discharged his obligations under the modified loan agreement, (2) it did not arise out of a debt that was "independent" of the plaintiff's claim under the settlement agreement and should have been raised in a counterclaim, and (3) pursuant to *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 249 A.3d 327 (2020), the amount of debt owed could only be finally determined within the context of the foreclosure action. The plaintiff also argued that the trial court erred in not permitting evidence of his damages after he conveyed legal title to the subject property to the SFK Trust in November, 2014.

In addition, the plaintiff filed a motion for additur "to add the amount of $350,000 to the jury's verdict . . . ." In his memorandum of law in support of the motion, he argued that "the jury verdict of zero for the plaintiff on the verdict for material breaches of the settlement agreement [was] based on a mistake of law as to the effect of the defendant's claimed right of setoff. The defendant had no such rights because the defense of setoff could not be asserted in this action because it is not an independent action, and because any obligation to pay the defendant per the terms of the settlement agreement was discharged by the defendant's material breaches."

The defendant objected to each of the plaintiff's posttrial motions, arguing that the plaintiff waived any claim regarding its setoff special defense because he neither

challenged the legal sufficiency of that defense nor took exception to the jury charge. The plaintiff filed a response, arguing that he had not waived his challenge to the setoff special defense because he (1) denied the setoff in his reply to the defendant's special defenses, (2) agreed with the trial court on the first day of trial, when the court indicated that it did not believe the setoff defense was proper, and (3) argued against a setoff when objecting to the defendant's oral motion for a directed verdict. The plaintiff also argued that any exception to the jury charge on setoff was unnecessary because the issue of whether it was a valid defense is a question of law for the court, not one of fact for the jury.

After filing reply memoranda to the defendant's objections, the plaintiff filed a "Motion for Equitable Relief and Consolidation with the Foreclosure Case" (motion to consolidate), which provided in relevant part: "This motion is made in the alternative to the pending motions for mistrial, to set aside, etc. The two cases should be consolidated so that the equitable and legal relief may be considered together [in the foreclosure action]. . . . In fact, a counterclaim was just filed last week (October 19, 2022) in the foreclosure case . . . ." The defendant filed an objection, arguing that the plaintiff's "request would create procedural chaos by consolidating two duplicative sets of claims by [the plaintiff] into one case, with a jury having already adjudicated one of them."

The court held a hearing on the parties' motions on November 7, 2022, and it issued a memorandum of decision denying both parties' motions on December 9, 2022. The court held that the plaintiff had waived any claim that a setoff was improper and, alternatively, that the jury had properly applied the setoff based upon the evidence. Specifically, the court reasoned that "the special defense of setoff was not the subject of a motion

to strike or some other timely challenge or exception either before or during the trial. Also, after discussions about the special defenses, the charge, the interrogatories, and the verdict forms on the record and in a charging conference, this is not a defense which was unknown to the plaintiff. . . . Thus, by not raising an exception to the charge on the record or objections to the special defense of setoff until these posttrial motions, such claims have been waived.

"Further, beyond the issue of waiver, as to the substance of the claims in the plaintiff's motions, there are no grounds to set aside or otherwise reject the verdict. The plaintiff himself testified on the record and freely admitted to the fact that he owes the defendant on the outstanding loan. The jury appears to have accepted the plaintiff's admission/concession that he still owes money [to the defendant] while also accepting the plaintiff's testimony that the gap in time where the second mortgage was not released and that damages resulted to the plaintiff from that breach of the settlement agreement.

"The plaintiff's complaint did not allege or seek to be absolved from the mortgage as a remedy. In fact, both parties through their arguments on various motions were quite aware of the pending foreclosure action . . . . That case is a separate and distinct case that the parties are actively litigating. The defendant has made no claim in this case to seek collection on the foreclosure case either. The plaintiff's argument that the setoff special defense is improper is inconsistent with the law, the facts of the case, and the evidence presented.

"The defendant properly asserted a defense of setoff based on the debt owed to it by the plaintiff, a debt that the plaintiff conceded to in open court, on the record. . . . While it is true that the jury did assign

some damages to count three, the same jury also concluded a specific amount applicable to a setoff consistent with the jury instructions related to the special defense of the defendant. This was not some random or invented number that the jury pulled out of thin air. Rather, the jury took the time to cite the source of the number in the evidence, exhibit GG. This deliberative process is not to be ignored. . . .

"The court did not find its own facts or tell the jury to find facts or make its own calculation of damages or even engage in any math . . . rather, the court used the findings made by the jury in their interrogatories. The court simply reminded the jury to confirm their calculation and the math and to follow the instruction of how to transfer their result to the verdict form with respect to the damages figure and any setoff figure found. If the result of that math was a zero or negative number, the jury was to follow the instructions as to how to apply that result to the verdict form. Once the jury returned to their deliberations and reviewed the calculation, they reasonably and logically concluded that the math result of their findings was a negative number. This is reflected in their own hand where they had written the negative number on the interrogatories form. The jury applied the setoff that it found to apply based on the evidence they found in a manner consistent with the instructions and the charge that had been vetted with the parties in advance and returned a defense verdict as to count three, along with a defense verdict on the other six counts. That verdict was accepted by the court.

"The verdict does not shock the conscience, it is not unreasonable. The jury listened to the evidence and chose to credit the testimony and evidence presented by the plaintiff with respect to the second mortgage breach and the plaintiff's lost opportunities to refinance or sell the property. . . . They then assigned a specific

amount of damages that they found proven. Given the dates, figures, and testimonial evidence submitted, the court cannot determine that these findings are unreasonable to require the verdict be directed or set aside.

"Considering the unchallenged special defense pleading of setoff, the various discussions on the record and the evidence presented at trial, including admissions/concessions by the plaintiff and various financial documents submitted as full exhibits, it is entirely logical and understandable that the jury would consider a potential setoff. The jury appears to have paid extremely close attention to the evidence in this regard, even citing an exhibit in their interrogatories as the source of their offset amount. . . .

"[T]he totality of the verdict and the answers to interrogatories reflect an appropriate and thoughtful review of the evidence presented and a following of the law given through the charge. . . . By finding certain breaches of the settlement agreement without any damages as well as other breaches with specific damages, the jury did exactly what the parties asked them to do. . . .

"At this juncture, it appears that these experienced litigators and parties seek to undo the result of the litigation that they collectively framed and presented simply because they are displeased with certain aspects of the results. The parties presented their respective cases and made their arguments to the jury. The jury applied the law to the facts found. The jury exhibited a fidelity to their oath that is laudable and there is no basis for their work and their verdict to be undone by this court. As such, the defendant's motions for directed verdict . . . and the plaintiff's motions to set aside the verdict and for judgment notwithstanding the verdict are denied . . . .

"The court finds that the jury made no mistake in the calculation of their final verdict and that the jury applied the setoff, that they found to have been proven, appropriately. As such, there [are] no grounds for the court to grant the plaintiff's motion for additur, and it is denied.

"The court does not consider the motion [to consolidate] to be an appropriate remedy . . . to the . . . motions as suggested by the plaintiff. . . . Retroactively moving to consolidate postverdict and seeking to apply a portion of the verdict as opposed to the entire verdict to another pending case does a disservice to this jury and their complete verdict. As such, the court will decline the invitation to incorporate [the motion to consolidate] into its remedies or rulings on these motions. Rather, that motion . . . will stand alone and be referred to the presiding civil judge for due consideration." (Citations omitted; footnote omitted.)

The court, *Genuario*, *J.*, held a remote hearing on the plaintiff's motion to consolidate on December 19, 2022. That same day, the court issued a written order denying the motion "for several reasons," though primarily because the motion was "untimely." This appeal followed.[3]

I

On appeal, the plaintiff claims that the trial court erred in denying his motion to set aside the verdict and motion for judgment notwithstanding the verdict "to the extent that the verdict awarded no damages to the plaintiff." More specifically, the plaintiff claims that the court improperly concluded that (1) "the defendant's

[3] After filing the appeal, the plaintiff filed a motion for articulation, which Judge Clark denied on March 7, 2023, without comment. The plaintiff filed a motion for review, requesting that this court order the trial court to articulate the bases of its decision denying his posttrial motions. This court granted review but denied the relief requested therein.

claimed setoff could properly be plead[ed] and prosecuted as a defense," (2) the defendant's material breach of the settlement agreement did not discharge the plaintiff from his obligations under the settlement agreement, and (3) "the plaintiff's testimony that he owed the defendant an amount of money on the loan was a judicial admission." We conclude that the plaintiff's claims are unpreserved and, therefore, decline to review them.

Practice Book § 16-20 provides in relevant part: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. . . ." Accordingly, "a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given. . . . Thus, the essence of the preservation requirement is that fair notice be given to the trial court of the party's view of the governing law and of any disagreement that the party may have had with the charge actually given." (Internal quotation marks omitted.) *Champeau* v. *Blitzer*, 157 Conn. App. 201, 207 n.5, 115 A.3d 1126, cert. denied, 317 Conn. 909, 115 A.3d 1105 (2015).

It is well settled that "we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. . . . This same principle requires parties to raise an objection, if possible, when there is still an opportunity for the trial court to correct the proposed error." (Internal quotation marks omitted.) *Tomick* v. *United Parcel Service, Inc.*, 135 Conn. App.

589, 619, 43 A.3d 722, cert. denied, 305 Conn. 920, 47 A.3d 389 (2012), and cert. denied, 305 Conn. 920, 47 A.3d 389 (2012). "Raising that objection as an issue for the first time in a motion to set aside the verdict, obviously does not allow such a possibility because the jury has been excused. When we speak of correcting the claimed error, we mean when it is possible during that trial, not by ordering a new trial. We do not look with favor on parties requesting, or agreeing to, an instruction or a procedure to be followed, and later claiming that that act was improper." *Powers* v. *Farricelli*, 43 Conn. App. 475, 478, 683 A.2d 740, cert. denied, 239 Conn. 954, 688 A.2d 326 (1996); see also *Herrera* v. *Madrak*, 58 Conn. App. 320, 325, 752 A.2d 1161 (2000) ("to preserve for appeal a claimed error in the trial court's charge to the jury, a party must take an exception when the charge is given that distinctly states the objection and the grounds therefor" (internal quotation marks omitted)).

The plaintiff first contends that the court improperly concluded that the setoff defense "could properly be plead[ed] and prosecuted as a defense" because the debt is contingent, and it is not independent of the plaintiff's claims.

In the present case, there is no dispute that the plaintiff was on notice of the defendant's setoff defense because the defendant asserted it in its initial answer and special defenses and specifically requested an instruction on the issue in its request to charge. The plaintiff, however, never sought to challenge the legal sufficiency of that defense by filing a motion to strike in accordance with our rules of practice. Nor did the plaintiff distinctly raise his claim that the setoff defense was invalid because the debt is contingent and arises from the same transaction prior to the submission of the case to the jury.

On the first day of evidence, although the court initially disagreed with the defendant's request to charge on the setoff defense, and the plaintiff's counsel expressed agreement with the court's position at that time, the court made clear that it was expressing its preliminary thoughts only, and the defendant's counsel maintained that he intended to present evidence on that defense at trial. Ultimately, when the defendant's request for a setoff instruction was discussed again during the charging conference, although Attorney Silverstein questioned the fairness of instructing the jury as to setoff while not allowing the plaintiff to assert damages arising from his release of his claims in the two federal lawsuits against the defendant, he did not claim that it was improper because the alleged debt was not independent of the plaintiff's breach of contract claims. In fact, rather than arguing that the setoff was invalid on the ground that it was not independent of the plaintiff's claims, Attorney Silverstein argued that setoff was improper because the foreclosure action is a separate proceeding. See, e.g., *State* v. *Alvarez*, 209 Conn. App. 250, 252 n.2, 267 A.3d 303 (2021) (when party makes different argument on appeal than at trial, claim is unpreserved), aff'd, 346 Conn. 530, 292 A.3d 1 (2023).

Furthermore, when discussing the interrogatories that clearly set forth how the jury was to apply any setoff based on their answers, the plaintiff's counsel again failed to object to the setoff on the ground that it was not independent of the plaintiff's claims. In fact, not only did the plaintiff's counsel not object to the inclusion of the setoff defense in the interrogatories, but Attorney Ferranti noted his partial agreement with the framing of that issue when he stated: "If the difference is zero, you must enter a verdict—a verdict in favor of the defendant, *is fine*. I do believe a negative number would still be valid because it would be a setoff

even though it doesn't [rise] above what is owed, that number should be subtracted from what is owed." (Emphasis added.)

Accordingly, the plaintiff had every opportunity to challenge the validity of the defendant's setoff defense, either by filing a motion to strike or by objecting to the charge and interrogatories on that basis, but he failed to do so. Instead, he waited until the jury had reached its verdict before claiming that the defendant's setoff was improper because it did not arise from an independent transaction. "Raising that objection as an issue for the first time in a motion to set aside the verdict, obviously does not allow [the trial court to correct the proposed error] because the jury has been excused." *Powers* v. *Farricelli*, supra, 43 Conn. App. 478.

Although the plaintiff contends that the court improperly concluded that he waived his challenge to the setoff defense, during oral argument before this court, his appellate counsel conceded that, because the plaintiff failed to take an exception to the inclusion of either the setoff charge or the setoff interrogatories, his claim challenging that defense is unpreserved. Consequently, because the plaintiff did not preserve his challenge to the setoff, we decline to review it on appeal. See, e.g., *Barrese* v. *DeFillippo*, 45 Conn. App. 102, 104, 694 A.2d 797 (1997) ("Our review of the record reveals that the defendant first raised the claim of inconsistency in his motion to set aside the verdict. The defendant never undertook to require the plaintiff to choose between negligence and intentional battery and assault, did not except to the jury charge, and, in fact, submitted jury verdict forms and interrogatories based on the plaintiff's allegations of both negligence and intentional tort. Because the defendant's claim was not properly preserved, we decline to review it." (Footnote omitted.)).

Likewise, the plaintiff failed to preserve his claim that the defendant's material breach of the settlement

agreement necessarily discharged his obligations under the loan modification agreement by failing to submit a written request to charge or proposed jury interrogatories on the issue and by agreeing to the submission of interrogatories to the jury that plainly allowed it to find both that the defendant materially breached the settlement agreement and that the plaintiff was indebted to the defendant pursuant to his loan obligations. The interrogatories specifically required that the jury determine whether the defendant's alleged breach of the settlement agreement was "a material breach" and, if the plaintiff proved his damages as to that material breach, whether "the defendant [had] proven that the plaintiff owes it mon[eys] due to the plaintiff's ongoing default in his loan obligations." If the plaintiff believed that the jury's finding that the defendant's material breach of the settlement agreement necessarily excused his "ongoing default in his loan obligations," then he should have distinctly raised that claim by objecting to those interrogatories. Our review of the record reveals that the plaintiff, however, expressed no disagreement with this portion of the interrogatories, and "[w]e may presume from the plaintiff's repeated failure to object to the interrogatories that he agreed to their content and their submission to the jury." *Mokonnen* v. *Pro Park, Inc.*, 113 Conn. App. 765, 770–71, 968 A.2d 916 (2009). Accordingly, we decline to review this unpreserved claim as well.[4]

[4] The plaintiff also claims that, "[b]y instructing the jury to mark the damages award to zero, the court impermissibly found a fact that was within the province of the jury because it effectively reversed the jury's decisions that the defendant's breaches were material." The plaintiff argues that, "although the court instructed the jury to set off the plaintiff's damages according to what it believed to be the legal effect of the defendant's claim for setoff, the actual legal effect of the material breach found by the jury compelled the court to conclude that the plaintiff's obligations under the modified mortgage were discharged. By instructing the jury to the contrary, the court effectively negated their findings as to material breaches of the defendant." Although the plaintiff briefed this subclaim separately, he simply restates his unpreserved challenges to the court's setoff charge and the related interrogatories, which we decline to review.

