STATE OF CONNECTICUT *v.* ANTRON GORE
(SC 20211)

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

Syllabus

Pursuant to the applicable provision (§ 7-3 (a)) of the Connecticut Code of Evidence, testimony in the form of an opinion is generally inadmissible if it embraces an ultimate issue to be decided by the trier of fact.

Pursuant further to this court's decision in *State* v. *Finan* (275 Conn. 60), lay opinion testimony identifying a defendant in video surveillance footage had been deemed inadmissible when the identification embraced an ultimate issue.

Convicted of the crimes of murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court, claiming, inter alia, that the trial court improperly had admitted the testimony of P, a police officer, that C, a close friend of the defendant, made a statement identifying the defendant in a still photograph taken from a surveillance video of the shooting. At the start of the defendant's trial, the defendant filed a motion in limine, seeking to preclude the state from introducing C's statement to the police identifying the defendant in the surveillance video and still photograph. The trial court ruled that C's identification of the defendant in the surveillance video would constitute lay opinion testimony concerning an ultimate issue and thus was inadmissible under § 7-3 (a) of the Code of Evidence. The court, however, left open the possibility that the state could introduce C's identification of the defendant in the still photograph if the state were able to demonstrate that C had, independently of the video, identified the subject depicted in the still photograph as the defendant. During C's testimony at trial, C denied that he ever had identified the defendant in the still photograph, and P testified, in accordance with the court's ruling, that C had told him that the subject in the still photograph was the defendant. During deliberations, the jury asked the court if it could provide the jury with a magnifying glass. Over defense counsel's objection, the court provided the jury with a magnifying glass supplied by the state. The jurors submitted a subsequent request for a "better" magnifying glass, which the trial court denied. After the verdict was announced, the court learned that some of the jurors had used additional, unauthorized magnifying glasses to view certain photographs in evidence. The court held a hearing to question the jurors about the matter, and, on the basis of the answers the jurors provided and its observation of the additional magnifying glasses, the court denied the defendant's motion for a mistrial and a new trial based on alleged juror misconduct. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly admitted P's testimony that C had identified the subject in the still photograph as the defendant:

a. This court amended § 7-3 (a) of the Connecticut Code of Evidence and overruled *Finan* and its progeny, holding that opinion testimony that relates to the identification of persons depicted in surveillance video or photographs is not inadmissible simply because it embraces an ultimate issue and that such lay opinion testimony is admissible if it meets the general requirements for the admissibility of such testimony set forth in § 7-1 of the Code of Evidence, that is, it is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of that witness or the determination of a fact in issue: the application of the ultimate issue rule in § 7-3 (a) to identifications of criminal defendants in video surveillance footage had spawned a line of cases in which courts struggled to draw an illusory distinction between fact and opinion testimony and to determine when such identifications embrace an ultimate issue, and this court determined that the better approach should focus on the relative helpfulness of the testimony regarding the identification to the trier of fact versus the potential prejudice that such testimony would pose to the defendant; accordingly, this court adopted a totality of the circumstances test under which courts are to consider four factors in determining whether there is some basis for concluding that the witness is more likely than the jury to correctly identify the defendant from surveillance video or photographs, including the witness' general familiarity with the defendant's appearance, the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken, any change in the defendant's appearance between the time the surveillance video or photographs were taken and the time of trial, or the subject's use of a disguise in the surveillance footage, and the quality of the video of photographs, as well as the extent to which the subject is depicted in the surveillance footage; moreover, with respect to the first factor, the witness' general familiarity with the defendant's appearance, this court declined to join the majority of jurisdictions that adhere to a minimum threshold for general familiarity and concluded, instead, that, in order for this factor to weigh in favor of admitting lay opinion testimony relating to the identification of persons depicted in surveillance footage, the proponent of the testimony must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant, and trial courts, in considering whether a witness' level of familiarity with the defendant is sufficient to satisfy this factor, should consider the particular, relevant circumstances, including, but not limited to, the frequency, number and duration of any individual prior contacts between the witness and the defendant, the duration of the entire course of contacts and the length of time since the contacts,

the relevant viewing conditions, and the nature of the relationship between the witness and the defendant, if any.

b. In the present case, although the record did not reflect whether the defendant's appearance had changed between the time the surveillance video was recorded and the time of trial, C's long-standing and intimate association with the defendant, whom C had known for years, easily satisfied the general familiarity factor, C was familiar with the defendant's appearance when the surveillance footage was recorded, the defendant was not wearing a disguise in that footage, and the quality of the still photograph weighed in favor of admission of the identification testimony, as the trial court found that the subject in the photograph was close enough to the camera and that the subject's face was visible enough to allow for recognition.

2. The trial court acted within its discretion in finding that the defendant had failed to prove that he was prejudiced by the conduct of the jurors in bringing into the deliberations two unauthorized magnifying glasses to assist in their review of the photographic evidence, and, accordingly, the trial court properly denied the defendant's motion for a mistrial and a new trial based on alleged juror misconduct; the trial court found that the additional magnifying glasses did not allow the jury to do anything different or additional beyond what the court provided magnifying glass allowed and did not introduce new evidence or alter existing evidence.

Argued September 17, 2020—officially released February 7, 2022*

Procedural History

Information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, where the court, *Schuman*, *J.*, denied in part the defendant's motion to preclude certain evidence; thereafter, the charge of murder was tried to the jury before *Schuman*, *J.*; verdict of guilty; subsequently, the charge of criminal possession of a firearm was tried to the court; finding of guilty; thereafter, the court, *Schuman*, *J.*, rendered judgment in accordance with the jury verdict and the court's finding, from which the defendant appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

* February 7, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Linda F. Currie-Zeffiro, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Chris A. Pelosi*, former senior assistant state's attorney, for the appellee (state).

Lisa J. Steele filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

MULLINS, J. When the judges of the Superior Court adopted the Connecticut Code of Evidence in 1999, § 7-3 (a) codified the existing common-law evidentiary rule, which prohibited lay opinion testimony that embraced an ultimate issue to be decided by the trier of fact.[1] In accordance with that rule, this court held, in *State* v. *Finan*, 275 Conn. 60, 66–67, 881 A.2d 187 (2005), that lay opinion testimony identifying a defendant in video surveillance footage is prohibited when that identification embraces an ultimate issue.

In this appeal, we reconsider the wisdom of the "ultimate issue rule" as applied to lay witness identifications of persons depicted in video surveillance footage.[2] In

[1] Section 7-3 of the Connecticut Code of Evidence provides: "(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

"(b) Mental state or condition of defendant in a criminal case. 'No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.' General Statutes § 54-86i."

[2] Although we use the terms "surveillance video" and "surveillance footage" in this opinion, our reasoning applies with equal force to identifications of a defendant in other types of video recordings and photographs that depict an event relevant to the case. For example, the rule we announce today would apply to any identifications of a defendant in cell phone videos or photographs.

this limited context, we join the majority of federal and state jurisdictions in concluding that the rule is neither tenable nor necessary. Accordingly, we hereby amend § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate issue rule for lay opinion testimony that relates to the identification of persons depicted in surveillance video or photographs, and overrule *State* v. *Finan*, supra, 275 Conn. 60.[3] As we explain in part I of this opinion, we adopt a totality of the circumstances test for determining whether lay opinion testimony identifying a person in surveillance video or photographs is admissible.

The defendant, Antron Gore, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[4] The defendant raises two claims on appeal. First, he contends that the trial court improperly allowed an officer to testify regarding a witness' identification of the defendant in a still photograph taken from video surveillance footage. Second, the defendant claims that the trial court improperly denied his motion for a new trial based on juror misconduct.

With respect to the defendant's first claim, the parties originally relied on *State* v. *Finan*, supra, 275 Conn. 60, in support of their respective positions. The defendant argued that, because the witness' identification constituted a lay opinion that embraced the ultimate issue to be decided by the trier of fact, the admission of the officer's

[3] We emphasize that the rule change we announce today extends to identifications of any "person" depicted in surveillance video or photographic footage. Because the current appeal involves a criminal defendant, however, for ease of discussion, we sometimes refer to "defendants" depicted in surveillance video or photographic footage. Those references are not intended to narrow the scope of the exception we announce today to the ultimate issue rule.