Finally, the plaintiff claims that the court improperly concluded that his testimony that he owed the defendant more than $3 million was a judicial admission that supported the jury's finding as to the defendant's setoff because that admission is a "legal [conclusion] which . . . a layman could not be qualified to make." The problem, however, is that his counsel neither objected to the questions about the debt posed by the defendant's counsel nor moved to strike the plaintiff's responses as to the amount of the debt. As a result, his claim is unreviewable. See *State* v. *Heriberto M.*, 116 Conn. App. 635, 641, 976 A.2d 804 ("[t]he defendant's failure to object to the admission of [the] testimony [at issue] renders his claim unpreserved and unreviewable"), cert. denied, 293 Conn. 936, 981 A.2d 1080 (2009).

II

Next, the plaintiff claims that the court improperly precluded him from presenting evidence of damages incurred after November, 2014, when he transferred title to the property to the SFK Trust. We conclude that the plaintiff's evidentiary claim is not reviewable.

"A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or *without prejudice to its later renewal*, or may reserve decision thereon until a later time in the proceeding. Practice Book § 42-15. This court has said that [t]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Emphasis in original; internal quotation marks omitted.) *State* v. *Patel*, 186 Conn. App. 814, 843, 201

A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019).

Practice Book § 60-5 provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, *and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling* thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same. . . ." (Emphasis added.)

Consistent with these rules of practice, it is well settled that an appellate "court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . *Once counsel states the authority and ground of* [*the*] *objection, any appeal will be limited to the ground asserted.* . . . [T]hese requirements are not simply formalities. [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party. . . . Thus, because the essence of preservation is fair notice to the trial court, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on

appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018).

As previously noted in this opinion, before trial, the defendant filed a motion in limine seeking to preclude the plaintiff from presenting evidence of damages he allegedly incurred after November, 2014, when he was no longer the owner of the subject property. The court granted the motion in limine without prejudice on May 20, 2022. On appeal, the plaintiff claims that the court erred in granting the defendant's motion in limine "despite the representation of [the] plaintiff's counsel that the trust agreement allows the plaintiff to access the equity in the property and therefore should be admitted as an exhibit . . . [and] the plaintiff testified that under the terms of the trust, he still had access to the funds of the trust and received reimbursements from the trust from the rental of the property . . . . In fact, [the] defendant's counsel admitted as much by eliciting this testimony on cross examination . . . .

"The plaintiff therefore did suffer damages after the conveyance of legal title to the trust in November, 2014. The beneficiary of a trust has an equitable interest or title that is legally cognizable . . . . [T]he plaintiff therefore should have been permitted to introduce evidence that the damages to his credit arising from the defendant's failure to release the lis pendens and second mortgage continued past the date of conveyance to the trust and that the plaintiff's interest in the property gave him the ability to sell or refinance the property or rent it. In addition, he should have been able to show evidence that the damage to his credit prevented him from obtaining gainful employment." (Citations omitted.)

Initially, we note that the record is bereft of any arguments that the plaintiff made in opposition to the

defendant's motion in limine because he neither filed a written objection nor requested the May 20, 2022 transcript of the hearing on that motion for his appeal. Accordingly, the record does not reflect that the plaintiff distinctly raised the claim that he now advances on appeal in opposition to the defendant's motion in limine. See Practice Book § 61-10 (a) ("[i]t is the responsibility of the appellant to provide an adequate record for review"); Practice Book § 63-8 (a) ("[w]ithin ten days of filing an appeal, the appellant shall . . . order . . . the transcript of the parts of the proceedings not already on file that the appellant deems necessary for the proper presentation of the appeal").

Moreover, although the plaintiff attempts to marshal the purportedly "uncontroverted and admitted evidence" as to the plaintiff's alleged "beneficial ownership" of the property to support his claim on appeal that the court should have allowed him to present "evidence of [his] rights under the trust and damages suffered after the conveyance," he fails to identify any attempt to seek a definitive ruling from the court on the basis of that evidence. Indeed, in arguing that the court granted the motion in limine "despite the representation of the plaintiff's counsel" as to the nature of the trust, the plaintiff relies on a representation that was made on the first day of trial, more than one month *after* the court granted the defendant's motion in limine. Specifically, the plaintiff directs this court's attention to the following exchange between the trial court and the plaintiff's counsel before the start of trial:

"[Attorney Silverstein]: [F]rom my understanding, you want to limit this case from 2011 when it was breached to today because we're claiming the breach is ongoing. Fair enough?

"The Court: Fair enough. Also understanding the transfer of property in 2014 and that motion in limine.

"[Attorney Silverstein]: We haven't really reached that on—are you saying that 2012 to 2014 is where I'm—my damages end?

"The Court: There's a line at [2014], *at the moment* based upon the transfer of property based on the prior rulings, *so as we sit here right now, that is a line.*

"[Attorney Silverstein]: Right.

"The Court: With respect to damages.

"[Attorney Silverstein]: But with the understanding that when we produce what we intend to produce, the trust agreement which is no different than the others, other than different characters, and if it allows him to access the equity or sell the property on behalf of the trust, then that's a completely different parameter.

"The Court: I'm not sure it's a completely different parameter, but depending on how the evidence goes—

"[Attorney Silverstein]: Well—

"The Court: —we may need to revisit certain dates and time and whatnot, but *based on where we are today and based on the motions and the rulings*, there was a transfer of the property, I believe it was November of 2014—

"[The Defendant's Counsel]: Yes.

"The Court: —and so, at the moment, there is no discussion or evidence of damages associated with the ownership of that property by [the plaintiff] from that transfer forward because the entity it was transferred to is not a party to this case.

"[Attorney Silverstein]: But I don't want to run afoul to the court's ruling because it was my intention to argue on opening that should you hear evidence that the damages are ongoing after this issue of whether the property still remained in the condition where [the

plaintiff] could access it, that is something that you can also consider, but only if the judge—

"The Court: Well, there won't be an opening, so we won't have that problem.

"[Attorney Silverstein]: I'm not going to be able to open?

"The Court: No. But as we get to evidence, I think as we discussed in the motion in limine, the—to the extent there's damages that occurred between breach and the sale in 2014, that any of those damages continue on. I think that's fair game. *But to the extent that there's damages associated with the property and the owner of that property post the transfer of that property, that's where the cut off would be pursuant to those rulings as we sit here right now.*

"[Attorney Silverstein]: Your Honor, with all due respect, you know, I know that you are concerned that I will deviate from your order, but I can assure you that over lunchtime, I confined myself just to what happened in 2011 on. I will cut it off at 2014 with just a simple statement that the judge may instruct you that those damages that we intend to show my client incurred from 2011 to 2014 may in fact be ongoing. That was all I was gonna say. . . . I think it would be helpful." (Emphasis added.)

This exchange demonstrates that the plaintiff's counsel never sought "a definitive ruling [when the evidence was offered at trial] in [compliance] with the requirements of our court rules of practice for preserving his claim of error . . . ." (Internal quotation marks omitted.) *State* v. *Patel*, supra, 186 Conn. App. 844. To the contrary, it appears to demonstrate counsel's acquiescence to the court's preliminary "without prejudice" ruling on the motion in limine, as counsel ends the exchange by stating, "I will cut it off at 2014, with just

a simple statement that the judge may instruct you that those damages that we intend to show my client incurred from 2011 to 2014 may in fact be ongoing."

Consequently, because the record does not reflect that the plaintiff distinctly raised his evidentiary claim in opposing the defendant's motion in limine before trial or at any point during the trial, we conclude that the plaintiff has not preserved his claim for appellate review. See *State* v. *Patel*, supra, 186 Conn. App. 844 ("[h]aving not taken advantage of the court's offer and having not objected at the time the evidence was offered, the defendant has not preserved this evidentiary issue for appellate review"). Therefore, we will not review it.

III

The plaintiff also claims that the court improperly denied his motions to set aside the verdict as inadequate and for additur. The plaintiff argues that "[t]he jury's determination that the plaintiff's damages for breach of the settlement agreement were only $350,000 was clearly against the weight of the evidence" and that the court "should have found the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law . . . and set aside the verdict and grant a new trial as to any consequential and incidental damages in addition to the $350,000 that the jury found for the plaintiff . . . ." (Internal quotation marks omitted.) We conclude that the court did not abuse its discretion in denying the plaintiff's postverdict motions to set aside the verdict as inadequate and for additur.

In considering a motion to set aside the verdict and to order an additur, the trial court must view the evidence in the light most favorable to sustaining the verdict. See *Maldonado* v. *Flannery*, 343 Conn. 150, 166, 272 A.3d 1089 (2022). "The question for the trial court

is not whether the jury exercised poor judgment but, instead, whether the jury's damages award lies outside the range of reasonableness; mere disagreement is not enough to warrant judicial intervention. For this reason, [t]he ultimate test [that] must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . If the verdict cannot be explained rationally, then the trial court may presume that it is tainted by improper considerations. . . .

"We review a decision of the trial court to set aside the jury's verdict and to order an additur for an abuse of discretion. . . . A trial court's decision to set aside a verdict and to order an additur is entitled to great weight and every reasonable presumption should be given in favor of its correctness. . . . The trial court, having observed the trial and evaluated the testimony firsthand, is better positioned than a reviewing court to assess both the aptness of the award and whether the jury may have been motivated by improper sympathy, mistake, partiality, or prejudice. . . .

"The action of a trial judge is no less entitled to weight when he sets aside a verdict, than when he refuses to set it aside; and for the same reasons. He has seen the witnesses, heard their testimony, observed their demeanor on the witness stand, their manner and bearing, their intelligence, character and means of knowledge. And if while all this is fresh in his mind he sets aside a verdict, great weight would naturally be given to his action. . . .

"[O]ur case law involving trial court rulings on motions to set aside a jury's verdict and award of damages as excessive or inadequate . . . reflects a firm

commitment to the belief that we should give great weight to the trial court's exercise of discretion regarding the reasonableness of the jury's verdict." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 166–69.

In the present case, in returning a defendant's verdict on the second count of the plaintiff's complaint, the jury found that the defendant's failure to release the lis pendens until March 2, 2012, constituted a material breach of the settlement agreement but also found that the plaintiff failed to prove that that breach caused him to incur damages due to "negative references with regard to his credit and good name," lost employment opportunities, the loss of "a potential favorable refinance," and lost potential sale of the property. As to the third count, the jury found that the defendant's failure to release the second mortgage until April 21, 2014, constituted a material breach of the settlement agreement and that the plaintiff had proven that he suffered $350,000 in damages due to "lost potential favorable refinance" and "lost potential sale of the property," but rejected his claims for damages for negative references to his credit and good name and for lost employment opportunities.

In denying the defendant's postverdict motions seeking additur, the court specifically noted that "[t]he jury listened to the evidence and chose to credit the testimony and evidence presented by the plaintiff with respect to the second mortgage breach and the plaintiff's lost opportunities to refinance or sell the property. . . . They then assigned a specific amount of damages that they found proven. Given the dates, figures, and testimonial evidence submitted, the court cannot determine that these findings are unreasonable to require the verdict be directed or set aside. . . .

"[T]he totality of the verdict and the answers to interrogatories reflect an appropriate and thoughtful review

of the evidence presented and a following of the law given through the charge. . . . By finding certain breaches of the settlement agreement without any damages as well as other breaches with specific damages, the jury did exactly what the parties asked them to do." (Citations omitted.)

On appeal, the plaintiff argues that "the principal amount of the [modified] loan was $2.9 million, with interest to be charged at 1 percent for the first three years and then 5.12 percent for the remainder of the life of the loan . . . . The monthly mortgage payments would, therefore, rise from $7332 to $13,636 in November, 2014, an increase of $6304 per month, $75,648 per year, and an increase of $2,792,672 over the 443 remaining payments under the term of the mortgage . . . . The increase in payments that would render the plaintiff unable to meet the monthly mortgage payments and the fact that the failure to release the second mortgage prevented a refinance for a more affordable mortgage resulted in damage that is far greater than the $350,000 damages that the jury found." (Citations omitted.) We are not persuaded.

Although the plaintiff focuses on the increase in the mortgage payments as of November, 2014, as the primary basis for the damages he suffered, he ignores the fact that, because he transferred the property to the SFK Trust on November 3, 2014, the court instructed the jury that it could "only award amounts for damages incurred related to the property while [the plaintiff] was actually in title of the property, i.e., before November 3, 2014 . . . ." Given that limited time period during which the plaintiff suffered damages due to his inability to refinance or sell the property, the jury's award of $350,000 "falls somewhere within the necessarily uncertain limits of just damages" and, therefore, that amount does not "compel the conclusion that the jury [was]

influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Maldonado* v. *Flannery*, supra, 343 Conn. 166. We recognize that the plaintiff believes that $350,000 "is clearly inadequate" to compensate him for "the millions of dollars that [he] could have saved, as well as [for] the prevention of the loss of his home." "In the absence of evident mistakes or partiality, however, we defer to the jury's judgment . . . ." *Munn* v. *Hotchkiss School*, 326 Conn. 540, 579, 165 A.3d 1167 (2017). In short, because there is a reasonable basis in the evidence for the jury's verdict, the trial court did not abuse its discretion by denying the plaintiff's motions to set aside the verdict and for additur.

IV

Finally, the plaintiff claims that the court, *Genuario*, *J.*, improperly denied his motion to consolidate this breach of contract action with the pending foreclosure action. We disagree.

We review a court's ruling on a motion to consolidate under the abuse of discretion standard. See *Valentine* v. *LaBow*, 95 Conn. App. 436, 453, 897 A.2d 624, cert. denied, 280 Conn. 933, 909 A.2d 963 (2006). In the absence of "a case of manifest abuse," the court's "exercise of that discretion will not be reversed on appeal . . . ." (Internal quotation marks omitted.) Id.

In denying the plaintiff's motion to consolidate in the present case, the court explained that "this case has already been tried before a jury and a verdict has been rendered. Postverdict motions have been filed and decided by the trial judge. . . . Thus, the purpose of consolidation as set forth in [Practice Book §] 9-5 (a) cannot be achieved, since this case has already been tried and the foreclosure action has not yet been tried. The motion is quite untimely. The plaintiff knew of [the] foreclosure action, at the time he chose to file this

action, at the time he claimed this action for the jury on [July 16, 2021], and at the time this case was tried in the summer of 2022. He did not move to consolidate until after this case had been tried and postverdict motions had been filed. The motion is therefore grossly untimely and serves little purpose in either promoting judicial economy or avoiding contradictory results. Any meaningful attempt to accomplish either would have required, at a minimum, this motion to have been filed before trial. The court sees no purpose in consolidating these cases at this time. Indeed, the court believes that such belated consolidation would only promote confusion in the adjudication of these cases. Finally, the court observes that the motion to consolidate was not filed in the foreclosure action as required by Practice Book § 9-5 (b). For all these reasons, the motion to consolidate is denied." (Citation omitted.)

On appeal, the plaintiff argues that the court abused its discretion in denying his motion to consolidate because: "(a) the trial court mischaracterized the motion to consolidate as a motion to consolidate the case based on the verdict rendered and not on the basis of a new trial that would be granted after reversal on appeal; (b) the two cases contained the same parties; (c) they arose out of the same transaction; (d) the ends of substantial justice would be promoted by having the plaintiff's claims adjudicated in connection with the foreclosure; and (e) judicial economy and the avoidance of inconsistent results would be promoted by the consolidation of the cases."

The plaintiff's arguments ring hollow given that, *after* the defendant initiated the foreclosure action, the plaintiff initiated the underlying action instead of asserting his breach of contract claims in a counterclaim in the foreclosure action. Moreover, the court properly considered the belated nature of the plaintiff's motion to consolidate, as well as the futility of doing so after a

verdict had been returned and after Judge Clark had denied the plaintiff's motion for a new trial. See *Valentine* v. *LaBow*, supra, 95 Conn. App. 454 (finding no abuse of discretion as to denial of defendant's motion to consolidate when "her attempt at consolidation came at the eleventh hour of an action that ha[d] been ongoing since 1979 and would serve only to further delay its resolution"). In light of the procedural history of the case, and given Judge Clark's denial of the plaintiff's postverdict motions, the court's denial of the postverdict motion to consolidate was not an abuse of its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVID D. ROBERTS (AC 45801)

Alvord, Suarez and Westbrook, Js.

Syllabus

Convicted, on a plea of guilty, of the crimes of reckless endangerment in the second degree, threatening in the second degree, and intimidation based on bigotry or bias in the third degree, the defendant appealed to this court. His conviction arose out of an incident in which he aimed a shotgun at individuals renting his neighbor's property, called them racial slurs and told them to get out. The defendant was charged in a second docket with, inter alia, intimidation based on bigotry or bias in the third degree for his actions in calling his neighbor and leaving a voicemail message that intimated future violence if the neighbor again rented the residence to people of color. He elected to enter a plea of guilty to reckless endangerment and threatening in the first docket and intimidation based on bigotry or bias in the second docket. At his plea hearing, the trial court expressed doubt as to the sufficiency of the factual basis for applying the charge of intimidation based on bigotry or bias in the second docket. The state, with the agreement of defense counsel, added the intimidation charge to the first docket, and the defendant was put to plea only in the first docket. The court canvassed the defendant and accepted his guilty plea. The court thereafter denied the defendant's motion to withdraw his plea and rendered a judgment of guilty. *Held*:

1. The trial court correctly concluded that the plea canvass was sufficient; although the court did not restate each of the three constitutional rights delineated in *Boykin* v. *Alabama* (395 U.S. 238), namely, the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers, the defendant was cognizant of those rights prior to entering his guilty plea because he affirmed during the plea canvass that his attorney had fully explained the constitutional rights he was waiving and, thus, his plea was knowingly, voluntarily, and intelligently made.
2. The defendant could not prevail on his claim that, prior to ruling on his motion to withdraw his plea, the trial court improperly failed to hold an evidentiary hearing sua sponte on his ineffective assistance of counsel claim; the defendant failed to meet his burden of showing a plausible reason for the withdrawal of his plea sufficient to justify an evidentiary hearing, as the record of the plea proceeding demonstrated that the defendant had previously been presented with a plea offer that he accepted and that contained the same charges, and the defendant failed to allege that his counsel did not advise him on the charges when he was presented with the previous plea offer.
3. The trial court properly determined that defense counsel did not render ineffective assistance, as the defendant failed to prove the performance prong of his claim; the defendant did not dispute that his counsel provided him with adequate information and advice in connection with the previous plea offer, the record reflected that he understood the factual basis underlying his guilty plea and how those facts supported the charges against him, and the only change to the plea offer was the docket in which the intimidation charge was filed, and the defendant failed to present evidence that his counsel did not previously advise him on possible constitutional concerns of a guilty plea to the intimidation charge.

Argued March 13—officially released August 6, 2024

Procedural History

Substitute information charging the defendant with the crimes of reckless endangerment in the second degree, threatening in the second degree, breach of the peace in the second degree, intimidation based on bigotry or bias in the third degree and harassment in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the defendant was presented to the court, *Keegan*, *J.*, on a plea of guilty to reckless endangerment in the second degree, threatening in the

first degree, and intimidation based on bigotry or bias in the second degree; thereafter, the state entered a nolle prosequi as to the remaining charges; subsequently, the court, *Keegan*, *J.*, denied the defendant's motion to withdraw his plea and rendered judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Michael W. Brown, with whom were *Vishal K. Garg* and, on the brief, *Abigail H. Mason*, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, *Alison Kubas*, assistant state's attorney, and *Danielle Koch*, deputy assistant state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The defendant, David D. Roberts, appeals from the judgment of conviction rendered following the trial court's denial of his motion to withdraw his guilty plea. On appeal, the defendant claims that the court improperly (1) concluded that it had conducted an adequate plea canvass; (2) (a) failed to hold an evidentiary hearing on his ineffective assistance of counsel claim, and (b) concluded that his guilty plea was not the result of ineffective assistance of counsel;[1] and (3) concluded that General Statutes (Rev. to 2019) § 53a-181*l*[2] is not facially unconstitutional. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth by the prosecutor as the factual basis underlying the plea, and procedural

[1] For ease of discussion, we address these claims in a different order from which they were briefed.

[2] We note that the legislature has amended this statute since the events underlying this appeal. See Public Acts 2021, No. 21-78, § 19. All references herein are to the 2019 revision of the statute.

history are relevant to our resolution of this appeal. On September 11, 2020, the defendant approached a group of individuals renting his neighbor's property. During this interaction, he cocked and aimed a shotgun at them while calling them racial slurs and telling them to "get the F out of here." The defendant then called the property owner and left a voicemail message in which, as the prosecutor summarized the message, he stated "that he was going to bring the N-words and Puerto Ricans down, and that the owner of the residence was f-ed, and that the war was on if he found out that there would be more people of color renting at that residence."

The defendant was arrested and charged in two separate dockets. He was charged in the first docket for the incident involving the renters (first docket) with reckless endangerment in the second degree in violation of General Statutes § 53a-64,[3] threatening in the second degree in violation of General Statutes § 53a-62,[4] and breach of the peace in the second degree in violation of General Statutes § 53a-181.[5] In the second docket,

[3] General Statutes § 53a-64 (a) provides: "A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person."

[4] General Statutes § 53a-62 (a) provides in relevant part: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror . . . ."

[5] General Statutes § 53a-181 (a) provides: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, 'public

which pertained to the message he left for the property owner (second docket), the defendant was charged with intimidation based on bigotry or bias in the third degree in violation of § 53a-181*l*,[6] and harassment in the second degree in violation of General Statutes (Rev. to 2019) § 53a-183.[7]

On August 31, 2021, the state conveyed a plea offer to the defendant in the first docket that required a guilty plea to a charge of intimidation based on bigotry and bias in the second degree. When the proposed disposition was presented to the court, the court stated that it would only accept a disposition that included a guilty plea to a least one charge in each docket. The state later extended the defendant a second plea offer pursuant to which he would enter a guilty plea to reckless endangerment in the second degree and threatening in the first degree in violation of General Statutes § 53a-61aa[8]

place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

[6] General Statutes (Rev. to 2019) § 53a-181*l* (a) provides: "A person is guilty of intimidation based on bigotry or bias in the third degree when such person, with specific intent to intimidate or harass another person or group of persons because of the actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or persons: (1) Damages, destroys or defaces any real or personal property, or (2) threatens, by word or act, to do an act described in subdivision (1) of this subsection or advocates or urges another person to do an act described in subdivision (1) of this subsection, if there is reasonable cause to believe that an act described in said subdivision will occur."

[7] General Statutes (Rev. to 2019) § 53a-183 (a) provides: "A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or by any other form of written communication, in a manner likely to cause annoyance or harm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

[8] General Statutes § 53a-61aa (a) provides in relevant part: "A person is guilty of threatening in the first degree when such person . . . (3) commits

in the first docket, and intimidation based on bigotry or bias in the second docket. In return for his guilty pleas, the state would agree to a sentence of six years of incarceration, execution suspended after one year, and three years of probation. The defendant would retain the right to argue for a term of incarceration as short as six months.

On January 14, 2022, the defendant appeared before the court to plead guilty under the *Alford* doctrine[9] in accordance with the second plea offer. During the hearing, however, the court, *Keegan*, *J.*, expressed doubt about the sufficiency of the factual basis for applying the charge of intimidation based on bigotry or bias to the second docket. The state offered to instead put the defendant to plea on the charge of intimidation based on bigotry or bias in the first docket and defense counsel agreed to this change. The defendant was therefore put to plea in only the first docket. The defendant pleaded guilty under the *Alford* doctrine to reckless endangerment in the second degree and threatening in the first degree and entered a straight guilty plea to intimidation based on bigotry or bias. The following colloquy occurred, in relevant part, during the plea canvass:

"The Court: Okay. So, what they're going to do is, they're going to change that guilty plea on the intimidation in the third degree to the original file, everything that happened with the renters. So, with that factual understanding, what is your plea, guilty or not guilty?

"The Defendant: Guilty.

threatening in the second degree as provided in section 53a-62, and in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a pistol, revolver, shotgun, rifle, machine gun or other firearm . . . ."

[9] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

"The Court: All right, I'm going to ask you questions now about the plea. Any questions you don't understand, or you need to speak to your attorney, please let me know. . . .

"All right, sir. Have you had enough time to speak with your lawyer about your case and your decision to plead guilty to the intimidation charge, and guilty under the *Alford* doctrine to the charges of reckless endangerment and threatening in the first degree?

"The Defendant: Guilty.

"The Court: Do you understand?

"The Defendant: Yes.

"The Court: My question is do you understand? Have you had enough time?

"The Defendant: Yes.

"The Court: All right. And did you review with your attorney all the facts that led to your arrest on all three of those charges?

"The Defendant: Yes.

"The Court: And you understand the day we're talking about, that these charges led to, right?

"The Defendant: Yes.

"The Court: All right. Now, did your attorney go through with you the elements of each crime? What the state has to prove in order for someone to be found guilty of that crime?

"The Defendant: Yes.

"The Court: And do you understand how the facts recited by the prosecutor support, they meet the legal burden for each of those crimes?

"The Defendant: Yes.

"The Court: With respect to the intimidation, you do admit your guilt upon that charge, correct?

"The Defendant: Yes.

"The Court: And with respect to the other two charges, you don't agree with all the factual bas[es], but you do not want to take this to trial. You do understand that the state has sufficient evidence to prosecute you and therefore you want to enter into a plea agreement, is that fair to say?

"The Defendant: Yes.

"The Court: Is that the reason you're entering your plea under the *Alford* doctrine?

"The Defendant: Yes.

"The Court: Thank you. Did your attorney explain to you all the constitutional rights that you give up today, because of your plea?

"The Defendant: Yes.

"The Court: All right, and did anyone force you in any way to cause you to enter your pleas today?

"The Defendant: No.

"The Court: Are you doing so voluntarily?

"The Defendant: Yes.

"The Court: And did you take anything today that interferes with your ability to understand what you're doing in court?

"The Defendant: No.

"The Court: Are you satisfied with your lawyer's representation of you?

"The Defendant: Yes.

* * *

"The Court: All right. All right, once I accept your pleas, sir, you will not be able to take them back unless you have a valid, legal reason to do so. So, you need to be sure today that this is how you want to resolve . . . your case. Are you sure about that?

"The Defendant: Yes.

"The Court: All right . . . . Either attorney know of any reason the court should not accept the pleas?

"[The Prosecutor]: No, Your Honor.

"[Defense Counsel]: No, Your Honor. Thank you.

"The Court: The court will accept the pleas, find them knowingly and voluntarily made with the assistance of competent counsel. There is a factual basis, plea is accepted. Findings of guilty may enter." The court thereafter continued the matter to April 13, 2022, for sentencing.

After the entry of the guilty plea, but before the scheduled sentencing hearing, the defendant, through substitute counsel, filed a motion to withdraw his guilty plea.[10] In his motion, he claimed that his plea was invalidly entered because (1) the court did not specifically identify the constitutional rights that the defendant waived by entering his guilty plea and, thus, conducted an inadequate plea canvass, (2) defense counsel failed to properly consult with or advise him prior to accepting a change in the plea agreement, and (3) his guilty plea to the intimidation charge was a result of ineffective assistance of counsel. The defendant requested an evidentiary hearing only as to the ineffective assistance of counsel claim.

[10] The defendant initially filed the motion to withdraw his guilty plea on April 11, 2022. On August 15, 2022, he filed a "renewed" motion to withdraw his guilty plea in which he set forth additional arguments.

On September 9, 2022, the court held a hearing on the defendant's motion to withdraw his plea. During the hearing, the defendant, through substitute counsel, argued that his plea canvass was insufficient to establish that his plea was made knowingly, voluntarily, and intelligently. He argued that the plea canvass regarding the constitutional rights waived by the plea was too general and that "there needs to be a canvass on the specific bundle of rights that a defendant is waiving . . . ." The defendant additionally argued that his guilty plea to the intimidation charge was uncounseled because his prior attorney agreed to change the defendant's plea on the intimidation charge in the middle of the hearing without first consulting with him. He argued that, given the circumstances, it was "impossible that there had been an actual discussion between [the defendant] and his attorney about what this new package offer was, as it was happening live on the record in front of the court." He last argued that defense counsel provided ineffective assistance of counsel because he had failed to explain to the defendant how the new factual basis supported the intimidation charge. He argued that there was "no indication that [he] understood . . . the first amendment issues that were raised by the factual basis that [was] offered" and that his attorney was therefore ineffective. In connection with this claim, the defendant argued that § 53a-181*l* unconstitutionally punished speech. Although the defendant had requested an evidentiary hearing in his motion, he did not request, during the scheduled hearing, to present evidence or request that the court hold an evidentiary hearing.

The state countered that, although the court did not list the three core constitutional rights delineated in *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), in its canvass of the defendant, substantial compliance, rather than strict compliance,

is required under our Supreme Court's holding in *State* v. *Badgett*, 200 Conn. 412, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). It further argued that the record shows that the defendant's plea was made knowingly, voluntarily, and intelligently because the court "repeatedly asked the defendant if he was [pleading guilty] voluntarily [and] asked the defendant if his attorney had gone over all of his constitutional rights that he was giving up by doing the plea." Additionally, the state argued that the record was clear that defense counsel had previously discussed the disposition of the case with the defendant because "that disposition had actually been contemplated and was going forward [in an earlier court proceeding]. That counsel had already prepared the defendant for that plea deal, and but for the judge not accepting that offer . . . and wanting it to be changed to the new disposition which involved [a plea] in all [the] files it would have gone forward with the plea and the sentencing that date." The state last argued that the defendant's first amendment claim was not a proper ground on which the defendant could base his motion to withdraw his guilty plea.

At the end of the hearing, the court denied the defendant's motion, concluding that the plea canvass substantially complied with the requirements of Practice Book § 39-19[11] and that there was no ineffective assistance of counsel. The court additionally concluded that

[11] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands:

(1) The nature of the charge to which the plea is offered;

(2) The mandatory minimum sentence, if any;

(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

(5) The fact that he or she has the right to plead not guilty or to persist

"the factual basis presented at the time of the plea [was] sufficient for [§ 53a-181*l*] and . . . does not violate our . . . constitution." The defendant was then sentenced to a total effective sentence of six years of incarceration, execution suspended after nine months, followed by three years of probation.[12] This appeal followed.

We begin by setting forth the following standard of review and relevant legal principles. "Practice Book § 39-26 provides in relevant part: A defendant may withdraw his or her plea of guilty . . . as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in [Practice Book §] 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed.

"[O]ur standard of review is abuse of discretion for decisions on motions to withdraw guilty pleas brought under Practice Book § 39-27. . . . [Section 39-27] specifies circumstances under which a defendant may withdraw a guilty plea after it has been entered.[13] [O]nce

in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

[12] The state nolled the remaining charges in the second docket.

[13] Practice Book § 39-27 provides: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with Section 39-19;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed;

"(3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered;

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

"(6) The plea either was not entered by a person authorized to act for

entered, a guilty plea cannot be withdrawn except by leave of the court, within its sound discretion, and a denial thereof is reversible only if it appears that there has been an abuse of discretion. . . . The burden is always on the defendant to show a plausible reason for withdrawal of a plea of guilty. . . .

"In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Footnote altered; internal quotation marks omitted.) *State* v. *Lynch*, 193 Conn. App. 637, 657–58, 220 A.3d 163 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020).