[4] The trial court found the defendant guilty of criminal possession of a firearm in violation of § 53a-217 (a) (1).

testimony recounting that lay opinion violated § 7-3 (a) of the Connecticut Code of Evidence. The state responded that the officer's testimony recounted the witness' *factual* recognition of the defendant in the photograph, and, therefore, the testimony was not lay opinion testimony subject to § 7-3 (a) of the Connecticut Code of Evidence. Following oral argument, we ordered the parties to submit supplemental briefs addressing two issues: (1) "Whether this court should adopt [r]ule 704 (a) of the Federal Rules of Evidence[5] and overrule *State* v. *Finan*, [supra, 275 Conn. 60]?" (Footnote added.) And (2) "[i]f the court adopts [r]ule 704 (a) of the Federal Rules of Evidence, what standard should govern the admission of lay opinion testimony identifying a defendant as depicted in photographic or video surveillance?"[6]

In his supplemental brief, the defendant urges the court to refrain from abandoning the ultimate issue rule and overruling *Finan*. The defendant contends that the rule change would be drastic, and that he would suffer unfair prejudice if the court applies the rule in the present case. The defendant argues that, if the court adopts rule 704 (a) of the Federal Rules of Evidence, the standard by which the admissibility of lay opinion testimony identifying a defendant in photographic or video surveillance should be crafted in a manner designed to protect, to the greatest extent possible, the jury's role as the fact finder.

As we explain subsequently in this opinion, our amendment of § 7-3 (a) to the Connecticut Code of Evidence to incorporate an exception for testimony relating to the identification of persons depicted in surveillance

[5] Rule 704 (a) of the Federal Rules of Evidence provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue."

[6] Subsequent to the issuance of the supplemental briefing order, we granted the application of the Connecticut Criminal Defense Lawyers Association for permission to submit an amicus brief.

video or photographs does not affect the result in this appeal.[7] We affirm the judgment of the trial court.

The jury could have found the following relevant facts. At approximately 1 p.m. on January 20, 2017, the defendant shot and killed the victim, Jason Reddick, at a Sunoco gas station located at 550 Albany Avenue in Hartford. Video surveillance cameras at the gas station, as well as cameras located at nearby buildings on Albany Avenue and Garden Street, captured the shooting. The video footage showed the victim, wearing a turquoise hooded sweatshirt, walking toward one of the gas pumps at the station. The shooter, subsequently identified as the defendant, wore blue and white Nike sneakers and a Los Angeles Lakers cap. He entered the frame, pulled out a gun and fired once at the victim, hitting him in the torso. The victim retreated on foot northbound on Garden Street. The shooter followed the victim, first in his vehicle, then on foot. The shooter's vehicle was an older model, green, four door Volvo, with mismatched front and rear rims, a blue sticker attached to the windshield and a unique license plate holder.

Officers who reported to the scene discovered the victim's body in a parking lot at 520 Albany Avenue. They also discovered one spent .25 caliber shell casing near one of the gas pumps in the gas station lot and a

[7] The defendant urges the court not to make the rule change in this appeal, contending that we should not raise the issue sua sponte. We disagree. This appeal presents appropriate circumstances for this court to raise the question sua sponte. The record is adequate for review, all parties have been afforded the opportunity to be heard, and, because our application of the amendment to § 7-3 (a) of the Connecticut Code of Evidence does not affect the result of the appeal, the defendant will not suffer prejudice. See, e.g., *In re Yasiel R.*, 317 Conn. 773, 790, 120 A.3d 1188 (2015); *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155–61, 84 A.3d 840 (2014).

We emphasize that our narrow holding today is limited to the context of identifications of persons depicted in surveillance video or photographs. We do not address in this appeal whether we should abandon the ultimate issue rule in its entirety.

trail of blood leading northbound on Garden Street. When the police later searched the defendant's vehicle, they found, under the driver's seat, an unfired, .25 caliber bullet, with the same casing as the one found at the gas station.

On the day following the shooting, the police located an older model, green Volvo in the driveway at 31 Winchester Street in Hartford, the home of Caron Canty. The Volvo had mismatched rims, a blue sticker on the windshield and a license plate frame resembling the one depicted in the surveillance video. The license plates on the car were registered to a different vehicle, owned by Crystal Gore. Detectives spoke with Canty, who told them that the car belonged to the defendant. Canty accompanied the detectives to the major crimes division of the Hartford Police Department, where he gave a statement. Canty had never seen anyone other than the defendant drive the Volvo, and, as far as Canty knew, the defendant was the only person who had keys to the car. The defendant lived in Middletown and, when staying in Hartford, he sometimes left his car in Canty's driveway.

Canty described the defendant as a close friend, whom he had known for "half [his] life." He had seen the defendant, whom he referred to as his "cousin," on most days around the time of 2016 and 2017. He, in fact, had seen the defendant at approximately 5:30 p.m. on the day of the shooting. On that day, the defendant arrived at Canty's home in the Volvo, wearing what Canty described as a red "Nike outfit." The defendant, Canty, and the defendant's sister's boyfriend spent the evening in the south end of Hartford together. The next day, Canty and the defendant spent several hours together at Canty's house. The defendant departed before the police arrived, but he left his car in Canty's driveway.

At the station, the lead detective in the case, Jeffrey Placzek, showed Canty a photograph of the defendant

that had been posted on the defendant's Facebook page in December, 2016, less than one month before the shooting. Canty identified the defendant in the photograph, then signed, dated, and wrote the defendant's nickname, "Tron," at the bottom of the photograph. In the photograph, the defendant wore a Lakers cap and blue and white sneakers. Placzek then showed Canty a 2015 booking photograph of the defendant. After identifying the defendant in the photograph, Canty signed, dated, and wrote "my cousin Tron" underneath the photograph.

Placzek next showed Canty a still photograph of the vehicle in the video surveillance footage. Canty identified the vehicle as the defendant's, then signed, dated, and indicated on the back of the photograph that it was the defendant's vehicle.[8] Finally, Placzek showed Canty a still photograph taken from the video surveillance footage. Canty identified the person depicted in the photograph as the defendant. He signed, dated, and wrote "Tron" on the back of the photograph.

Subsequently, during the defendant's trial, Placzek testified that Canty identified the subject depicted in the still photograph as the defendant. Following his conviction, the defendant appealed directly to this court.

I

We first address the defendant's claim that the trial court improperly allowed Placzek to testify that Canty had identified the defendant as the person depicted in the still photograph taken from the video surveillance footage. The parties' disagreement centers on whether the trial court properly concluded that Canty's identifi-

[8] Placzek also showed Canty an excerpt from the video itself, and Canty identified the suspect in the video as the defendant. The jury did not hear any evidence that Canty had identified the defendant in the video, however, because the trial court granted the defendant's motion in limine seeking to preclude that identification.

cation was not a statement of opinion but, rather, a recounting of Canty's factual recognition of the defendant. The state posited that it was permissible factual testimony. The defendant countered that it was prohibited lay opinion. Until today, that distinction mattered.

As we explain in this opinion, the application of the ultimate issue rule, as set forth in § 7-3 (a) of the Connecticut Code of Evidence, to identifications of criminal defendants in video surveillance footage has spawned a line of cases that, rather than focusing on the relative helpfulness of the testimony to the trier of fact versus the potential prejudice to the defendant, have struggled to distinguish between fact and opinion testimony, and then, if the testimony is deemed opinion testimony, whether it embraces an ultimate issue. We now eschew those distinctions in favor of focusing on whether a witness' testimony would be helpful to the jury and not prejudicial to the defendant. We therefore conclude, albeit on different grounds, that the trial court properly admitted the testimony.

We emphasize that, even if we applied § 7-3 (a) of the Connecticut Code of Evidence without the amendment we announce today, we would conclude that the trial court acted within its discretion in admitting the testimony. We nonetheless ground our decision on the application of the rule change we announce today because doing so illustrates the application of the new rule. In addition, trial courts have struggled to apply § 7-3 (a) of the Connecticut Code of Evidence in this context, laboring both to draw an illusory distinction between fact and opinion testimony suggested by *Finan* and its progeny, and to determine when identifications of persons in video footage or still photographs embrace an ultimate issue.[9] Rather than apply an analysis that

[9] In the present case, for example, during the hearing on the defendant's motion in limine, the trial court posed one hypothetical after another to counsel, trying to navigate the distinction between identifications that constitute factual recognition and ones that are opinion testimony.

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

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

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

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

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

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

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

The court left open the possibility that the state could introduce Canty's identification of the defendant in the

still photograph if it were able to demonstrate that Canty had—independently of the video—identified the subject depicted in the still photograph as the defendant. The state proposed to do precisely that through the testimony of Placzek. Specifically, anticipating that Canty would deny his identification of the defendant, the state proposed that Placzek would testify that, during his interview with Canty, Canty verbally told Placzek, independently of his written statement and without reference to the video, that the subject in the photograph was the defendant. The court ruled that Placzek's testimony as proposed by the state could come in for the truth of the matter asserted pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Thereafter, at trial, Canty denied that he ever identified the defendant in the still photograph. Consistent with the court's ruling, Placzek testified that Canty had told him that the subject in the still photograph was the defendant.

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

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

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

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

reason alone, an ultimate issue." Id. In order for an issue or fact to embrace the ultimate issue, it must be so interwoven with the question of guilt that it cannot reasonably be separated. Id., 231. Although the identification of the defendant as one of the men in the video was material to the state's case, that identification could be disentangled from the ultimate question of guilt. Id., 232. All that the video proved, the court explained, was that the defendant was in the store simultaneously with the robber—the state still needed to prove that the defendant had participated in the crime. Id. The court concluded, therefore, that the officers' testimony did not violate § 7-3 (a) of the Connecticut Code of Evidence. See id., 233.

In the appeal to this court, although we began with the same definition of "ultimate issue" as the Appellate Court, this court concluded that the identifications embraced an ultimate issue. *State* v. *Finan*, supra, 275 Conn. 66–67. This court's review of the record persuaded it that the identification of the defendant as the person shown in the video was central to the jury's determination of the defendant's guilt. Id., 67–69. Although this court's decision in *Finan* did not discuss whether there is a distinction between evidence that is material and evidence that embraces the ultimate issue, its analysis suggests that the court saw none.

In applying § 7-3 (a) of the Connecticut Code of Evidence, Connecticut courts have also struggled to distinguish between fact and opinion testimony. Although this court has not had occasion to consider the distinction, the Appellate Court has done so. See *State* v. *Holley*, 160 Conn. App. 578, 127 A.3d 221 (2015), rev'd on other grounds, 327 Conn. 576, 175 A.3d 514 (2018); *State* v. *Felder*, supra, 99 Conn. App. 18. Both the *Felder* and *Holley* decisions relied on the witness' level of familiarity with the defendant to distinguish between factual recognition and mere opinion.

In *Holley*, the defendant was convicted of numerous crimes, including felony murder, in connection with a home invasion. *State* v. *Holley*, supra, 160 Conn. App. 582. At trial, the state presented testimony from Nicole Clark, a coworker of the defendant, who identified him on video surveillance footage taken on a bus he rode home with his coconspirator after committing the crimes. Id., 615. The Appellate Court concluded that Clark's testimony that she recognized the defendant's face in the still photographs from the footage "is not characterized accurately as *opinion* testimony as to whether the photograph depicted the defendant. Clark recognized the defendant's face as it appeared in the still image based on the fact of her past acquaintance with him; she did not merely offer an opinion as to whether the still image depicted the defendant. Thus, her testimony was based on the *fact* that she recognized the defendant, not on an opinion that the photograph depicted him." (Emphasis in original.) Id., 617.

In *Felder*, the defendant was convicted of robbery in the first degree and larceny in the third degree in connection with a bank robbery. *State* v. *Felder*, supra, 99 Conn. App. 19–20. At trial, his girlfriend and former roommate, Michelle Mills, testified that she recognized him in photographs taken from the bank surveillance video. Id., 21. Mills testified that her recognition of the defendant was based on his head covering, sneakers, nose and posture. Id. On appeal, the defendant relied on this court's decision in *Finan* to argue that Mills' testimony should have been excluded as lay opinion testimony that went to the ultimate issue. Id., 25 n.6. The Appellate Court rejected the defendant's claim on the ground that Mills' testimony did not constitute opinion testimony. Id. Although the court did not explain the reasoning that led it to that conclusion, in the facts section, the court specifically detailed Mills' level of familiarity with the defendant, listed the bases of her

recognition, and stated that she testified that she "recognized" the defendant. Id., 21.

Both *Holley* and *Felder* envision a continuum. At one end, the testimony of witnesses with an intimate level of familiarity, such as a parent or sibling, concerns factual recognition, and such testimony is not subject to § 7-3 (a) of the Connecticut Code of Evidence. At the opposite end, witnesses who never met or saw the defendant prior to identifying him as depicted in video or still photographs would be prohibited by § 7-3 (a) of the Connecticut Code of Evidence from offering lay witness opinion testimony that embraces an ultimate issue. The *Felder*/*Holley* approach holds a certain familiar appeal. After all, as the trial court in the present case explained, it would be odd to question the ability of a parent to recognize his or her child in a photograph or video.

Our prior case law also offers insight into the particular nature of this type of identification evidence, namely, the process of recognizing a familiar face. In *Shields* v. *State*, 45 Conn. 266, 269 (1877), this court explained that "[a] witness well acquainted with another usually identifies him without conscious mental effort in the way of comparison or inference. In the absence of striking peculiarities of form or feature the identification may be, and often is, by the mere expression of countenance, which cannot be described. And the witness may be correct in his opinion, and yet be unable to give a single feature, or the color of the hair, or of the eyes, or any particulars as to the dress. In such cases the distinction between opinion and fact is so very nice that it might perhaps have been as well to consider such identification as a fact, like any other direct perception of the senses." (Internal quotation marks omitted.)

To be sure, both the federal courts and legal scholars have characterized the distinction between fact and opinion as illusory. The United States District Court

for the Eastern District of New York summarized the problem, observing that "Wigmore . . . questioned the possibility of clearly distinguishing the two: 'As soon as we come to analyze and define these terms . . . the distinction vanishes . . . .' [7 J. Wigmore, Evidence (Chadbourne Rev. 1978) § 1919]. Moore also acknowledged 'the illusory quality of such a fact-opinion distinction.' [11 J. Moore, Moore's Federal Practice (2d Ed. 1976) § 701.02]. The critical point bearing on the issue . . . is not simply the philosophical insight that statements usually contain both objective and subjective components . . . but rather the practical experience that opinions often represent a summary of statements of fact. The lay witness uses his opinion as a shorthand rendition of a set of collective facts otherwise difficult to state." (Citations omitted; internal quotation marks omitted.) *In re Franklin National Bank Securities Litigation*, 478 F. Supp. 577, 584 (E.D.N.Y. 1979); see also *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988) (observing that "[i]t has frequently been remarked that the distinction between statements of fact and opinion is, at best, one of degree: All statements in language are statements of opinion, i.e., statements of mental processes or perceptions. So-called statements of fact are only more specific statements of opinion." (Internal quotation marks omitted.)); G. Bach, "Moderating the Use of Lay Opinion Identification Testimony Related to Surveillance Video," 47 Fla. St. U. L. Rev. 445, 451 (2020) ("[i]n its 'purest form,' lay opinion testimony is just a 'shorthand rendition' of the facts that a witness observed").