I

The defendant first claims that the court improperly concluded that it conducted an adequate plea canvass. He argues that the plea canvass was inadequate because the record of the canvass does not indicate that the defendant expressly waived the following three constitutional rights enumerated in *Boykin* v. *Alabama*, supra, 395 U.S. 243: the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. He contends that, in the absence of an express waiver of each right, the plea canvass is insufficient to demonstrate that he understood that his guilty plea waived these fundamental constitutional rights, and that his guilty plea was therefore invalid because it was not knowingly, voluntarily, and intelligently made. The state counters that the court properly concluded that the canvass was adequate because "the

a corporate defendant or was not subsequently ratified by a corporate defendant."

plea canvass expressly included the defendant's affirmative answer to the question '[d]id your attorney explain to you all the constitutional rights that you give up today, because of your plea' " and the defendant failed to offer any evidence that his counsel failed to explain the constitutional rights that were waived. The state argues that "the plea canvass here, as a whole, satisfied the requirements of *Boykin* in demonstrating a knowing and voluntary guilty plea" and substantially complied with the requirements of Practice Book § 39-19 (5). We conclude that the record, read as a whole, demonstrates that the defendant's plea was knowingly, voluntarily, and intelligently made.

"Several federal constitutional rights [as enunciated in *Boykin* v. *Alabama*, supra, 395 U.S. 243] are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination . . . [s]econd, is the right to trial by jury . . . [t]hird, is the right to confront one's accusers. . . .[14] Further, under the Connecticut rules of practice, a trial judge must not accept a plea of [guilty or] nolo contendere without first addressing the defendant personally and determining that the plea is voluntarily made under Practice Book § [39-20] and that the defendant fully understands the items enumerated in Practice Book § [39-19]." (Footnote in original; internal quotation marks omitted.) *State* v. *Hurdle*, 217 Conn. App. 453, 473, 288 A.3d 675, cert. granted, 346 Conn. 923, 295 A.3d 420 (2023).

Our Supreme Court stated in *State* v. *Badgett*, supra, 200 Conn. 420, that "[l]iteral compliance [with the precise language of *Boykin*] is *not* constitutionally

[14] "The same rights are guaranteed under our state constitution in article first, § 8, as amended by article seventeen of the amendments. See *State* v. *Suggs*, 194 Conn. 223, 227 n.3, 478 A.2d 1008 (1984)." *State* v. *Hurdle*, 217 Conn. App. 453, 473 n.16, 288 A.3d 675, cert. granted, 346 Conn. 923, 295 A.3d 420 (2023).

required." (Emphasis in original.) In *Badgett*, the defendant claimed that the court had not properly informed him that his guilty plea operated as a waiver of his right to a trial by jury. The defendant argued that, during the plea canvass, the court asked him only if he was " 'giving up [his] right to trial at this present time,' " without specifically referencing the right to a *jury* trial. Id., 419. The court reasoned that, "[a]lthough *Boykin* requires that relinquishment of the right to a trial by jury must be evident and cannot be presumed from a 'silent' record . . . the trial court's express mention of waiver of the right to *trial*, combined with the defendant's prior election for a jury trial, his experience with criminal proceedings and apparently adequate representation by counsel," rendered the plea canvass constitutionally sufficient. (Emphasis in original.) Id., 419–20.

The purpose of the plea canvass, as articulated by the United States Supreme Court in *Boykin*, is to "make certain [the accused] has a full understanding of what the plea connotes and of its consequence so that there is an adequate record for review. The plea of guilty by the defendant must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . A plea of guilty is in effect a conviction and the equivalent of a finding of guilty by a jury and a court should not allow a defendant to enter such a plea until the court is satisfied that it is freely made and that the party making it understands its purport and effect." (Citation omitted.) *State* v. *Bugbee*, 161 Conn. 531, 534, 290 A.2d 332 (1971).

"[The Supreme Court] indicated in *Consiglio* v. *Warden*, 160 Conn. 151, 164, 165, 276 A.2d 773 [1970], that the rule in *Boykin* v. *Alabama*, [supra, 395 U.S. 238], does not render invalid a conviction based on a guilty plea when there were facts in the record on the basis of which a reasonable presumption could be made that the plea was intelligent and voluntary. The record in

the *Consiglio* case . . . disclosed that the plaintiff was questioned at length by the trial judge and it was ascertained that his plea was made after a discussion with the public defender. The trial judge also ascertained from [the plaintiff] the factual basis of the charge that he was a third offender. These factors, in conjunction with several others, led the court to conclude . . . that the record in the case was not 'a silent record.' " (Citations omitted.) *State* v. *Bugbee*, supra, 161 Conn. 535.

Our Supreme Court concluded in *State* v. *Bugbee*, supra, 161 Conn. 534–36, that *Boykin* was not satisfied when the court did not ask questions about the defendant's waiver of his constitutional rights, but, rather, just asked the defendant how he pleaded to the charges without any further inquiry. Id. The court reasoned that, because "[t]he record in the present case does not reveal any facts from which a reasonable conclusion could be drawn that the plea was intelligent and voluntary," and because "[n]othing was ascertained from the defendant regarding his plea and the court did not inquire into the factual basis of the plea"; id., 535; that, therefore, "[t]he record in [that] case [could] be characterized as a 'silent record' and [did] not comply with constitutional standards as determined in the *Boykin* case." Id., 535–36.

In the present case, the court specifically asked the defendant if "[his] attorney explain[ed] to [him] all the constitutional rights that [he] [gave] up today, because of [his] plea?" The defendant responded, "*Yes*." (Emphasis added.)

It is reasonable to conclude from the record as a whole that, although the court did not restate each of the three *Boykin* constitutional rights during the plea canvass, the defendant was cognizant of these rights prior to entering his guilty plea because he affirmed during the plea canvass that his attorney had fully

explained the constitutional rights he was waiving. The defendant does not argue that his attorney did *not* explain the three constitutional rights enumerated in *Boykin* to him but simply alleges that, because the three rights were not explicitly outlined by the court during the plea canvass, it is not apparent that his waiver of these rights was made knowingly, voluntarily and intelligently.

Boykin does not require any specific canvass, or talismanic words, but rather holds only that the court "cannot presume a waiver of [the] three important federal rights *from a silent record*." (Emphasis added.) *Boykin* v. *Alabama*, supra, 395 U.S. 243. In the present case, the record is not silent. Like the record in *Consiglio* v. *Warden*, supra, 160 Conn. 164, the record here reflects that the judge questioned the defendant at length, including questions in which the defendant affirmed that he was voluntarily pleading guilty, and that he was "sure today that this is how [he] want[ed] to resolve [his] case". It is therefore apparent from the record that the defendant understood all the implications of his guilty plea and, nevertheless, was certain that he wanted to plead guilty. The court additionally asked the defendant's counsel whether he knew of any reason that the court should not accept the defendant's guilty plea, and his counsel affirmed that he did not. Taken as a whole, therefore, the record of the plea canvass shows that the defendant's guilty plea was made knowingly, voluntarily and intelligently.

Our Supreme Court consistently has concluded that the lack of an on the record discussion between the trial court and a defendant with respect to each of the constitutional rights being waived does not itself render a defendant's decision to waive those rights unknowing, involuntary, or unintelligent. See *State* v. *Shockley*, 188 Conn. 697, 710, 453 A.2d 441 (1982) (holding that there is no constitutional requirement that trial judge advise

defendant of each right that defendant gives up by pleading guilty by name and that "[t]he true substantive question is whether the election was in fact intelligently and voluntarily made and the record so demonstrates"); *Blue* v. *Robinson*, 173 Conn. 360, 373–76, 377 A.2d 1108 (1977) (affirming denial of petition for writ of habeas corpus when canvass failed to address any of three *Boykin* rights because record showed "that the court accepted the plea after inquiry and an express finding that it 'was made voluntarily with full knowledge of the charge and of the possible penalties and after the advice of counsel' "); *State* v. *Slater*, 169 Conn. 38, 45–46, 362 A.2d 499 (1975) (affirming denial of motion to vacate guilty plea when canvass failed to address privilege against self-incrimination and right to confront one's accusers). We therefore conclude that, although the court did not discuss on the record each of the three constitutional rights delineated in *Boykin*, it is nevertheless clear from the record as a whole that the defendant's plea was made knowingly, voluntarily and intelligently.[15] Because the record reflects that the defendant had a full understanding of what his guilty plea meant and because he affirmed during the plea canvass that his attorney explained to him the constitutional consequences of his guilty plea, the plea canvass sufficiently establishes that the defendant's plea was made knowingly, voluntarily, and intelligently. Accordingly, we conclude that the court correctly concluded that the plea canvass was sufficient.

II

The defendant next claims that the court erred in not holding an evidentiary hearing with respect to his

[15] We emphasize that, although our case law is clear that the constitutional rights delineated in *Boykin* are validly waived if the record shows that, even where the court did not discuss each of the constitutional rights being waived, the guilty plea was made knowingly, voluntarily and intelligently, the best practice is for a court to individually question the defendant about these rights during the plea canvass so the record is abundantly clear that

ineffective assistance of counsel claim and that the court improperly concluded that his guilty plea to the intimidation charge was not the result of ineffective assistance of counsel. He specifically contends that the court improperly concluded that his counsel's performance was reasonable despite counsel's failure to advise the defendant "on the nature of the charge and how the facts to which he was pleading related to the legal charge" when the charges were changed during the plea hearing. We are not persuaded.

"Almost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible. The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. . . .

"Practice Book § 39-27 (4) provides an explicit exception to this general rule, however, and allows a defendant to withdraw a guilty plea after its acceptance if the plea resulted from the denial of effective assistance of counsel. . . . We recognize, therefore, that the defendant's claim of ineffective assistance of counsel is procedurally correct. Nevertheless, we are mindful that on the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review to situations in which the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further

the defendant is aware of all the constitutional implications of his or her guilty plea.

evidentiary development. We point out, finally, that irrespective of whether a defendant proceeds by way of habeas corpus or direct appeal, our review is the same, and the burden remains on the defendant to produce an adequate record so that an appellate court may ascertain whether counsel's performance was ineffective. . . .

"A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law . . . . Second, there must exist such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance. . . . In addressing this second prong, the United States Supreme Court held in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), that to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . The resolution of this inquiry will largely depend on the likely success of any new defenses or trial tactics that would have been available but for counsel's ineffective assistance. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a [claim of ineffective assistance of counsel]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Lynch*, supra, 193 Conn. App. 658–59.

A

The defendant first argues that the court improperly failed to hold an evidentiary hearing on his ineffective

assistance of counsel claim prior to denying his motion to withdraw his guilty plea. He argues that he had sufficiently questioned defense counsel's performance to warrant an evidentiary hearing and that the court improperly denied his request to hold an evidentiary hearing on this claim. The state counters that the court never precluded the defendant from presenting evidence in support of his claim, and that, even if it had, the court properly declined to hold an evidentiary hearing because the record conclusively establishes that the defendant's motion is without merit. We agree with the state.

"An evidentiary hearing is not required if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . . In considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique. For the purpose of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegations of fact to be true. If such allegations furnish a basis for withdrawal of the plea under [Practice Book § 39-27] . . . and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, then an evidentiary hearing is required. . . .

"An evidentiary hearing is not required if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]." (Citations omitted; emphasis omitted;

internal quotation marks omitted.) *State* v. *Salas*, 92 Conn. App. 541, 544, 885 A.2d 1258 (2005).

"We further observe that there is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea. . . . [T]he administrative need for judicial expedition and certainty is such that trial courts cannot be expected to inquire into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion. To impose such an obligation would do violence to the reasonable administrative needs of a busy trial court, as this would, in all likelihood, provide defendants strong incentive to make vague assertions of an invalid plea in hopes of delaying their sentencing. . . .

"When the trial court does grant a hearing on a defendant's motion to withdraw a guilty plea, the requirements and formalities of the hearing are limited. . . . Indeed, a hearing may be as simple as offering the defendant the opportunity to present his argument on his motion for withdrawal. . . . As one court observed, an *evidentiary* hearing is rare, and, outside of an evidentiary hearing, often a limited interrogation by the [c]ourt will suffice [and] [t]he defendant should be afforded [a] reasonable opportunity to present his contentions." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 837, 189 A.3d 1215 (2018).

For purposes of our analysis here, we first construe the defendant's claim as challenging the court's failure to sua sponte hold an evidentiary hearing. Although the defendant's motion stated that an evidentiary hearing was requested, the defendant did not renew this request during the hearing that followed. In arguing that defense

counsel was ineffective because there was no indication that the defendant understood the possible first amendment implications of the guilty plea as charged, defense counsel mentioned in passing that "maybe an evidentiary hearing would elaborate on this." He did not thereafter request to present evidence.

The defendant did not address his ineffective assistance of counsel claim further after the state pointed to the fact that the disposition had been previously contemplated and the parties had been prepared to go forward with it in an earlier court proceeding. The defendant had an opportunity to respond to the state and argue why an evidentiary hearing was required to clarify whether defense counsel had in fact advised him of the effect of this disposition and to present evidence in support of his assertion that defense counsel nevertheless had failed to advise him of this disposition. The defendant, however, failed to do so. See *State* v. *Hanson*, 117 Conn. App. 436, 454, 979 A.2d 576 (2009) (noting that court had no responsibility to require presentation of evidence), cert. denied, 295 Conn. 907, 989 A.2d 604, cert. denied, 562 U.S. 986, 131 S. Ct. 425, 178 L. Ed. 2d 331 (2010).

We continue the analysis by assuming without deciding that the court was apprised of the fact that that the defendant continued to seek an evidentiary hearing and implicitly denied such hearing in denying the defendant's motion. Even under that assumption, we conclude that the defendant had not met his burden of setting forth sufficient facts to warrant an evidentiary hearing. In support of his motion, the defendant argued to the trial court that, although he answered affirmatively when asked during the plea canvass whether he was advised of the essential elements of the crimes charged, the record clearly demonstrates that counsel failed to properly advise him. He now argues before this court that it was therefore an error for the trial

court to rely on the record of the canvass in denying his motion to vacate his guilty plea without first affording him an evidentiary hearing on the merits of his ineffective assistance of counsel claim.

Reviewing the plea canvass and the record as a whole, we conclude that the defendant did not meet his burden of showing a plausible reason for the withdrawal of his guilty plea sufficient to require an evidentiary hearing. The only reason offered in support of his motion was that the record of the plea hearing clearly established that his counsel failed to advise him on the charges in the new plea deal and therefore clearly showed that his counsel rendered deficient performance. The record of the plea proceeding, however, conclusively refutes the allegations in the defendant's motion because it demonstrates that the defendant had previously been presented with a plea offer that he later accepted and that was the impetus for his guilty plea. The defendant has failed to allege that his counsel did not advise him of the charge when he was presented with the initial plea offer. We accordingly conclude that the defendant failed to set forth sufficient facts to require an evidentiary hearing.

B

The defendant further argues that counsel was ineffective because, at the time of the plea hearing, he did not advise the defendant of the nature of the charge of intimidation based on bigotry or bias to which he was pleading guilty or how the facts relate to that charge and because counsel failed to advise him of possible constitutional concerns with § 53a-181*l*. We are not persuaded.

The record reflects that the first docket included a charge of intimidation based on bigotry or bias as early as August 31, 2021, several months prior to the defendant's plea hearing. The state first made a plea offer

that included a charge of intimidation based on bigotry and bias in the second degree in the first docket. The defendant, through his counsel, acknowledged the state's offer and asked the court for a date by which he could accept or reject the offer. Additionally, during the plea hearing on January 14, 2022, defense counsel stated on the record that the defendant "was originally going to plea[d] [guilty] to intimidation based on bigotry and bias" in the first docket, but that, at the pretrial judge's insistence, the offer was instead amended to include the intimidation charge in the second docket.