In short—at least in this narrow context—we have arrived at the same conclusion that prompted the advisory committee for the Federal Rules of Evidence to abolish the ultimate issue rule. See Fed. R. Evid. 704 (a), advisory committee notes. Specifically, the advisory

committee notes to rule 704 (a) of the Federal Rules of Evidence state that "[t]he rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. [7 J. Wigmore, supra, §§ 1920 and 1921; C. McCormick, Evidence (1954) § 12]. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' [7 J. Wigmore, supra, § 1920]. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule."[10]

[10] The vast majority of states also have enacted evidentiary codes abolishing the ultimate issue rule. See Alaska R. Evid. 704; Ariz. R. Evid. 704 (a); Ark. R. Evid. 704; Cal. Evid. Code § 805 (Deering 2004); Colo. R. Evid. 704; Del. R. Evid. 704; Fla. Stat. Ann. § 90.703 (West 2011); Ga. Code Ann. § 24-7-704 (a) (2013); Haw. R. Evid. 704; Idaho R. Evid. 704; Ill. R. Evid. 704; Ind. R. Evid. 704 (a); Iowa R. Evid. 5.704; Kan. Stat. Ann. § 60-456 (d) (Cum. Supp. 2020); La. Code Evid. Ann., art. 704 (2017); Me. R. Evid. 704; Md. R. Evid. 5-704 (a); Mich. R. Evid. 704; Minn. R. Evid. 704; Miss. R. Evid. 704; Mont. R. Evid. 704; Neb. Rev. Stat. § 27-704 (2016); Nev. Rev. Stat. § 50.295 (2019); N.H. R. Evid. 704; N.J. R. Evid. 704; N.M. R. Evid. 11-704; N.C. R. Evid. 704; N.D. R. Evid. 704; Ohio R. Evid. 704; Okla. Stat. Ann. tit. 12, § 2704 (West 2020); Or. Rev. Stat. § 40.420 (2017); Pa. R. Evid. 704; R.I. R. Evid. 704; S.C. R. Evid. 704; S.D. Codified Laws § 19-19-704 (2016); Tenn. R. Evid. 704; Tex. R. Evid. 704; Utah R. Evid. 704 (a); Vt. R. Evid. 704; Wn. R. Evid. 704; W. Va. R. Evid. 704; Wis. Stat. Ann. § 907.04 (West 2000); Wyo. R. Evid. 704; see also Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, Massachusetts Guide to Evidence (2021) § 704, p. 177 (summarizing Massachusetts law).

Virginia's evidentiary rule prohibits "opinion testimony on the ultimate issues of fact" in criminal proceedings, but not in civil cases. Va. R. Evid. 2:704. A lay witness who is familiar with the defendant and identifies him in surveillance footage does not, however, testify as to an ultimate fact. Under Virginia law, "[u]ltimate issues of fact for purposes of the conviction of a crime are the statutory elements of [the] offense." (Internal quotation marks omitted.) *Bowman* v. *Commonwealth*, 30 Va. App. 298, 303, 516 S.E.2d 705 (1999); see id. (testimony of defendant's father-in-law identifying defendant in video surveillance footage did not implicate "ultimate issue of fact" (internal quotation marks omitted)).

Alabama is the only state other than Connecticut that has, through its evidence code, expressly and categorically barred opinion testimony as to an ultimate issue. See Ala. R. Evid. 704 ("[t]estimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact"). The Supreme Court

For all these reasons, we now hold that opinion testimony that relates to the identification of persons depicted in surveillance video or photographs is not inadmissible solely because it embraces an ultimate issue. Lay opinion testimony identifying a person in surveillance video or photographs is admissible if that testimony meets the requirements of § 7-1 of the Connecticut Code of Evidence.[11] That is, such testimony is admissible if the opinion is "rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Conn. Code Evid. § 7-1. To the extent that

of Alabama, however, has long held that testimony identifying a defendant as depicted in a surveillance video or photograph by a witness who has general familiarity with the defendant is not opinion evidence; rather, the witness is "testifying to facts that are within his personal knowledge." *Ex parte Rieber*, 663 So. 2d 999, 1011 (Ala.), cert. denied, 516 U.S. 995, 116 S. Ct. 531, 133 L. Ed. 2d 437 (1995).

Kentucky's evidence code does not expressly address the ultimate issue rule. The decision of the Supreme Court of Kentucky in *Stringer* v. *Commonwealth*, 956 S.W.2d 883 (Ky. 1997), cert. denied, 523 U.S. 1052, 118 S. Ct. 1374, 140 L. Ed. 2d 522 (1998), however, resolved the issue. In *Stringer*, the court recognized that its decisions in this area had been inconsistent. Id., 890–91. The court overruled the decisions that were inconsistent with rule 704 (a) of the Federal Rules of Evidence and clarified that "[w]e now once again depart from the 'ultimate issue' rule and rejoin the majority view on this issue." Id., 891.

Missouri's evidence code also does not expressly abandon the ultimate issue rule as to lay opinion testimony. Recent authority, however, follows the majority rule that such testimony is not necessarily barred. See *State* v. *Saucy*, 164 S.W.3d 523, 530 (Mo. App. 2005) (witness properly allowed to identify defendant in surveillance video; because she lived with defendant at time of crime and defendant's appearance had since changed, and, therefore, witness more likely than jury to correctly identify defendant in videotape).

New York has no code of evidence. The New York Court of Appeals, however, has upheld a trial court's decision to allow lay witness opinion testimony identifying a defendant in surveillance photographs. *People* v. *Russell*, 79 N.Y.2d 1024, 1025, 594 N.E.2d 922, 584 N.Y.S.2d 428 (1992).

[11] In this appeal, we address the effect of the rule change we announce today on the admissibility of lay opinions identifying a person in video or photographic surveillance footage. In *State* v. *Bruny*, 342 Conn. 169, A.3d (2022), also decided today, we address the effect of the rule change on the admissibility of expert opinions in the same context.

this court's decision in *Finan* is inconsistent with the rule we adopt today, that decision and its progeny; see *State* v. *Holley*, supra, 160 Conn. App. 578; *State* v. *Felder*, supra, 99 Conn. App. 18; are overruled.[12]

Because § 7-1 of the Connecticut Code of Evidence essentially mirrors rule 701 of the Federal Rules of Evidence,[13] we look to federal decisions for guidance in determining whether the trial court in the present case acted within its discretion in allowing the testimony. The Third Circuit explained the careful balancing intended to be effectuated by rule 701 of the Federal Rules of Evidence, which represents "a movement away from . . . courts' historically skeptical view of lay opinion evidence, and is rooted in the modern trend away from fine distinctions between fact and opinion and toward greater admissibility. . . . The [r]ule is nonetheless designed to exclude lay opinion testimony that amount[s] to little more than choosing up sides . . . or that merely tell[s] the jury what result to reach

[12] Notwithstanding the codification of the common law in the Code of Evidence, this court retains the authority to "develop and change the rules of evidence through case-by-case common-law adjudication." *State* v. *DeJesus*, 288 Conn. 418, 421, 953 A.2d 45 (2008). Subsequent to the publication of this court's opinion in *DeJesus*, the legislature authorized this court to adopt the Connecticut Code of Evidence and expressly stated: "Nothing in this section shall limit with respect to the law of evidence the authority of the Supreme Court under common law . . . ." General Statutes § 51-14a (c). This court's subsequent notice of adoption emphasized our continuing authority over the code, noting that, "[i]n adopting the Code of Evidence, the Supreme Court expressly reserved to itself its common-law authority regarding the law of evidence." 76 Conn. L.J., No. 4, p. 1D (July 22, 2014); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) §§ 1.1.4 through 1.1.7, pp. 10–16.

[13] Rule 701 of the Federal Rules of Evidence provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

"(a) rationally based on the [witness'] perception;

"(b) helpful to clearly understanding the [witness'] testimony or to determining a fact in issue; and

"(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

. . . .” (Citations omitted; internal quotation marks omitted.) *United States* v. *Stadtmauer*, 620 F.3d 238, 262 (3d Cir. 2010), quoting Fed. R. Evid. 704, advisory committee notes.

We begin with the observation that identifications of a defendant in surveillance video or photographs differ from eyewitness identifications. Unlike eyewitness identifications, which are grounded on the witness’ recollection of what the witness observed during the incident in question, an identification of a defendant by a nonpercipient witness in surveillance video or photographs is grounded on the witness’ general familiarity with the defendant’s appearance or the witness’ familiarity with the defendant’s appearance at the time that the incident occurred.

An eyewitness, therefore, testifies regarding something that the jury cannot itself observe—that the eyewitness observed the defendant engaged in conduct that is relevant to whether he committed the offense with which he is charged. Jurors can never be on the same footing as an eyewitness because they were not there. In contrast, a witness who identifies the defendant in surveillance video or photographs testifies regarding material that the jury also is able to observe. Unlike the past events testified to by an eyewitness, the video or photographs in evidence are physically present in the courtroom. So is the defendant. The jury is therefore able to compare the defendant with the video or photographs. Accordingly, as a general rule, nonpercipient lay opinion testimony identifying a defendant in surveillance video or photographs is admissible only “if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than is the jury.” *United States* v. *Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984).