The prior plea offer required the defendant to plead guilty to the same charge to which he later pleaded guilty. The defendant does not dispute that counsel provided him with adequate information and advice in connection with the prior plea offer. Thus, without any evidence to the contrary, we may presume that counsel provided adequate information and advice to the defendant on which the defendant could make an informed decision as to whether to accept the offer. "[I]t is appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." (Internal quotation marks omitted.) *State* v. *Lopez*, 269 Conn. 799, 802, 850 A.2d 143 (2004); see also *Oppel* v. *Meachum*, 851 F.2d 34, 38 (2d Cir.) ("under *Henderson* v. *Morgan*, [426 U.S. 637, 647, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)] it is normally presumed that the defendant is informed by his attorney of the charges against him and the elements of those charges"), cert. denied, 488 U.S. 911, 109 S. Ct. 266, 102 L. Ed. 2d 254 (1988). We can therefore presume that, prior to the January 14, 2022 plea hearing, defense counsel informed the defendant about the nature of the charge and how the charge applied to the facts.

Moreover, the record reflects that the defendant understood the factual basis underlying his guilty plea

and how those facts supported the charges against him. During his plea canvass, the defendant stated that he had reviewed the facts that led to his arrest on all three charges with his attorney, he understood the day to which the court was referring and how the charges pertained to that day, and his attorney had explained the elements of each charge to him. He additionally affirmed that he was satisfied with the legal advice he received from his attorney after the change to the charges had occurred.

We additionally conclude that the defendant failed to establish that his counsel rendered ineffective assistance by failing to advise him of possible constitutional concerns with § 53a-181*l*. He argues that it must be the case that his counsel failed to advise him of any constitutional concerns implicated by his guilty plea under § 53a-181*l* because the plea offer was changed in the middle of the hearing. As addressed at length previously in part II, however, the prior plea offer was the same offer to which he later pleaded. The only change made to the plea offer was the docket in which the charge of intimidation based on bigotry or bias was filed. The defendant therefore pleaded guilty to the same crime, only under a different docket.

The fact that counsel did not stop to discuss the change in the plea with the defendant *during* the plea hearing does not indicate that counsel did not previously advise the defendant of the possible constitutional concerns of § 53a-181*l*. We therefore conclude that the defendant has failed to meet his burden in showing that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases, and, therefore, conclude that the defendant has failed to prove the performance prong.

Because we conclude that the defendant has failed to prove the performance prong and the failure to prove

either of the two prongs is fatal to a claim of ineffective assistance of counsel; see, e.g., *State* v. *Lynch*, supra, 193 Conn. App. 659; we need not address the prejudice prong. We accordingly conclude that the court properly determined that there was no ineffective assistance of counsel.

III

The defendant finally claims that § 53a-181*l* is facially unconstitutional under the first amendment because it "plainly criminalizes conduct that could not be considered a 'true threat'[16] and does so explicitly on the basis of the viewpoint of the speaker." (Footnote added.) We conclude that the defendant has failed to adequately brief his claim and accordingly decline to review it.[17]

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not

[16] "The first amendment . . . does not protect speech that qualifies as [t]rue threats. . . . True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Parnoff*, 329 Conn. 386, 394, 186 A.3d 640 (2018).

[17] Although the state argues that this claim is not properly before this court because the defendant failed to raise it *prior* to his guilty plea, citing the United States Supreme Court cases of *Class* v. *United States*, 583 U.S. 174, 138 S. Ct. 798, 200 L. Ed. 2d 37 (2018), and *Haynes* v. *United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968), for the proposition that only a *preplea challenge* to the constitutionality of a statute may be raised on appeal, we need not decide this issue because we conclude that the defendant's claim that § 53a-181*l* is facially unconstitutional is inadequately briefed.

merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

The defendant argues in his appellate brief that the statute "plainly criminalizes conduct that could not be considered a 'true threat' and does so explicitly on the basis of the viewpoint of the speaker." He asserts, with no relevant citations or legal support, that "[a] threat against property is not a true threat of violence, as acts of violence are commonly understood to be acts committed against *persons*. Even if there is a usage of the word 'violence' that includes a threat to property, it would not be the type of violence discussed by the United States Supreme Court in its 'true threats' jurisprudence." (Emphasis in original.) Although the defendant cites a Supreme Court case, *Virginia* v. *Black*, 538 U.S. 343, 344, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), which states that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death," he does not engage in meaningful analysis that considers the application of *Black* to § 53a-181*l*. Instead, he offers only hypothetical examples of the overbreadth of the statute[18] and conclusively states

[18] The defendant argues: "The statute is also broad enough to cover mere threats to personal property of others that would not constitute unprotected speech. For example, the statute would criminalize a neighbor's expression that they intend to destroy a neighbor's pride flag, Black Lives Matters sign, or nativity scene."

that, although these hypothetical statements "might be obnoxious and constitute harassment under certain circumstances, they cannot be criminalized simply because they harass a certain group of individuals. Such statements do not fall into any category that has ever been recognized as the unprotected category of nonspeech, and clearly it is only speech and not conduct."

The defendant additionally devotes very little argument to his claim that § 53a-181*l* is facially unconstitutional. "Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed. This is especially so with regard to first amendment and other constitutional claims, which are often analytically complex. See, e.g., *Schleifer* v. *Charlottesville*, 159 F.3d 843, 871–72 (4th Cir. 1998) ('[f]irst [a]mendment jurisprudence is a vast and complicated body of law that grows with each passing day' and involves 'complicated and nuanced constitutional concepts'), cert. denied, 526 U.S. 1018, 119 S. Ct. 1252, 143 L. Ed. 2d 349 (1999); *Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301, 1326 (8th Cir.) (first amendment issues are 'complex'), cert. denied, 449 U.S. 842, 101 S. Ct. 122, 66 L. Ed. 2d 49 (1980); see also *In re Melody L.*, 290 Conn. 131, 154–55, 962 A.2d 81 (2009) (one and one-half page equal protection claim was inadequate), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 746–47, 91 A.3d 862 (2014); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, [266 Conn. 108, 120, 830 A.2d 1121 (2003)] (claim under takings clause was inadequately briefed when plaintiff provided 'no authority or analysis in support of its specific claim'); *In re Shyliesh H.*, 56 Conn. App. 167, 181, 743 A.2d 165 (1999) (attempt to brief two constitutional claims in two and one-half pages was inadequate)."

State v. *Buhl*, supra, 321 Conn. 726. We therefore conclude that the defendant's constitutional challenge to § 53a-181*l* is inadequately briefed and we decline to review it.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHEVALIER TERRELL PURVIS (AC 46058)

Alvord, Seeley and Bear, Js.

Syllabus

Convicted of the crimes of, inter alia, possession of a controlled substance with intent to sell by a person who is not drug-dependent, possession of a controlled substance, and possession of drug paraphernalia with intent to use, the defendant appealed to this court. The defendant was arrested during an investigation and search of an apartment. When the police entered the apartment, the defendant turned and ran down a hallway, dropping six small bags of crack cocaine, which were individually wrapped in plastic. He then fled to a bathroom, where he was found attempting to ingest narcotics, which the arresting police officer forced him to spit out. The narcotics that fell out of the defendant's mouth were six pieces of cocaine, each wrapped in plastic, and two glassine bags containing a mixture of heroin and fentanyl. *Held*:

1. The defendant could not prevail on his claim that the evidence adduced at trial was insufficient to sustain his conviction of possession of a controlled substance with intent to sell: contrary to the defendant's argument, there was no requirement that an individual must have possessed a certain quantity of narcotics to support a finding of an intent to sell; moreover, the fact that the state did not present any evidence establishing that the defendant had engaged in a sale of narcotics was not dispositive of a lack of intent to sell; furthermore, the state presented sufficient circumstantial evidence to support an inference that the defendant intended to sell the narcotics found in his possession, as it was undisputed that the defendant was present in a location known as a crack house that was associated with narcotics dealing and use, that he was in the company of four individuals known to law enforcement as drug users, and he was in the possession of fourteen individually packaged units of narcotics and $2126 in cash.

2. The defendant could not prevail on his claim that there was insufficient evidence to sustain his conviction of possession of drug paraphernalia with intent to use: although the defendant claimed that the pieces of plastic surrounding the bits of crack cocaine were not "bags" and, thus, could not constitute drug paraphernalia as defined in the statute (§ 21a-240 (2) (A)), the state repeatedly referred to the plastic wrappings as plastic bags throughout the trial, § 21a-240 (2) (A) does not require that the paraphernalia constitute a bag, and the plastic wrapping material in this case, which was tied in a knot at the top and used as a means to contain the bits of crack cocaine, constituted "materials of any kind" that contained a "controlled substance" pursuant to § 21a-240 (2) (A); moreover, even if this court assumed without concluding that the plastic did not constitute drug paraphernalia under the statute, the defendant's claim was unavailing as the defendant was also found in possession of two glassine bags, which he used to hold or contain narcotics and which fell within the definition of drug paraphernalia under § 21a-240 (2) (A); furthermore, contrary to the defendant's claim, the plain language of § 21-240 (20) (A) did not exempt from its coverage individual bags used to contain the very narcotics the defendant was found to have possessed.

3. This court concluded that the defendant's conviction of both possession of a controlled substance with intent to sell and possession of a controlled substance, violated his constitutional protection against double jeopardy and deprived him of a fair trial: because possession of a controlled substance is a lesser included offense of the crime of possession of a controlled substance with intent to sell, the charged crimes are the same offense for double jeopardy analysis; moreover, the conduct charged in those counts arose out of the same act or transaction, as the jury could not reasonably have found that the defendant committed a separate act of possession of controlled substances when he ran into the bathroom carrying some of the same narcotics that he had possessed in the kitchen/hallway area; furthermore, the state, in its charging documents, its overall presentation of the case and in the evidence adduced at trial, did not draw a distinction between the defendant's conduct inside and outside of the bathroom with respect to the defendant's possession of narcotics.

Argued March 13—officially released August 6, 2024

Procedural History

Substitute information charging the defendant with the crimes of possession of a controlled substance with intent to sell by a person who is not drug-dependent, possession of a controlled substance, possession of drug paraphernalia with intent to use, conspiracy to possess a controlled substance with intent to sell, and

interfering with an officer, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of possession of a controlled substance with intent to sell by a person who is not drug-dependent, possession of a controlled substance, possession of drug paraphernalia with intent to use, and interfering with an officer, from which the defendant appealed to this court. *Reversed in part*; *judgment directed in part.*

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

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, and *Matthew Knopf*, assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Chevalier Terrell Purvis, appeals from the judgment of conviction, rendered after a jury trial, of possession of a controlled substance with intent to sell by a person who is not drug-dependent[1] in violation of General Statutes § 21a-278 (b) (1) (A), possession of a controlled substance in violation of General Statutes (Rev. to 2017) § 21a-279 (a) (1),[2] possession of drug paraphernalia with intent to use in violation of General Statutes (Rev. to 2017) § 21a-267 (a),[3] and interfering with an officer in violation of General Statutes (Rev. to 2017) § 53a-167a. On appeal, the defendant claims that (1) the evidence adduced at trial was

[1] Because the defendant's drug dependency is not at issue, for convenience we refer to this crime as possession of a controlled substance with intent to sell.

[2] In this opinion, our references to § 21a-279 (a) (1) are to the 2017 revision of the statute.

[3] In this opinion, our references to § 21a-267 (a) are to the 2017 revision of the statute.

insufficient to sustain his conviction of possession of a controlled substance with intent to sell and possession of drug paraphernalia with intent to use, and (2) if his conviction of possession of a controlled substance with intent to sell is upheld, then his conviction of both possession of a controlled substance with intent to sell and possession of a controlled substance violates his constitutional protection against double jeopardy. We agree with the defendant as to his second claim and, accordingly, affirm in part and reverse in part the judgment of the trial court.

The jury reasonably could have found the following facts based on the evidence presented at trial. On October 11, 2018, police officers assigned to the special investigations division of the Danbury Police Department executed a search warrant at an apartment located at 12 Bank Street in Danbury (premises). Law enforcement suspected that the premises was being used as a "crack house" by the person living there, Christopher Maloney. Upon entering the premises, the officers found five individuals—Maloney, the defendant, and three other persons. Maloney and the three other individuals were known to law enforcement as "drug users." The defendant and Maloney were standing in the kitchen/hallway area of the premises, while the other three individuals were seated in an area described as a living room. Sergeant Stephen Hilderbrand of the Danbury Police Department observed the defendant turn and run down the hallway, dropping several items along the way as he fled to a bedroom and then a bathroom and attempted to barricade himself inside. Hilderbrand, however, pursued the defendant into the bathroom and found him attempting to ingest narcotics. Hilderbrand wrestled the defendant into the bathtub and forced the defendant to spit out the narcotics that he was attempting to swallow. Thereafter, the defendant was handcuffed and searched. The search of his person

revealed that the defendant was in possession of car keys, a wallet containing $1970 in cash, $156 in cash in his pocket, a multitool,[4] a bag of marijuana, a cell phone and cigarettes. The police subsequently conducted a search of the premises.

The narcotics that fell out of the defendant's mouth in the bathtub consisted of six "small, white rock-like substances" that each were "tightly wrapped into small slivers of plastic," which later were determined to contain cocaine, as well as two glassine bags that each contained a mixture of heroin and fentanyl. The items the defendant dropped in the kitchen/hallway area similarly consisted of six "small bags of crack cocaine," each of which was individually wrapped in plastic. In all, the police seized fourteen individually packaged narcotics from the defendant. The nature of those substances was confirmed through testing performed by a state forensic examiner.[5] The police also seized from the bedroom in the premises empty clear plastic bags.[6]

Following his arrest, the defendant was charged in an amended long form information with possession of a controlled substance with intent to sell in violation of § 21a-278 (b) (1) (A), possession of a controlled substance in violation of § 21a-279 (a) (1), possession of drug paraphernalia with intent to use in violation of

[4] The multitool seized from the defendant is an object approximately five and one-half inches long that resembles a hammer and contains a hammer, knife, wrench, can opener and pliers.

[5] Specifically, the forensic examiner testified as to the nature of the substances recovered from the bathtub. Those substances consisted of 1.220 grams of cocaine, including packaging, and 0.061 grams of heroin and fentanyl in a knotted plastic bag. The forensic examiner also testified as to the nature of the substances found in the kitchen/hallway area, which consisted of 0.880 grams of cocaine, including packaging.

[6] The police also seized from the bedroom a note that was on a dresser, which read, "Criss send the ha[l]f bag with Michael; now or she call the cops for us. Tiger." The defendant stipulated at trial that he went by the nickname Tiger.

§ 21a-267 (a), conspiracy to possess a controlled substance with intent to sell in violation of General Statutes §§ 53a-48 (a) and 21a-278 (b) (1) (A), and interfering with an officer in violation of § 53a-167a. A jury trial was held, at which the state presented testimony from Hilderbrand; Joanna Urban, the state forensic examiner who tested the substances; Detective Kevin Zaloski of the Danbury Police Department, who was the lead investigator for the search warrant; and Detective Mark Traholis, the evidence officer in connection with the search who provided expert testimony concerning narcotics activities. The defendant testified in his own defense. At the conclusion of the trial, the defendant was found not guilty of the conspiracy charge and guilty of the remaining four charges. On September 12, 2022, the court sentenced him to a period of incarceration of twelve years, execution suspended after six years, five of which are a mandatory minimum, and five years of probation.[7] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the evidence adduced at trial was insufficient to establish his guilt for the offenses of possession of a controlled substance with intent to sell and possession of drug paraphernalia with intent to use. We disagree.

We first set forth the relevant standard of review for a sufficiency of the evidence challenge. "As this court has observed, [a] defendant who asserts an insufficiency of evidence claim bears an arduous burden."

[7] For the defendant's conviction of possession of a controlled substance with intent to sell, the court sentenced the defendant to twelve years of incarceration, execution suspended after six years, and five years of probation. The court also sentenced the defendant to concurrent 364 day terms for his conviction of the charges of possession of a controlled substance and interfering with an officer, and imposed a $150 fine for his conviction of the charge of possession of drug paraphernalia with intent to use.

(Internal quotation marks omitted.) *State* v. *Shawn G.*, 208 Conn. App. 154, 158, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021). "When a criminal conviction is reviewed for the sufficiency of the evidence, we apply a well established [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . As we previously have explained, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Fisher*, 342 Conn. 239, 249, 269 A.3d 104 (2022); see also *State* v. *Kyle A.*, 212 Conn. App. 239, 246, 274 A.3d 896 (2022) ("We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the [fact finder's] opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility. . . . We are content to rely on the [fact finder's] good sense and judgment." (Internal quotation marks omitted.)), aff'd, 348 Conn. 437, 307 A.3d 249 (2024).

We also must be mindful that "[i]t is within the province of the jury to draw reasonable and logical inferences from the facts proven. . . . The jury may draw

reasonable inferences based on other inferences drawn from the evidence presented. . . . Our review is a fact based inquiry limited to determining whether the inferences drawn by the jury are so unreasonable as to be unjustifiable." (Internal quotation marks omitted.) *State* v. *Jones*, 210 Conn. App. 249, 256–57, 269 A.3d 870, cert. denied, 343 Conn. 901, 272 A.3d 199 (2022). Furthermore, "[w]e emphasize that the probative force of the evidence is not diminished because it consists, in whole or in part, of circumstantial evidence rather than direct evidence. . . . It has been repeatedly stated that there is no legal distinction between direct and circumstantial evidence so far as probative force is concerned. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Kyle A.*, supra, 212 Conn. App. 255.

A

We first address the defendant's sufficiency of the evidence claim with respect to his conviction of possession of a controlled substance with intent to sell in violation of § 21a-278 (b) (1) (A).[8] The defendant argues that there was insufficient evidence to sustain his conviction under this statute because the evidence presented failed to establish the requisite intent to sell beyond a reasonable doubt. To support his argument, the defendant points out that there was no evidence presented that he had engaged in a sale of narcotics and claims any circumstantial evidence is irrelevant in the absence of such proof. Similarly, he claims that any narcotics found in his possession were for personal use

[8] General Statutes § 21a-278 (b) (1) provides in relevant part: "No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter or chapter 420f, (A) a narcotic substance . . . ."

only and that the total quantity of the narcotics found on him was inconsistent with an intent to sell. We do not agree.

"To prove its case [of a violation of § 21a-278 (b)], the state must prove beyond a reasonable doubt that (1) the defendant possessed a substance, (2) the substance was a narcotic and (3) the defendant intended to sell it." (Internal quotation marks omitted.) *State* v. *Bruno*, 293 Conn. 127, 136, 975 A.2d 1253 (2009).[9] The defendant's claim in the present case focuses on the intent element. "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11). "It is well established that [i]ntent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Stovall*, 316 Conn. 514, 520–21, 115 A.3d 1071 (2015); see also *State* v. *Nash*, 316 Conn. 651, 672, 114 A.3d 128 (2015) ("The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually proved by circumstantial evidence . . . and is, except in rare cases, a question of fact." (Internal quotation marks omitted.)).

[9] "The law . . . is clear that the absence of drug dependency is not an element of the offense of sale of narcotics under § 21a-278 (b)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Walker*, 90 Conn. App. 737, 740, 881 A.2d 406, cert. denied, 275 Conn. 930, 883 A.2d 1252 (2005).

Circumstantial evidence that is probative of a defendant's intent to sell narcotics includes evidence of the "quantity of narcotics found in the defendant's possession . . . the manner in which the narcotics are packaged [and] [e]vidence demonstrating that the defendant was present in a known drug trafficking area . . . ." (Internal quotation marks omitted.) *State* v. *Billie*, 123 Conn. App. 690, 704, 2 A.3d 1034 (2010). Also relevant to the issue of an intent to sell is the "amount of . . . cash the defendant possessed . . . ." (Internal quotation marks omitted.) *State* v. *Garcia*, 108 Conn. App. 533, 539, 949 A.2d 499, cert. denied, 289 Conn. 916, 957 A.2d 880 (2008). Additionally, a defendant's possession of a weapon at the time of the arrest is circumstantial evidence that can support a jury's finding of an intent to sell. See *State* v. *Avila*, 166 Conn. 569, 580, 353 A.2d 776 (1974) ("[i]t may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use" (internal quotation marks omitted)).

Contrary to the defendant's argument, evidence of a sale or transaction is not required to satisfy the intent to sell element of a charge pursuant to § 21a-278 (b) (1) (A). See *State* v. *Jimenez*, 73 Conn. App. 664, 667–68, 808 A.2d 1190 (affirming conviction pursuant to § 21a-278 (b) (1) (A) when only evidence presented was plastic bag of cocaine found in backseat of police cruiser after defendant's transport to police station), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002); see also *State* v. *Francis*, 90 Conn. App. 676, 682–83, 879 A.2d 457 (concluding that evidence was sufficient to support conviction of possession of narcotics with intent to sell within 1500 feet of school when no sale was alleged to have been made), cert. denied, 275 Conn. 925, 883 A.2d 1248 (2005). Moreover, given that intent "usually is inferred from conduct," it follows that the lack of evidence of a sale is simply one of "a multitude of facts"

that a jury may consider in reaching its conclusion. (Internal quotation marks omitted.) *State* v. *Billie*, supra, 123 Conn. App. 704. Therefore, in the present case, the fact that the state did not present any evidence establishing that the defendant had engaged in a sale of narcotics is not dispositive of a lack of intent to sell.

With respect to the defendant's argument that the amount of narcotics he possessed was not consistent with an intent to sell, there is no requirement that a defendant must have possessed a certain quantity of narcotics to support a finding of an intent to sell. See *State* v. *Jeffreys*, 78 Conn. App. 659, 676–77, 828 A.2d 659 (acknowledging that "[t]he quantity of drugs is not . . . the sole dispositive factor" because intent can be inferred through circumstantial evidence), cert. denied, 266 Conn. 913, 833 A.2d 465 (2003), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 248, 253, 61 A.3d 1084 (2013). "Moreover, [a] large number of packets in the defendant's possession is [a] fact from which the inference of possession with intent to sell can be drawn." *State* v. *Bowens*, 24 Conn. App. 642, 649, 591 A.2d 433, cert. denied, 220 Conn. 906, 593 A.2d 971 (1991).

The defendant relies on *Billie* in support of his argument that an intent to sell cannot be found based on the quantity of narcotics he possessed. *Billie*, however, is inapposite to the present case, as the defendant in *Billie* possessed only "a single package" of narcotics; *State* v. *Billie*, supra, 123 Conn. App. 704; whereas, in the present case, the defendant was in possession of fourteen individually packaged units of narcotics. Significantly, the amount of narcotics in the defendant's possession in the present case exceeds the quantity of narcotics possessed by defendants in similar cases in which this court has determined that the evidence was sufficient for the jury to infer that the defendant intended to sell narcotics. See *State* v. *Jeffreys*, supra,

78 Conn. App. 676–77 (where defendant possessed two "separate, small plastic bags" of cocaine, "the evidence was sufficient to permit the fact finder reasonably to find that the defendant possessed the intent to sell the drugs found in his possession"); *State* v. *Clark*, 56 Conn. App. 108, 111, 113, 741 A.2d 331 (1999) (defendant's possession of "cellophane wrapper containing seven pieces of crack cocaine and three small bags of heroin" was sufficient evidence of intent to sell); *State* v. *Conley*, 31 Conn. App. 548, 551, 561, 627 A.2d 436 (defendant's possession of six glassine packets of heroin was sufficient to establish intent to sell), cert. denied, 227 Conn. 907, 632 A.2d 696 (1993); see also *State* v. *Abreu*, 34 Conn. App. 629, 631, 634, 643 A.2d 871 (affirming conviction of possession of narcotics with intent to sell when defendant possessed ball of white powder cocaine wrapped in cellophane that weighed 2.2 grams), cert. denied, 230 Conn. 915, 645 A.2d 1019 (1994).[10]

In the present case, the state presented sufficient circumstantial evidence to support an inference that the defendant intended to sell the narcotics found in his possession. It is undisputed that, at the time of his arrest, the defendant was present in a location known as a crack house that is associated with narcotics dealing and use, and he was in the company of four individuals known to law enforcement as drug users. He was also in possession of fourteen individually packaged units of narcotics, an object described as a multitool and $2126 in cash. Further, Trohalis, an expert witness for the state, testified that low-level narcotics dealers generally carry large amounts of cash and smaller quantities of packaged narcotics, that a "crack house" is a location where addicts know they can find a dealer to purchase narcotics from, and that the defendant was

[10] We note that the amount of narcotics that the defendant possessed in *Abreu* is comparable to the amount involved in the present case. See footnote 5 of this opinion.

the only individual at the location with narcotics found on his person. During the state's cross-examination of the defendant, he answered affirmatively when asked if he brought $2000 in cash with him to "that crack den."

As we have stated, "[p]roof of intent is usually established through circumstantial evidence, from which the [jury] may draw reasonable and logical inferences." (Internal quotation marks omitted.) *State* v. *Brown*, 90 Conn. App. 835, 840, 879 A.2d 466, cert. denied, 276 Conn. 901, 844 A.2d 1026 (2005). Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have inferred from the defendant's possession of fourteen individually packaged units of narcotics, a large sum of cash and a multitool,[11] at a location associated with drug dealing in the company of known addicts who themselves did not possess any narcotics, that he intended to sell the narcotics in his possession. See *State* v. *Williams*, 110 Conn. App. 778, 792, 956 A.2d 1176 (evidence sufficient to support conviction of possession of narcotics with intent to sell when defendant possessed "forty-three individually packaged bags that contained various forms of cocaine," state's expert witness testified that manner in which cocaine was packaged and amount of cocaine defendant possessed "were consistent with packaging for sale, rather than for personal use," and "defendant was arrested in an area

[11] Construing the evidence in the light most favorable to upholding the verdict, we conclude that the jury reasonably could have inferred that the multitool in the defendant's possession was meant to serve as a weapon. See *State* v. *Ryan*, 23 Conn. Supp. 425, 428–29, 184 A.2d 183 (1962) ("[a]rticles which are manufactured and generally used for peaceful and proper purposes, such as baseball bats, axes, hammers, ordinary pocketknives, razors, or other articles too numerous to mention, may become dangerous or deadly weapons when they are used or carried for the purpose of assault or defense"); see also *State* v. *Ramos*, 271 Conn. 785, 789–90, 798, 860 A.2d 249 (2004) (evidence was sufficient to support conviction for having weapon in motor vehicle where defendant used hammer in vehicle during altercation).

known for drug activity''), cert. denied, 289 Conn. 957, 961 A.2d 424 (2008); *State* v. *Clark*, supra, 56 Conn. App. 110–13 (sufficient circumstantial evidence existed to demonstrate that defendant intended to sell narcotics when evidence showed that defendant possessed ''$205 in mostly $10 and $20 bills,'' ''seven pieces of crack cocaine and three small bags of heroin,'' and was present in high drug trafficking area). This view of the evidence is entirely reasonable and supports the jury's guilty verdict on this charge. See *State* v. *Fisher*, supra, 342 Conn. 249. Accordingly, the evidence was sufficient to support the defendant's conviction of possession of a controlled substance with intent to sell.

B

The defendant next claims that the evidence was insufficient to support his conviction under count three of possession of drug paraphernalia with intent to use in violation of § 21a-267 (a).[12] The defendant's claim is premised on his assertion that the evidence presented was not sufficient to establish that he was in possession of drug paraphernalia. Specifically, the defendant claims that the court's jury instruction ''limited the definition of 'drug paraphernalia' to encompass only packaging materials,''[13] and that there was no evidence that

[12] General Statutes (Rev. to 2017) § 21a-267 (a) provides in relevant part: ''No person shall use or possess with intent to use drug paraphernalia, as defined in subdivision (20) of section 21a-240, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain or conceal, or to ingest, inhale or otherwise introduce into the human body, any controlled substance, as defined in subdivision (9) of section 21a-240, other than a cannabis-type substance in a quantity of less than one-half ounce. . . .''

[13] We note that, during the trial, there were several references to broken, smaller glass pipes that are used to consume crack cocaine, which were found in and around the premises. The amended long form information, however, alleged that the defendant ''possessed with the intent to use drug paraphernalia, to prepare, pack, repack, store, contain and conceal any controlled substance, in violation of . . . § 21a-267 (a).'' Additionally, the court's jury charge defined drug paraphernalia to include material used ''to prepare, pack, repack, store, contain or conceal any controlled substance

he was actively or constructively in possession of any packaging materials. The state counters that the jury was "within its prerogative to find [the defendant] guilty on count three vis-à-vis the plastic bags that contained his narcotics." The state also argues that the jury reasonably could have found that the defendant constructively possessed the larger plastic bags found in the bedroom, which, the state contends, the defendant was using "to package his narcotics into smaller, sellable units." Thus, according to the state, the jury could have based its guilty verdict with respect to this charge on either "the plastic bags that contained his narcotics" or "the empty plastic bags . . . that were discovered inside the bedroom."

In his appellate reply brief, the defendant responds by making the following argument: "The . . . bits of plastic wrap [surrounding the various bits of crack cocaine] were not 'bags' and do not qualify as 'paraphernalia' under the meaning of the statute. . . . Arguably, the pile of empty plastic bags in . . . Maloney's bedroom ([exhibit 16]) that the prosecutor pointed to as comprising drug paraphernalia *would* constitute drug paraphernalia, but they were never tied to [the defendant] and that is not what the defendant was found to have possessed. All [the defendant] possessed by way of 'containers' was the slivers of plastic wrap on the individual bits of crack, and the two *glassine envelopes* holding the . . . heroin. . . . It makes no sense that wrappings of individual 'doses' . . . would constitute 'paraphernalia.' . . . The defendant respectfully submits that it is not a sensible reading of the statute to conclude that an individual container or wrapping is 'paraphernalia' within the meaning of the Model Drug

other than cannabis." Accordingly, count three was not prosecuted under a theory that the drug paraphernalia possessed by the defendant included the broken pipes.

Paraphernalia Act and as defined in [General Statutes § 21a-240 (20)]." (Emphasis altered.) We disagree.

The following additional facts and procedural history are relevant to our analysis of this issue. As we stated previously in this opinion, the defendant was found to be in possession of the narcotics that fell out of his mouth in the bathtub, which consisted of six "small, white rock-like substances" that were each "tightly wrapped into small slivers of plastic" and later were determined to contain cocaine, as well as two glassine bags that each contained a mixture of heroin and fentanyl. The items the defendant dropped in the kitchen/hallway area similarly consisted of six "small bags of crack cocaine," each of which was individually wrapped in plastic. The police also seized from the bedroom in the premises empty clear plastic bags. In the amended long form information charging the defendant with, inter alia, possession of drug paraphernalia with intent to use, the state alleged the following: "[I]n the city of Danbury, in the area of #12 Bank Street, on or about October 11, 2018, at approximately 6:50 p.m., [the defendant] possessed with the intent to use drug paraphernalia, to prepare, pack, repack, store, contain and conceal any controlled substance . . . ."

With respect to this charge, the court instructed the jury in relevant part as follows: "The defendant is charged in count three with possessing with intent to use drug paraphernalia. The statute defining this offense reads in pertinent part as follows: No person shall possess with the intent to use drug paraphernalia to prepare, pack, repack, store, contain or conceal any controlled substance other than cannabis. Again, this is one of the times where I've indicated to you there were alternative methods given by the state. . . . For you to find the defendant guilty of this charge, the state must prove beyond a reasonable doubt that the

defendant possessed with intent to use drug paraphernalia. The drug paraphernalia must have been used to prepare, pack, repack, store, contain or conceal any controlled substance other than cannabis. . . . The state must prove beyond a reasonable doubt that the defendant knew that he was in possession of the drug paraphernalia. The defendant must have specifically intended that the object was to be used to prepare, pack, repack, store, contain or conceal a controlled substance. . . . In conclusion, the state must prove beyond a reasonable doubt that the defendant possessed with the intent to use drug paraphernalia to prepare, pack, repack, store, contain or conceal a controlled substance."