In making this determination, courts evaluate the totality of the circumstances. See, e.g., *United States*

v. *Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005). Courts consider the following four factors relevant to determining whether the witness is more likely to correctly identify the defendant than is the jury: (1) the witness' general level of familiarity with the defendant's appearance; see, e.g., *United States* v. *Jackman*, 48 F.3d 1, 3–6 (1st Cir. 1995) (defendant's former wife and two acquaintances, each of whom had known defendant for years, had sufficient relevant familiarity with defendant to allow testimony identifying defendant in surveillance footage); (2) the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken; see, e.g., *United States* v. *Saniti*, 604 F.2d 603, 605 (9th Cir.) (roommates allowed to identify defendant in surveillance footage based both on general familiarity with defendant and familiarity with defendant's clothing), cert. denied, 444 U.S. 969, 100 S. Ct. 461, 62 L. Ed. 2d 384 (1979); (3) a change in the defendant's appearance between the time the surveillance video or photographs were taken and trial, or the subject's use of a disguise in the surveillance footage; see, e.g., *United States* v. *Farnsworth*, supra, 729 F.2d 1160 (defendant wore scarf over his face at time of robbery and had grown full beard by time of trial); and (4) the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage. See, e.g., *United States* v. *Allen*, 787 F.2d 933, 936 (4th Cir. 1986) ("less than clear" quality of photographs, which provided only "limited glimpses" of individual depicted, rendered testimony of witnesses familiar with defendant more helpful to jury), vacated on other grounds, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987).

A witness' general familiarity with the defendant is relevant both to whether the testimony is rationally based on the witness' perception and whether the testi-

mony is helpful to the fact finder. The Fourth Circuit explained: "[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting." Id.

Decisions of state and federal courts have set a low bar for general familiarity, holding that, as long as a witness has a greater degree of familiarity with the defendant than does the jury, the general familiarity requirement favors admissibility.[14] For example, courts have

[14] Notably, even Alabama, the only other state besides Connecticut that expressly retains the ultimate issue rule in its code of evidence; see footnote 10 of this opinion; has held that a lay witness may testify regarding the identity of a defendant in surveillance video or photographs if the witness "is better qualified or in a better position than the jury to draw the conclusion of identity from those facts personally observed by or known to [the witness]." *Hardy* v. *State*, 804 So. 2d 247, 269 (Ala. Crim. App. 1999), cert. denied, 534 U.S. 1043, 122 S. Ct. 621, 151 L. Ed. 2d 543 (2001); see also *Ex parte Rieber*, 663 So. 2d 999, 1011–12 (Ala.), cert. denied, 516 U.S. 995, 116 S. Ct. 531, 133 L. Ed. 2d 437 (1995).

If we were to retain the applicability of the ultimate issue bar to identifications of persons depicted in surveillance video or photographs, we would find the reasoning of *Ex parte Rieber*, supra, 663 So. 2d 999, and *Hardy* v. *State*, supra, 804 So. 2d 247, persuasive to the extent that it is consistent with the Appellate Court decisions in *State* v. *Felder*, supra, 99 Conn. App. 18, and *State* v. *Holley*, supra, 160 Conn. App. 578. Specifically, Alabama courts treat the testimony of a witness who identifies a defendant as depicted in surveillance video or photographs—and who has sufficient general familiarity with a defendant—as fact, rather than opinion testimony. *Ex parte Rieber*, supra, 1011. Such testimony, therefore, is not categorically barred by the ultimate issue rule. To determine whether testimony identifying a defendant in surveillance video or photographs is admissible, Alabama courts evaluate the totality of the circumstances in the same manner as the state and federal decisions on which we rely in this case. See *Hardy* v. *State*, supra, 804 So. 2d 270–71 (quoting *United States* v. *Pierce*, supra, 136 F.3d 774–75, for the applicable standard).

held this factor to support admissibility when law enforcement witnesses gained familiarity with the defendant by observing him from a distance. See, e.g., *United States* v. *Houston*, 813 F.3d 282, 287, 292 (6th Cir.) (trial court properly allowed video surveillance identification testimony of federal agent who had observed defendant in drive-bys of defendant's farm), cert. denied, U.S. , 137 S. Ct. 567, 196 L. Ed. 2d 448 (2016); id., 292 ("someone who is personally familiar with an individual is presumptively better able to identify the individual in a photograph than a juror"). Courts have concluded that witnesses who have had a handful of encounters of undetermined or brief duration with the defendant have nonetheless acquired sufficient general familiarity. See, e.g., *United States* v. *Arroyo*, 600 Fed. Appx. 11, 15 (2d Cir. 2015) (superintendent of apartment building who recognized defendant as boyfriend of one of building's tenants, and had seen defendant in building "several times," was properly allowed to identify defendant in video surveillance); *United States* v. *Kornegay*, 410 F.3d 89, 95 (1st Cir. 2005) (holding that detective's contact with defendant "on six occasions within a few months is within the zone that courts have found acceptable to show that the witness was sufficiently familiar with the defendant to provide a useful identification"); *United States* v. *Pierce*, 136 F.3d 770, 775 (11th Cir.) (identification testimony of probation officer who met defendant ten times over seven months was properly admitted because those contacts provided some basis for concluding that witness was "more likely" than jury

Thus, even without the rule change we announce today, we would have applied similar reasoning to that relied on by the Alabama courts, as well as *Felder* and *Holley*. Given Canty's familiarity with the defendant, both generally and at the time that the surveillance footage was recorded, those principles would have led us to the same conclusion that we arrive at today, namely, that Canty's identification of the defendant in the surveillance footage, as testified to by Detective Placzek, was admissible.

to correctly identify defendant from photograph (internal quotation marks omitted)), cert. denied, 525 U.S. 974, 119 S. Ct. 430, 142 L. Ed. 2d 350 (1998); *United States* v. *Wright*, 904 F.2d 403, 404–405 (8th Cir. 1990) (court properly admitted identification testimony of police officer who had seen defendant eight to ten times over two to three years); *United States* v. *Allen*, supra, 787 F.2d 935 (familiarity requirement was met when parole officer briefly met defendant on six or seven occasions); *People* v. *Mixon*, 129 Cal. App. 3d 118, 129, 180 Cal. Rptr. 772 (1982) (police officer possessed sufficient relevant familiarity when he had never spoken with defendant but had seen him from relatively close range on "numerous occasions" over period between one and ten years (internal quotation marks omitted)). Some courts have required even less, holding that a witness who viewed the defendant on a single occasion had sufficient general familiarity with the defendant. See, e.g., *United States* v. *Jackson*, 688 F.2d 1121, 1123–25 (7th Cir. 1982) (witness who met defendant only once, at holiday party, had sufficient general familiarity), cert. denied, 460 U.S. 1043, 103 S. Ct. 1441, 75 L. Ed. 2d 797 (1983); *Robinson* v. *People*, 927 P.2d 381, 382, 384 (Colo. 1996) (detective who had single, prior encounter with defendant had sufficient general familiarity); *People* v. *Thompson*, 49 N.E.3d 393, 408 (Ill. 2016) (witness who never met defendant, but saw him once, when he was sleeping on porch of mutual friend's house, had sufficient familiarity); see also annot., B. Filbert, "Admissibility of Lay Witness Interpretation of Surveillance Photograph or Videotape," 74 A.L.R.5th 643, 654–74, § 3 [a] (1999) (citing cases in which courts held that witness' familiarity with defendant's appearance was sufficient to render video or photographic surveillance identification testimony helpful to jury).

Even in jurisdictions expressing the standard for general familiarity in language that *suggests* a higher bar,

courts routinely find that standard met when the witness possesses marginally greater familiarity with the defendant than does the jury. For example, in *United States* v. *LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993), the Ninth Circuit identified two means by which a proponent could introduce this type of testimony—by establishing general familiarity with the defendant or by demonstrating changed appearance and familiarity with the defendant's appearance at the time of the incident.[15] The court stated that the general familiarity requirement is met when "the witness has had *substantial and sustained contact* with the person in the photograph." (Emphasis added.) Id.

In *LaPierre*, the court held that neither of those conditions was met. There was no evidence that the defendant's appearance had changed, and the witness, a police officer, "not only did not know [the defendant], he had never even seen him in person." Id. Despite the high standard for general familiarity described in *LaPierre*, the Ninth Circuit subsequently has applied the same low bar as that applied in other jurisdictions. See, e.g., *United States* v. *Beck*, supra, 418 F.3d 1015 (witness who had seen defendant four times in two month period for total of more than seventy minutes was sufficiently familiar).

In the handful of cases in which courts applying either rule 701 of the Federal Rules of Evidence or a state analogue to the rule have concluded that witnesses lacked sufficient general familiarity to favor admissibility, the witness had little or no familiarity with the defendant. See, e.g., *United States* v. *Fulton*, 837 F.3d 281, 299 (3d Cir. 2016) (identification testimony was improper when detectives' sole familiarity with defendant was "very

[15] The Ninth Circuit subsequently adopted the totality of the circumstances approach followed by the majority of jurisdictions. See *United States* v. *Beck*, supra, 418 F.3d 1015.

limited" and acquired only after defendant was under investigation), cert. denied, U.S. , 139 S. Ct. 214, 202 L. Ed. 145 (2018); *United States* v. *Jadlowe*, 628 F.3d 1, 24 (1st Cir. 2010) (testimony of federal agent identifying defendant in surveillance footage was improperly admitted when agent made identification by comparing defendant's image on screen with his driver's license photograph, which was in evidence), cert. denied, 563 U.S. 926, 131 S. Ct. 1833, 179 L. Ed. 2d 788 (2011); *United States* v. *LaPierre*, supra, 998 F.2d 1465 (testimony was inadmissible when witness did not know defendant, had never seen him in person, and based identification in surveillance footage on review of photographs of defendant and witnesses' description of him); *Commonwealth* v. *Vacher*, 469 Mass. 425, 442, 14 N.E.3d 264 (2014) (video surveillance identification testimony of detective was improperly admitted when record did not reveal that "detective possessed any special familiarity with the defendant that the jury lacked, or that the defendant's appearance had changed since the time the footage was taken, such that the jury needed assistance in identifying the individual depicted"); see also annot., 74 A.L.R.5th, supra, § 3 [b], pp. 674–78 (citing cases in which courts have held that witness' level of familiarity with defendant was insufficient to render testimony helpful to jury).

Courts have recognized that the concept of "familiarity" with another person is not an either/or dichotomy of "unfamiliar" versus "familiar." Universally, however, courts have held that the degree of familiarity goes to the weight rather than to the admissibility of the testimony. For instance, in *United States* v. *Jackson*, supra, 688 F.2d 1126, the Seventh Circuit concluded that a witness who had met the defendant only once, at a holiday party, was properly permitted to identify the defendant in a surveillance photograph. The court explained that, "[w]hile we recognize that there is a difference between

identification testimony which is based [on] a [witness'] one social encounter with the defendant and identification testimony which is based [on] a [witness'] close and on-going relationship with the defendant, we do not believe that the difference . . . is determinative of the issue of admissibility of the evidence. The amount of time that the witness had to observe the defendant goes to the weight to be accorded to the testimony by the jury rather than to its admissibility." Id., 1125; see also *United States* v. *Beck*, supra, 418 F.3d 1012, 1015 (probation officer's four contacts with defendant, each for thirty minutes or less, was sufficient for admissibility of testimony identifying defendant in surveillance photograph, as degree of familiarity goes to weight rather than to admissibility); *Robinson* v. *People*, supra, 927 P.2d 384 (rejecting defendant's challenge to testimony of detective, who had seen defendant once, that defendant was depicted in surveillance photograph, as degree of familiarity goes to weight rather than to admissibility). But see *United States* v. *Calhoun*, 544 F.2d 291, 294–96 (6th Cir. 1976) (it was abuse of discretion to admit parole officer's testimony identifying defendant in surveillance photograph because probative value was outweighed by prejudice to defendant on basis that cross-examination to test witness' level of familiarity with defendant would reveal that he was on parole).

In summary, our review of the relevant case law reveals that courts regularly find that this prong of the totality of the circumstances inquiry favors admissibility unless the witness has had virtually zero prior contacts with the defendant. The low bar for general familiarity renders this prong close to meaningless, a mere rubber stamp on the road to admissibility. Rather than inquiring whether a witness has some degree of "familiarity" with the defendant's appearance, the general familiarity prong, as applied in federal and state courts, merelyasks whether the witness has ever, even once, seen the defen-

dant prior to identifying him in surveillance video or photographs.

The low standard for general familiarity tends to favor the prosecution.[16] Although a defendant in some instances may seek to introduce testimony that he is not the person depicted in surveillance video or photographs; see, e.g., *United States* v. *Jackman*, supra, 48 F.3d 4 (defendant's brother testified that suspect depicted in surveillance photographs was not defendant); in the vast majority of cases, it is the state that seeks to introduce this type of testimony.

We conclude that the low threshold for general familiarity applied in virtually all jurisdictions that have con-

[16] The disadvantage that criminal defendants suffer due to the majority rule favoring admissibility unless the witness has no familiarity with the defendant is most pronounced when the witness is a member of law enforcement. See generally G. Bach, supra, 47 Fla. St. U. L. Rev. 445 (highlighting problems presented by law enforcement testimony in particular). Courts have recognized the risk that "testimony from law enforcement or corrections personnel may increase the possibility of prejudice to the defendant either by highlighting the defendant's prior contact with the criminal justice system, if the [witness'] occupation is revealed to the jury, or by effectively constraining defense counsel's ability to undermine the basis for the [witness'] identification on cross-examination . . . ." *United States* v. *Pierce*, supra, 136 F.3d 776; see also *United States* v. *Calhoun*, supra, 544 F.2d 294–96.

Because the present case does not involve direct lay opinion testimony from a member of law enforcement, we need not determine whether to adopt any additional limitations on the use of such testimony. Some safeguards that may merit future consideration include (1) restricting the use of lay opinion testimony by members of law enforcement to instances "when no other adequate identification testimony is available to the prosecution"; *United States* v. *Farnsworth*, supra, 729 F.2d 1161; see also *United States* v. *Butcher*, 557 F.2d 666, 670 (9th Cir. 1977); (2) barring testimony concerning the nature of the relationship between the defendant and the law enforcement witness; see G. Bach, supra, 47 Fla. St. U. L. Rev. 475–76; (3) allowing the defendant an opportunity to examine the proffered witness outside the presence of the jury, thus affording the trial court the opportunity to rule on admissibility without risking prejudice to the defendant; see *People* v. *Thompson*, supra, 49 N.E.3d 407; (4) limiting the number of law enforcement witnesses who may offer such testimony; see G. Bach, supra, 476–77; and (5) requiring that the witness have gained familiarity with the defendant prior to the litigation. Id., 478.

sidered the admissibility of lay witness identifications of a defendant in surveillance video or photographs does not afford sufficient protection to criminal defendants against good faith mistaken identifications. We believe that the better rule is to require, in order for the witness' general familiarity with the defendant's appearance to weigh in favor of admissibility, that the proponent of the testimony demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. We acknowledge that we are eschewing the bright line rule applied by other jurisdictions in favor of one that relies on trial courts to exercise their discretion to determine whether this factor supports admissibility. That determination will rest on the facts and circumstances of each case. For instance, although we are confident that viewing a defendant sleeping on a porch on a single occasion is insufficient to render a witness' testimony identifying the defendant in video surveillance footage reliable; contra *People* v. *Thompson*, supra, 49 N.E.3d 408; we cannot rule out the possibility that, under some circumstances, a single encounter will be sufficient to satisfy this factor. In exercising their discretion to determine whether the proponent has satisfied this factor, courts should consider whether the witness' level of familiarity with the defendant is sufficient to render the identification reliable. In making that determination, courts should consider the particular, relevant circumstances, including, but not limited to, the frequency, number and duration of any individual prior contacts; the duration of the entire course of contacts and the length of time since the contacts; the relevant viewing conditions; and the nature of the relationship between the witness and the defendant, if any. Of course, under certain circumstances, an itemized review of some of these circumstances will not be required. For example, in the present case, in which the witness had known the defendant

for half of his life, it would make little sense to question the relevant viewing conditions during his contacts with the defendant.

Our conclusion is guided in part by the measures taken, both by this court and by the legislature, to protect defendants against good faith, mistaken identifications in the related context of eyewitness identification. As we have observed in this opinion, eyewitness identifications are different from identifications of a defendant in surveillance footage. The two contexts, however, overlap in one significant respect: both involve the witness' claimed recognition of the defendant.

We have recognized that recent scientific developments "abundantly [demonstrate] the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 237, 49 A.2d 705 (2012). In light of the growing body of scientific research and studies revealing the fallibility of eyewitness identifications, this court has increased the procedural safeguards that apply in the context of eyewitness identifications. See, e.g., *State* v. *Harris*, 330 Conn. 91, 115, 191 A.3d 119 (2018) (state constitution required modification of factors set forth in *Neil* v. *Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), in light of "recent developments in social science and the law"); *State* v. *Guilbert*, supra, 234–35 (relying on "near perfect scientific consensus" in reversing longstanding bar on admission of expert testimony on fallibility of eyewitness identification); *State* v. *Ledbetter*, 275 Conn. 534, 578–79, 881 A.2d 290 (2005) (relying on growing body of scientific research in invoking supervisory authority to require trial courts to instruct jury of

risk of misidentification in cases in which law enforcement failed to instruct witness that perpetrator may or may not be present in identification procedure, unless no significant risk of misidentification exists) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

The General Assembly has also enacted legislation adding significant procedural protections in the context of eyewitness identifications. See General Statutes § 54-1p. In adding the procedural safeguards, the legislature, like this court, relied on scientific research. See, e.g., 54 H.R. Proc., Pt. 23, 2011 Sess., p. 7813, remarks of Representative Gary Holder-Winfield (stating that new procedural safeguards intended to incorporate "the latest scientific [research] and best procedures"). None of the procedural safeguards in § 54-1p is currently required for witnesses who identify a defendant in surveillance video or photographs.[17] In light of our restriction of this type of testimony to witnesses who possess more than a minimal degree of familiarity with the defendant, we deem it unnecessary at this time to require any additional procedural protections in this context. Requiring more than a minimal degree of familiarity in order for this prong to weigh in favor of admissibility significantly reduces the risk of mistaken identifications.

In comparison to the vast amount of scientific research on stranger identifications, there have been only a small number of studies focused on the accuracy of familiar identifications. See J. Vallano et al., "Familiar Eyewit-

[17] Indeed, some of those protections would not be applicable or appropriate in this context. For instance, the prohibition against visible writings or information concerning any previous arrest of the person suspected as the perpetrator simply does not apply in this context. See General Statutes § 54-1p (c) (8). Another example: we question whether a requirement that lineups be presented sequentially would be appropriate in this context.

ness Identifications: The Current State of Affairs,'' 25 Psychol. Pub. Policy & L. 128, 128–29 (2019) (observing that bulk of scientific studies of accuracy of eyewitness identifications have focused on stranger identifications, whereas ''familiar identifications'' have received only ''sporadic and haphazard attention among social scientists and legal practitioners''). The relevant field studies in the area, however, are ''remarkably consistent'' and demonstrate that, as a general rule, familiarity renders an identification significantly more reliable than stranger identifications. Id., 131; see also *State* v. *Guilbert*, supra, 306 Conn. 259–60 (recognizing, in context of eyewitness identifications, that, ''although there are exceptions, identification of a person who is [well-known] to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not [well-known] to the eyewitness''). The more problematic question is *how much* familiarity is required to render an identification of a defendant in surveillance video or photographs sufficiently reliable to allay concerns regarding a lack of available procedural protections against a mistaken identification.

As we have already stated, the concept of familiarity encompasses a broad range of possibilities. Unlimited, the term may include both a person's spouse of fifty years and a stranger's onetime brief encounter. Few would doubt the ability of a spouse to accurately identify his or her partner—even from the relatively poor quality that is common among surveillance video and photographs—but we do not have the same confidence in an identification by a person who has a minimal degree of familiarity with a defendant.[18]

[18] One study found the effects of a high degree of familiarity to have a significant impact on the accuracy of identifications from low quality closed-circuit television footage. See generally V. Bruce et al., ''Matching Identities of Familiar and Unfamiliar Faces Caught on CCTV Images,'' 7 J. Experimental Psychol.: Applied 207 (2001). One of the experiments in the study involved two sets of participants. The first group had a high level of familiarity with

We particularly note that, although familiarity increases the accuracy of identifications, these identifications are not immune from detracting factors such as expectations (the belief that one will come across a familiar face), the presence of a disguise, cross-racial identifications, and an increased distance between the witness and the target individual. J. Vallano et al., supra, 25 Psychol. Pub. Policy & L. 133. Requiring more than a minimal degree of familiarity provides greater assurance that a witness' identification of a defendant in surveillance footage will be less affected by these detractors. See V. Bruce et al., "Matching Identities of Familiar and Unfamiliar Faces Caught on CCTV Images," 7 J. Experimental Psychol.: Applied 207, 212 (2001) (demonstrating high level of accuracy in high degree familiarity identifications despite poor video quality). Indeed, in a given case, the presence of such detractors may prompt the trial court to exercise its discretion to allow expert testimony on the risks of misidentification pursuant to this court's decision in *State* v. *Guilbert*, supra, 306 Conn. 246–48. In addition, the trial court may provide a cautionary jury instruction. See, e.g., *State* v. *Harris*, supra, 330 Conn. 134–35 ("it may be appropriate for the trial court to craft jury instructions to assist the jury in its consideration of [the reliability of eyewitness testimony]").

In accordance with these principles, we decline to join the majority of jurisdictions that adhere to a minimum threshold for general familiarity and hold that the degree of a witness' familiarity with a defendant goes

the target face in the video. The second group was unfamiliar with any people in the experiment. Id., 208. Both groups were asked to determine whether a photograph matched the target person shown in poor quality video images. Id. The participants with a high degree of familiarity were able to match or reject matches with more than 90 percent accuracy, despite the poor quality of the video images. Id., 212. By comparison, the participants with no familiarity were able to accurately match or reject a match approximately 75 percent of the time. Id.

to the admissibility of the witness' identification of the defendant in surveillance video or photographs. In order for the witness' general familiarity with the defendant's appearance to weigh in favor of admitting such testimony, the proponent of the testimony must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. Some illustrative examples of persons who may satisfy this standard are friends, longtime acquaintances, neighbors, coworkers, family members, and former classmates.

We believe that this standard comports with the requirement of § 7-1 of the Connecticut Code of Evidence that lay witness opinion testimony must be rationally based on the perception of the witness and helpful. When a witness who is familiar with the defendant's appearance views surveillance video or photographs that may or may not depict him, that witness brings to the task of identification an ability the jury cannot acquire in the context of a criminal trial. The witness' process of recognition is informed by having observed the defendant in different contexts, over an extended period of time. That wealth of experience renders the testimony helpful to the jury. See *United States* v. *Allen*, supra, 787 F.2d 936 (contrasting perspective of jury with witness who had observed defendant in variety of circumstances over extended period of time).

The remaining three factors—the witness' familiarity with the defendant's appearance at the time of the surveillance footage, any change in the defendant's appearance since the surveillance or any disguise worn by the subject at the time of the surveillance, and the quality of the video or photographs—also should be considered under the totality of the circumstances along with the witness' general familiarity with the defendant. With respect to the quality of the video or photographs, we agree with the First Circuit that this factor favors admissibility when "the [video or] photographs are not either

so unmistakably clear or so hopelessly obscure that the witness is no [better suited] than the jury to make the identification." *United States* v. *Jackman*, supra, 48 F.3d 5.

Applying these principles to the present case, we conclude that Canty's long-standing and intimate association with the defendant easily meets the general familiarity prong, which favors admitting Placzek's testimony that Canty had identified the suspect in the photograph as the defendant. Canty and the defendant had known each other for years. As Canty himself stated, he had known the defendant for half his life. They were so close that Canty described the defendant as his cousin.