During deliberations, the jury sent a note to the court asking: "Are the bags that contain the controlled substances . . . considered drug paraphernalia?" Due to their prior knowledge of the judge's unavailability at the time, the parties had agreed that, "if there was a note . . . that could be answered by both attorneys, without the need for [the court's] involvement, they would do that . . . ." Therefore, the parties agreed to the following answer: "[W]ith regard to your question, please refer to the jury instructions. Any further questions, please send another note." No further questions were submitted by the jury.

A conviction pursuant to § 21a-267 (a) requires the state to prove beyond a reasonable doubt that the defendant was in possession of drug paraphernalia. Our determination of whether the materials possessed by the defendant constitute drug paraphernalia for purposes of § 21a-267 (a) involves a matter of statutory interpretation, which concerns a question of law over which this court exercises plenary review. See *National Bank Trust* v. *Yurov*, 223 Conn. App. 637, 643, 309 A.3d 1259, cert. denied, 348 Conn. 961, 312 A.3d 37 (2024).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Avon* v. *Sastre*, 224 Conn. App. 155, 167, 312 A.3d 40, cert. denied, 349 Conn. 905, 312 A.3d 1058 (2024).

We first look at the text of the statute. Although the definition of drug paraphernalia in § 21a-240 (20) (A)[14] is expansive, the state limited the statutory definition in the amended long form information. Relevant to the present case, therefore, the statute provides in relevant part that " '[d]rug paraphernalia' means equipment, products and materials of any kind that are used, intended for use or designed for use in . . . packaging, repackaging, storing, containing or concealing . . . any controlled substance . . . ." General Statutes § 21a-240 (20) (A). Consistent with that definition, the trial court in the present case limited the jury's consideration of drug paraphernalia to those items that are used to "prepare, pack, repack, store, contain or conceal any controlled substance other than cannabis." The statute, however, does not further define the terms "prepare, pack, repack, store, contain or conceal . . . ." General Statutes § 21a-240 (20) (A). "[I]n the absence of a definition of terms in the statute itself, [w]e may presume

[14] Although § 21a-240 (20) (A) was amended by No. 22-108, § 2, of the 2022 Public Acts and No. 23-79, § 1, of the 2023 Public Acts, those amendments have no bearing on this appeal. For convenience, we refer to the current revision of the statute.

. . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary. . . . *Braasch* v. *Freedom of Information Commission*, 218 Conn. App. 488, 510, 292 A.3d 711 (2023); see also General Statutes § 1-1 (a) ([i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language)." (Internal quotation marks omitted.) *Avon* v. *Sastre*, supra, 224 Conn. App. 169. The term "contain" is defined in Merriam-Webster's Collegiate Dictionary as "to have within: hold . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 269.

On appeal, the defendant first argues that the pieces of plastic wrap surrounding the bits of crack cocaine were not "bags" and, thus, cannot constitute drug paraphernalia under the statute. The state counters that the "plastic wrappings were repeatedly referred to as plastic bags throughout the trial." (Emphasis omitted.) First, the record supports the state's contention regarding the repeated references, by both the state and the defense, to the "plastic bags" containing the narcotics that were dropped by the defendant in the kitchen/hallway area and that were recovered from him in the bathroom. Second, we note that the statute does not require that the paraphernalia constitute a bag; instead, all that is required for it to be drug paraphernalia under the statute as charged in this case is that it was used to "prepare, pack, repack, store, contain or conceal any controlled substance other than cannabis . . . ." Photographs of those plastic bags or wrappings that were entered into evidence demonstrate that the plastic, which was tied in a knot at the top, was used as a means to contain the bits of crack cocaine. These bags or plastic wrappings, albeit small, undeniably were used

to pack, store or contain narcotics within the meaning of § 21a-240 (20) (A), which pertains to "equipment, products and *materials of any kind* that are used, intended for use or designed for use in . . . packaging, repackaging, storing, containing or concealing . . . any controlled substance . . . ." (Emphasis added.)

Nevertheless, even if we were to assume without concluding that they do not constitute drug paraphernalia under the statute, the defendant also was found in possession of two glassine bags, each of which contained a mixture of heroin and fentanyl, which the defendant acknowledged in his appellate reply brief. Glassine bags are commonly used to package and sell narcotics; see *State* v. *Elijah*, 42 Conn. App. 687, 690, 682 A.2d 506, cert. denied, 239 Conn. 936, 684 A.2d 709 (1996); and are considered to be drug paraphernalia. See *State* v. *Rosario*, 238 Conn. 380, 383, 680 A.2d 237 (1996); *State* v. *DeFusco*, 224 Conn. 627, 644–45, 620 A.2d 746 (1993); *State* v. *Slaughter*, 151 Conn. App. 340, 344, 95 A.3d 1160, cert. denied, 314 Conn. 916, 100 A.3d 405 (2014); *State* v. *Hernandez*, 53 Conn. App. 706, 709, 736 A.2d 137 (1999), aff'd, 254 Conn. 659, 759 A.2d 79 (2000). The glassine bags, which were used by the defendant to hold or contain narcotics, fall within the definition of drug paraphernalia under the statute and provided by the court; therefore, the defendant's claim is unavailing.

The defendant further argues that "it is not a sensible reading of the statute to conclude that an individual container or wrapping is 'paraphernalia' within the meaning of the Model Drug Paraphernalia Act and as defined in . . . § 21a-267 (a)." The state, in response, points to the broad language of § 21a-240 (20) (A) and argues that "the plastic bags at issue squarely fall within the definition of paraphernalia provided for in § 21a-240 (20) (A), insofar as these bags were expressly used

to package, repackage, store, contain, and/or conceal the defendant's crack cocaine." We agree with the state.

The definition of drug paraphernalia in § 21a-240 (20) (A) is based on the Model Drug Paraphernalia Act; S. Gersten, "Drug Paraphernalia: Illustrative of the Need for Federal-State Cooperation in Law Enforcement in an Era of New Federalism," 26 Sw. U. L. Rev. 1067, 1079 n.80 (1997); which was "promulgated in 1979 by the Drug Enforcement Administration in an effort to help local governments draft legislation to deal with the problem of drug paraphernalia retailers"; *United States* v. *Main Street Distributing, Inc.*, 700 F. Supp. 655, 661 (E.D.N.Y. 1988); and adopted by a majority of states. See N. Golding, "The Needle and the Damage Done: Indiana's Response to the 2015 HIV Epidemic and the Need to Change State and Federal Policies Regarding Needle Exchanges and Intravenous Drug Users," 14 Ind. Health L. Rev. 173, 188 (2017) (noting that thirty-seven states and Washington, D.C., have adopted drug paraphernalia statutes based on the Model Drug Paraphernalia Act). Notably, other states that have adopted drug paraphernalia statutes based on the Model Drug Paraphernalia Act and have similar definitions of drug paraphernalia as the one in § 21a-240 (20), have construed those statutes in a manner consistent with the position advanced by the state in the present case, namely, that individual bags containing narcotics and/or residue do in fact constitute drug paraphernalia. See *Heydenrich* v. *State*, 379 S.W.3d 507, 512 (Ark. App. 2010) ("[t]he discovery of the baggies containing drugs and drug residue on [the defendant's] person constitutes substantial evidence to support the possession-of-drug-paraphernalia conviction"); *State* v. *Boone*, 108 Ohio App. 3d 233, 238, 670 N.E.2d 527 (1995) (holding that plastic bag or bags containing marijuana or residue were containers under drug paraphernalia statute and noting that, "[t]hough the result—that the possession

of the *drug itself* is a minor misdemeanor, while possession of the bag in which it is carried is a misdemeanor of the fourth degree—is absurd, this particular absurdity must have been intended by the legislature, and we cannot depart from the plain meaning of the statute" (emphasis in original)); see also *Ramirez* v. *United States*, 49 A.3d 1246, 1250–51 (D.C. 2012) (trial court's instruction that jury could convict for possession of drug paraphernalia based on single ziplock bag containing cocaine was not based on incorrect statement of law); *A.B.* v. *State*, 679 So. 2d 1299, 1299 (Fla. App. 1996) (stating in dicta that defendant in possession of baggie containing cocaine can be convicted of both possession of narcotic and possession of drug paraphernalia); *State* v. *Purves*, Docket No. 56600-1-II, 2023 WL 2263293, *6 (Wn. App. February 28, 2023) ("both the baggy and the substance [inside it] are evidence that [the defendant] violated the drug paraphernalia statute"), review denied, 1 Wn. 3d 1021, 532 P.3d 149 (2023).

Likewise, in the present case, under the plain language of § 21a-240 (20) (A), the glassine bags containing narcotics that were found in the defendant's possession constitute drug paraphernalia. We recognize that prosecutions under the drug paraphernalia statute typically involve other tools or items connected with the use, packaging and sale of narcotics; however, the plain language of § 21a-240 (20) (A) does not exempt from its coverage individual bags used to contain the very narcotics a defendant is found to have possessed.

We conclude, therefore, that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant was in possession of drug paraphernalia. Accordingly, the defendant's sufficiency of the evidence claim fails with respect to his conviction of possession of drug paraphernalia with intent to use.[15]

[15] Having determined that the evidence was sufficient for the jury to find the defendant guilty of possession of drug paraphernalia with intent to use

II

We next address the defendant's claim that his conviction of both possession of a controlled substance with intent to sell, as alleged in count one of the amended long form information, and possession of a controlled substance, as alleged in count two, violates the constitutional protection against double jeopardy. He asserts that, under *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), his conviction of possession of a controlled substance in violation of § 21a-279 (a) (1) must be vacated. Specifically, the defendant claims that because possession of a controlled substance is a lesser included offense of the crime of possession of a controlled substance with intent to sell, and because the conduct charged in counts one and two arose out of the same act or transaction, his right to be free from double jeopardy was violated when he was convicted and sentenced separately on both counts. We agree.

The defendant acknowledges that he did not preserve this claim before the court and accordingly requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Under *Golding* . . . a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the

on the basis of the defendant's possession of the small bags of crack cocaine that he dropped in the kitchen/hallway area and in the bathroom, as well as the two glassine bags containing narcotics, we need not decide whether the evidence was sufficient to support a finding that the defendant constructively possessed the empty plastic bags found in the bedroom of the premises.

defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." (Citation omitted; internal quotation marks omitted.) *State* v. *Mallozzi*, 225 Conn. App. 787, 814, 317 A.3d 131 (2024).

In the present case, we conclude that the defendant's claim is reviewable under the first two prongs of *Golding* because the record is adequate for review "and the defendant's claim that his conviction violated his right against being placed in double jeopardy is of constitutional magnitude . . . ." *State* v. *Bumgarner-Ramos*, 187 Conn. App. 725, 744, 203 A.3d 619, cert. denied, 331 Conn. 910, 203 A.3d 570 (2019); see also *State* v. *Schovanec*, 326 Conn. 310, 325, 163 A.3d 581 (2017) (reviewing unpreserved double jeopardy claim under *Golding*). We, therefore, initially focus our inquiry on the question of whether the alleged constitutional violation exists and deprived him of a fair trial. See *State* v. *Bumgarner-Ramos*, supra, 744.

The following additional facts and procedural history are relevant to our analysis of this issue. The amended long form information charged the defendant with, inter alia, possession of a controlled substance with intent to sell and possession of a controlled substance. With respect to the possession with intent to sell charge, the state alleged the following: "[I]n the city of Danbury, in the area of #12 Bank Street, on or about October 11, 2018, at approximately 6:50 p.m., [the defendant] possessed with the intent to sell and dispense, offer and give to another person a narcotic substance, to wit: heroin, fentanyl and cocaine . . . ." As to the charge of possession of a controlled substance, the state alleged:

"[I]n the city of Danbury, in the area of #12 Bank Street, on or about October 11, 2018, at approximately 6:50 p.m., [the defendant] did possess and have under his control a controlled substance, to wit: heroin, fentanyl and cocaine . . . ." During closing arguments, the prosecutor told the jury that the inquiry on the possession of narcotics with intent to sell charge is whether "[the defendant] possessed [the narcotics] . . . constructively by having control and knowing where they are or directly on his person." In explaining the possession of narcotics charge as alleged in count two during closing argument, the prosecutor told jurors: "I've described what it means to possess something and what direct control versus circumstantial evidence is, and I don't want to belabor the point, but again in this case, we have the officers' testimony, which the evidence shows the defendant possessed them. It doesn't really get much more direct possession than having something in [one's] mouth . . . ."

We begin by setting forth the appropriate standard of review and the principles of law that guide our analysis of the defendant's claim. "[O]ur standard of review for analyzing constitutional claims such as double jeopardy violations prohibited by the fifth amendment to the United States constitution presents an issue of constitutional and statutory interpretation over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 747. "The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. . . . Although the Connecticut constitution has no specific double jeopardy provision, we have

held that the due process guarantees of [the Connecticut constitution] include protection against double jeopardy." (Internal quotation marks omitted.) *State* v. *Underwood*, 142 Conn. App. 666, 681, 64 A.3d 1274, cert. denied, 310 Conn. 927, 78 A.3d 146 (2013).

"It is well established that [d]ouble jeopardy prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense. . . . Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [When] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact [that] the other does not." (Citation omitted; internal quotation marks omitted.) *State* v. *Abraham*, 343 Conn. 470, 488, 274 A.3d 849 (2022).

The state concedes, and we agree, that because possession of a controlled substance is a lesser included offense of the crime of possession of a controlled substance with intent to sell, the charged crimes are the same offense for double jeopardy purposes. See, e.g., *State* v. *Arokium*, 143 Conn. App. 419, 435, 71 A.3d 569 ("[b]ecause one cannot commit the greater offense of possession of narcotics with intent to sell without first committing the lesser offense of possession of narcotics, the defendant's conviction of this latter offense is violative of double jeopardy principles"), cert. denied,

310 Conn. 904, 75 A.3d 31 (2013). We need only determine, therefore, whether the charges arose out of the same act or transaction.

In determining whether the charges arise out of the same act or transaction, "it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars."[16] (Citation omitted; internal quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018). "When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found a separate factual basis for each offense charged." (Internal quotation marks omitted.) *State* v. *Jarmon*, 195 Conn. App. 262, 284, 224 A.3d 163, cert. denied, 334 Conn. 925, 223 A.3d 379 (2020); see also *State* v. *Crawley*, 93 Conn. App. 548, 557, 889 A.2d 930 ("separate convictions for possession of the same controlled substance . . . will not violate the [d]ouble [j]eopardy [c]lause if the possessions are sufficiently differentiated by time, location, or intended purpose" (internal quotation marks omitted)), cert. denied, 277 Conn. 925, 895 A.2d 799 (2006).

The state claims that the two charges stemmed from different acts. Specifically, the state argues that the charge in count one, possession of a controlled substance with intent to sell in violation of § 21a-278 (b) (1) (A), pertains to the narcotics that the defendant possessed when he was standing in the kitchen/hallway area at the time that the officers first entered the premises, which consisted of two glassine bags that each contained a mixture of heroin and fentanyl, as well as

[16] In the present case, the defendant filed a motion for a bill of particulars on February 10, 2020. The court, however, was not requested to issue a ruling, and therefore, there was no bill of particulars to amplify the information.

six "small, white rock-like substances" of cocaine and six "small bags of crack cocaine," whereas the charge in count two, possession of a controlled substance in violation of § 21a-279 (a) (1), pertains to the narcotics that the defendant subsequently attempted to swallow in the bathroom, which consisted of the same two glassine bags that contained a mixture of heroin and fentanyl and the same six "small, white rock-like substances" of cocaine that he had had in his possession in the kitchen/hallway area.[17] According to the state, "it was reasonable for the jury to infer that, after attempting to ingest [the] narcotics [in the bathroom], [the defendant] no longer possessed an intent to sell" but, rather, "at that point his intent was simply to consume his narcotics, albeit to avoid detection." We are not persuaded.