The second prong, the witness' familiarity with the defendant's appearance at the time that the surveillance footage was recorded, also weighs in favor of admissibility. Canty was familiar with the defendant's appearance when the surveillance video was recorded. Indeed, he spent several hours with the defendant both on the day of the shooting and the following day. In addition, at the time of the shooting, Canty saw the defendant regularly—he spent time with the defendant on most days. He was familiar with the type of clothing the defendant wore, describing him as favoring Nike outfits.

As for the remaining two prongs, the record does not reflect whether the defendant's appearance changed between the time the surveillance video was recorded and the time of trial, and, although he wore a baseball cap in the surveillance footage, he was not wearing a disguise.[19] The quality of the photograph, however, also

[19] Because we examine the totality of the circumstances in determining whether the identification testimony was admissible, the failure to satisfy this single factor to support admitting the testimony is not fatal. That weakness may be highlighted during cross-examination and in closing argument. See, e.g., *United States* v. *Jackman*, supra, 48 F.3d 5 (witnesses' lack of familiarity with defendant's appearance at precise time of robbery did not render testimony inadmissible).

weighs in favor of admission. The trial court found that, although it was not unmistakably clear, the subject was close enough to the camera, and his face was visible enough, to allow for recognition. The trial court, therefore, properly admitted Placzek's testimony that Canty had identified the subject in the photograph as the defendant.

II

We next address the defendant's claim that the trial court improperly denied his motion for a mistrial and a new trial based on alleged juror misconduct. Specifically, the defendant claims that the trial court abused its discretion in denying the defendant's motion for a new trial, in which he argued that he suffered prejudice when jurors brought in and used two unauthorized magnifying glasses to assist them in reviewing the photographic evidence during their deliberations. The state responds that the trial court acted within its discretion in concluding that the defendant had failed to prove that he suffered prejudice due to the alleged misconduct. We agree with the state.

The record reveals the following additional facts relevant to the resolution of this claim. In its final charge to the jurors, the court instructed them that they were not allowed to "go outside the evidence introduced in court to find the facts." On the first day of deliberations, the jury sent the court a note requesting a magnifying glass. Over defense counsel's objection, the court marked and sent to the jury a magnifying glass supplied by the state.[20] The jury sent a second note, requesting a "better" magnifying glass—the court denied that request.

After the verdict was announced, the trial judge met with the jurors "to talk to [them] informally about the

[20] This court has held that it is within the discretion of the trial court to allow a jury to use a magnifying glass to inspect photographic evidence during deliberations. *State* v. *Wallace*, 78 Conn. 677, 678–79, 63 A. 448 (1906).

trial process." During that discussion, after the jurors had returned the magnifying glass that the court had provided to them, the judge observed one of the jurors remove a different magnifying glass from her backpack, then replace it. The court subsequently held a hearing, pursuant to *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995), during which the court questioned both the foreman and the female juror who had displayed the magnifying glass. The female juror confirmed that she had brought in a magnifying glass, a toy belonging to her preschool aged son. She told the court that, although she did not use that magnifying glass, she believed that at least two other jurors did.

She informed the court that the foreman had also brought in a magnifying glass. She saw the foreman use the magnifying glass that he had brought but did not see anyone else use it. When the court pressed for more information regarding how the jurors had used the extra magnifying glasses, she explained that the jurors wished to use the magnifying glasses to assist them in evaluating the photographs that were not very clear, particularly the still photograph of the suspect taken from the video surveillance footage.

When the court questioned the foreman, he confirmed that he had brought a magnifying glass into court during deliberations. He told the court that the glass is called a "loupe," and it is used in photography for viewing negatives. The glass was old and foggy, no better than reading glasses. He used the magnifying glass to view the still photograph of the suspect. He believed that one or two jurors seated near him also viewed the photograph through the magnifying glass.

Over the course of an additional two days, the court questioned the remaining jurors. Two of the jurors were questioned by telephone set to speaker mode in the courtroom. Most recalled seeing at least one of the

additional magnifying glasses; many recalled both. Most of them remembered seeing at least some jurors using one of the additional magnifying glasses. The consensus was that people were using the magnifying glasses to view the photographs, particularly the still photographs from the video surveillance footage.

In its memorandum of decision denying the defendant's motion for a mistrial and a new trial, the trial court found that neither of the additional magnifying glasses, both of which had been marked as exhibits for the purpose of the hearing, had high powers of magnification. As to the loupe, the court found that it was quite foggy. The court also found that the additional two magnifying glasses did not allow the jury to do anything different or additional beyond what the court provided magnifier allowed.

Moreover, the court observed that "[t]he additional magnifiers did not introduce new evidence or alter existing evidence. Like the magnifying glass that the court authorized, the additional magnifying glasses simply allowed the jury to look closer at existing evidence, which was part of their task as jurors." The magnifying glasses, the court added, were "essentially neutral." The closer look allowed by a magnifier equally could have benefitted the defendant or the state and, therefore, was not inherently prejudicial to the defendant.

We review a trial court's determination as to whether juror misconduct has prejudiced a party for abuse of discretion. See, e.g., *State* v. *Roman*, 262 Conn. 718, 727, 817 A.2d 100 (2003). "We recognize that the trial judge has a superior opportunity to assess the proceedings over which he or she personally has presided . . . and thus is in a superior position to evaluate the credibility of allegations of jury misconduct, whatever their source." (Citations omitted.) *State* v. *Brown*, supra, 235 Conn. 527–28. For both forms of relief requested by the

defendant, a mistrial and a new trial, he bore the burden of establishing that the alleged misconduct prejudiced him. See Practice Book § 42-43 (in motion for mistrial, defendant must show that alleged error resulted in "substantial and irreparable prejudice to the defendant's case"); Practice Book § 42-53 (in motion for new trial, defendant must show that error was "materially injurious" to him). In light of the trial court's findings that the two unauthorized magnifiers did not allow the jurors to do anything different or additional beyond what the court provided magnifier allowed and did not introduce new evidence or alter existing evidence, we conclude that the court acted within its discretion in finding that the defendant had failed to prove that he was prejudiced by the alleged misconduct.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JEAN BRUNY
(SC 20174)

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

Syllabus

Convicted of the crimes of murder and criminal possession of a pistol or revolver in connection with the shooting death of the victim inside a nightclub, the defendant appealed to this court. Prior to the shooting, the defendant and several other individuals, including T, H and M, arrived at the nightclub. About forty-five minutes later, the victim arrived with his cousin, W, and a few friends. The victim's group and the defendant's group were at opposite ends of the nightclub's main room. Soon thereafter, the defendant made his way toward the area where the victim's group was standing and stood behind them. Immediately after someone in the defendant's group threw a bottle at the victim's group, the defendant stepped forward, aimed a handgun at the back of the victim's head, and fired. The victim fell to the ground, and the defendant ran and exited the nightclub. Video from before, during and after the shooting was captured on surveillance cameras in or around the nightclub. Multiple witnesses who either knew the defendant or were acquainted with

him provided testimony at the defendant's trial identifying him in the surveillance footage. On appeal to this court from the judgment of conviction, *held*:

1. The defendant could not prevail on his claim that the trial court had abused its discretion in admitting the testimony of four lay witnesses, T, H, M, and S, identifying the defendant as one of the persons depicted in the surveillance footage of the interior and exterior of the nightclub where the shooting occurred insofar as their testimony improperly embraced an ultimate issue to be decided by the jury, in violation of the Connecticut Code of Evidence (§ 7-3 (a)): in *State* v. *Gore* (342 Conn. 129), this court amended § 7-3 (a) of the Code of Evidence to incorporate an exception to the ban on lay opinion testimony that embraces an ultimate issue for opinion testimony that relates to the identification of a criminal defendant depicted in a surveillance video or photograph, and such testimony is admissible if, in accordance with the provision (§ 7-1) of the Code of Evidence governing the admissibility of lay opinion testimony, it is rationally based on the perception of the witness and is helpful to a clear understanding of that witness' testimony or the determination of a fact in issue; moreover, testimony identifying a defendant in surveillance footage meets the requirements of § 7-1 if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the footage than is the jury, and that determination should be based on consideration of several factors, in light of the totality of the circumstances, including the witness