Because the amended long form information does not resolve the question as to whether the charges arise out of the same act or transaction in the present case, and there was no bill of particulars to amplify the information, we look to the evidence presented at trial and to the state's theory of the case. On the basis of our review of the evidence presented at trial, we conclude that both offenses arose from a single act of possession of narcotics. The narcotics that were in the defendant's possession when he was in the bathroom were also in his possession when the police first entered the premises and the defendant was standing in the kitchen/hallway area. The state suggests that, after the defendant attempted to ingest the narcotics, his intent had changed from an intent to sell to an intent merely to possess. This contention, however, lacks merit because the proper inquiry is "whether *separate* [*criminal*] *acts* have been committed with the requisite criminal

[17] As stated previously in this opinion, the defendant dropped six "small bags of crack cocaine" onto the floor as he ran down the hallway away from the officers.

intent." (Emphasis in original.) *State* v. *Sullivan*, 220 Conn. App. 403, 429, 298 A.3d 1238, cert. granted, 348 Conn. 927, 305 A.3d 631 (2023). The defendant, while dropping some of the narcotics in the hallway, continuously possessed the remaining narcotics in a single course of conduct and, therefore, the jury could not reasonably have found that the defendant committed a *separate act* of possession of controlled substances when he ran into the bathroom carrying some of the same narcotics that he had possessed in the kitchen/hallway area. See, e.g., *State* v. *Crawley*, supra, 93 Conn. App. 556–57 ("possession, in itself, might more accurately be viewed as a course of conduct, rather than as an act"). Accordingly, we conclude that the offenses in question—possession of controlled substances with intent to sell and possession of controlled substances—arose out of the same act. Therefore, the defendant has established a constitutional violation that deprived him of a fair trial because his conviction and separate punishments violated the prohibition against double jeopardy.

The state also contends that the defendant possessed "separate stashes" of narcotics for each respective count in support of its claim that the charges arise from different acts. The considerations raised in *State* v. *Crawley*, supra, 93 Conn. App. 557, however, persuade us that the state's claim that counts one and two pertained to different stashes of narcotics is flawed because nothing in the state's case established that the defendant possessed separate stashes that were "sufficiently differentiated by time, location, or intended purpose." (Internal quotation marks omitted.) Id. In *Crawley*, "[t]he state charged the defendant with possessing two separate quantities of cocaine powder, in two separate locations, on the same day." Id., 555. The state presented evidence that when the police stopped the defendant's vehicle, the defendant possessed cocaine

powder located in the front pocket of his pants. Id. The state also presented evidence that when different law enforcement officers searched the defendant's room at another location, the defendant possessed additional cocaine powder that was located in a closet. Id., 556. On appeal, the defendant claimed that his convictions under both counts violated the prohibition against double jeopardy because " '[t]he evidence presented [did] not comprise two separate acts of possession' " but, rather, " 'the defendant possessed both stashes [of cocaine] concurrently, one constructively and one actually on his person.' " Id., 552.

In *Crawley*, in determining "whether the defendant's conduct with regard to the two stashes of cocaine reflected a single course of conduct or whether his conduct reflected distinct acts"; id., 556; this court stated: "Generally, courts which have considered the issue [of multiple prosecutions under controlled substance statutes] have determined that separate convictions for possession of the same controlled substance . . . will not violate the [d]ouble [j]eopardy [c]lause if the possessions are sufficiently differentiated by time, location, or intended purpose." (Internal quotation marks omitted.) Id., 557. The court in *Crawley* determined that "there was no evidence suggesting that both stashes of cocaine were in any way related to a single drug transaction" and that "[t]he police did not discover the cocaine during one encounter with the defendant." Id. Rather, the evidence reflected that "one stash was discovered during a search incident to an arrest" at one location, "and the other was discovered [later in the day] during a search of the defendant's residence." Id. As a result, this court concluded that the defendant failed to demonstrate on appeal "that his possession of the two stashes of cocaine on [the same date at different locations] was linked to a single course of conduct." Id., 558. This court also noted that "[e]ach of the charges

required distinct legal instructions by the court and factual findings by the jury." Id. This court concluded that because the two charges did not arise from the same act or transaction, the defendant's two criminal acts of possession were separately punishable and "did not put him in jeopardy twice for a single criminal act." Id.

In the present case, by contrast, the state's claim that counts one and two relate to two different "stashes" of narcotics is unpersuasive because the evidence presented showed that the narcotics that the defendant possessed in the bathroom were among the *same* narcotics that he possessed just moments earlier when he was standing in the kitchen/hallway area. The narcotics in the present case were "linked to a single course of conduct" and were discovered by the police during a single encounter with the defendant. Additionally, the court did not provide the jury with distinct instructions as to two separate stashes of narcotics. See, e.g., *Williams* v. *State*, 104 So. 3d 254, 262 (Ala. App. 2012) (acts of possession were not separate where "[b]oth stashes were found at essentially the same location" and "at the same time" and were "the same controlled substance" (internal quotation marks omitted)); see also *Commonwealth* v. *Harris*, Docket No. 15-P-1569, 2017 WL 715128, *2–3 (Mass. App. February 23, 2017) (unpublished opinion) (no duplicative punishment where charges were based on different quantities of cocaine found in different areas of defendant's vehicle and judge differentiated between two quantities of narcotics at issue during final instructions to jury), review denied, 476 Mass. 1114, 80 N.E.3d 980 (2017).

The state also relies on language from its closing argument regarding the defendant's attempt to consume certain narcotics in the bathroom to support its claim that counts one and two were based on different acts. That language, however, did not distinguish between

the conduct charged in the two counts in any meaningful way because it did not clearly articulate a theory that the two charges were each based on separate stashes of narcotics, which the state now claims on appeal. To be sure, the statement made by the prosecutor during closing argument regarding count one—that the charge is proven if "[the defendant] possessed [the narcotics] whether constructively by having control and knowing where they are or directly on his person"—indicates that the possession with intent to sell charge was being prosecuted on the theory that both the narcotics the defendant dropped and the narcotics that he attempted to ingest constituted the narcotics that he intended to sell. Although the state's later discussion of the possession charge at closing argument referenced the defendant's attempted ingestion of narcotics, that single reference is not enough to support the state's claim that it clearly distinguished between the conduct that gave rise to counts one and two during closing argument.

Moreover, a review of the record reveals that, in its theory of the case, the state did not draw a distinction between the defendant's conduct inside and outside of the bathroom with respect to his possession of narcotics. For instance, the amended long form information does not draw a distinction between the conduct, or the particular narcotics, that counts one and two are based on, and according to it, both offenses arose out of the same transaction—the defendant's possession of heroin, fentanyl and cocaine at the premises on October 11, 2018. Indeed, none of the evidence presented at trial indicated that counts one and two pertained to different stashes of narcotics possessed by the defendant, and the trial court's jury instructions on counts one and two did not draw any distinction between the particular narcotics that the defendant dropped outside of the bathroom and those that the defendant attempted to ingest inside the bathroom.

Given the lack of support for the state's argument in the charging documents, the evidence adduced at trial and the state's overall presentation of its case, the jury could not reasonably have found a separate factual basis for counts one and two. Therefore, we conclude that a constitutional violation exists that deprived the defendant of a fair trial.[18]

With respect to *Golding*'s fourth prong, we further conclude, and the state does not argue to the contrary, that the error is not harmless. "Although we acknowledge that the court sentenced the defendant to serve a concurrent sentence for the lesser and greater offenses, we recognize that the conviction of both of the separate offenses, in their own right, impermissibly harms the defendant." *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 751. Consequently, pursuant to *State* v. *Polanco*, supra, 308 Conn. 260,[19] we remand the case to the trial court with direction to vacate the defendant's conviction of the lesser included offense of possession of a controlled substance. In vacating the defendant's conviction of possession of a controlled substance, we note that the sentence imposed for his conviction of that offense was to run concurrently with the sentences imposed for the other offenses of which

[18] We note that, if the "legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial"; (internal quotation marks omitted) *State* v. *Burgos*, 170 Conn. App. 501, 551, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017); however, "the burden is on the state to present evidence of clear legislative intent to specifically authorize cumulative punishments," and the state has made no such argument in the present case. Id., 552.

[19] In *State* v. *Polanco*, supra, 308 Conn. 260, our Supreme Court exercised its supervisory authority and adopted a rule "that when a defendant is convicted of greater and lesser included offenses, the trial court shall vacate the conviction for the lesser offense rather than merging it with the conviction for the greater offense."

the defendant was convicted. Accordingly, it is unnecessary to remand this case to the trial court for resentencing. See *State* v. *Graham S.*, 149 Conn. App. 334, 346, 87 A.3d 1182 ("[w]e have held that when some of a defendant's convictions are reversed, and the trial court clearly intended that a nonreversed conviction control its sentencing scheme, remand for resentencing is not necessary where reversing the improper convictions and vacating the accompanying sentences will not frustrate the trial court's intent" (internal quotation marks omitted)), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

The judgment is reversed only as to the conviction of possession of a controlled substance and the case is remanded with direction to render judgment vacating the defendant's conviction of that offense; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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NOTICE OF CONNECTICUT STATE AGENCIES

Connecticut Housing Finance Authority

Notice of Intent to Amend Procedures

In accordance with Section 1-121 of the Connecticut General Statutes, NOTICE IS HEREBY GIVEN that the Connecticut Housing Finance Authority proposes to amend its Procedures:

Statement of Purpose:

To amend the Procedures of the Authority, specifically Section II, "Rental Housing", and Section IV, "Tax Credit Programs" (collectively the "Multifamily Procedures"), as described below.

Summary of Proposed Procedures Change:

The Multifamily Procedures are being amended to provide greater flexibility in its daily functions as well as to enhance its readiness to respond to changes in the market in a more timely fashion specifically with respect to the following existing Sections:

Section II: Rental Housing
- Subsection A: Multifamily Rental Housing Program
- Subsection B: Multifamily Asset Management
- Subsection C: Special Programs

Section IV: Tax Credit Programs
- Subsection A: Low-Income Housing Tax Credit
- Subsection C: Housing Tax Credit Contribution Program

Copies of the proposed amended Procedures may be obtained by visiting www.chfa.org. All interested persons may submit written data, views and arguments in connection with the above-stated proposed Procedures by email to PublicComment@chfa.org or by mail to the attention of Jenna Zaikarite, Connecticut Housing Finance Authority, 999 West Street, Rocky Hill, Connecticut 06067 no later than 30 days after the publication of this notice.

Department of Social Services

Notice of Public Comment Period Regarding RCH & ADC Compliance with HCBS Setting Rules

The Centers for Medicare and Medicaid Services (CMS) issued a final rule for home and community-based services (HCBS)[1] that requires states to review and evaluate home and community-based settings, including residential and non-residential settings to determine that such settings allow for, and facilitate the integration of, residents into their community.[2] The final rule requires that all home and community-based settings meet certain qualifications. These include:

- The setting is integrated in and supports full access to the greater community;
- Is selected by the individual from among setting options;
- Ensures individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimizes autonomy and independence in making life choices; and
- Facilitates choice regarding services and who provides them.

The final rule also includes additional requirements for provider-owned or controlled home and community-based residential settings. These requirements include:

- The individual has a lease or other legally enforceable agreement providing similar protections;
- The individual has privacy in their unit including lockable doors;
- The individual has a choice of roommates;
- The individual has the freedom to furnish or decorate the unit;
- The individual controls his/her own schedule including access to food at any time;
- The individual can have visitors at any time; and
- The setting is physically accessible.

In review of licensed Residential Care Homes (RCH) and Adult Day Centers (ADC) throughout the State of Connecticut, the Department of

[1] This final rule defines and describes the requirements for home and community-based settings appropriate for the provision of HCBS under section 1915(c) HCBS waivers, section 1915(i) State Plan HCBS and section 1915(k) (Community First Choice) authorities.

[2] 42 CFR Parts 430, 431, 435, 436, 440, 441 and 447.

Social Services (DSS) identified various settings that are presumed to have institutional qualities under the settings rules and must therefore successfully undergo a heightened scrutiny assessment in order to qualify to provide Medicaid HCBS. States must allow for a 30-day public comment period of the heightened scrutiny assessments in adherence to CMS requirements. The public comment period will extend from August 6th to September 5th, 2024. After this process, DSS will be submitting the heightened scrutiny evidence package to CMS, demonstrating that these settings have overcome the presumption and are permitted to provide Medicaid HCBS.

The following RCHs were subject to a heightened scrutiny review:

1. Bethel Health Care/Cascades
2. Bradley Home & Pavilion
3. Elim Park Baptist Home, Inc.
4. Jerome Home
5. Leeway Residential Care Home
6. Lutheran Home of Southbury, Inc.
7. McLean Health Center
8. Noble Horizons
9. St. Joseph's Independent Living
10. St. Joseph's Residence
11. St. Mary's Home

The following ADC was subject to a heightened scrutiny review:

Hebrew Senior Center (ADC)

The heightened scrutiny evidence package is available, on the DSS website, www.ct.gov/dsshttp://www.ct.gov/dss, under "News," as well as the following direct link: https://portal.ct.gov/dss/health-and-home-care/long-term-care/community-options/documents, then "Residential Care Home (RCH) & Adult Day Centers (ADC) Heightened Scrutiny Review." A copy is also available at no cost, upon request from: Sallie Kolreg, DSS Central Office, 55 Farmington Avenue, Hartford, CT, 06105, or via email at sallie.kolreg@ct.gov.

The public is invited to comment regarding the assessment that was completed for each respective RCH. All written comments regarding this must be submitted by September 5, 2024, to: Sallie Kolreg, DSS Central Office, 55 Farmington Avenue 9 Fl, Hartford, CT, 06105, or via email at sallie.kolreg@ct.gov.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in July 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

Agostini, Samuel Lenn of Wakefield, RI
Ayotte, Tracy Ellen of West Hartford, CT
Bhandari, Prabisha of West Hartford, CT
Bhatia, Shivangi of New Haven, CT
Bodey, Devon Cluett of Boston, MA
Field, Victoria of West Hartford, CT
Harmon, Clare of Guilford, CT
Hernandez, Christopher Daniel of Milford, CT
Howe, Nathan Eric of Chicago, IL
Jackson, William Boyd of Hartford, CT
Keenan, Adam Blake of Watertown, CT
Klepper, James Keaton of Oklahoma City, OK
Narayanan, Dhanya of Cary, NC
Nikolovski, Rosana of Towaco, NJ
Piermarini, Robyn-Lyn of Lancaster, MA
Prystowsky, Jeffrey of Providence, RI
Rao, Jennifer S. of Springfield, MA
Reeves, Channing of Mountlake Terrace, WA
Shaw, Candyss Joseph of Norwalk, CT
Sullivan, Matthew Moran of Monroe, CT
Thompson, Ezekiel of Staten Island, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in July 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

Barbee, Jaron Antwan of Simsbury, CT
Boriskin, Sara Zahava of Lawrence, NY
Cheung, Wingman of New Haven, CT
Kraft, Jonathan of Westport, CT
McNulty, Shannon Patricia of New York, NY
Morley, John Dirk of New Canaan, CT
Pramschufer, Erik Patrick of New York, NY
Roberts, Ronald Gregory of Wilton, CT
Tippett, Matthew of New York, NY
Varbero, Anthony Charles of New York, NY

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimands

May 17, 2024: William J. Hennessey – 310063
Lawrence T. Somma – 408862

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel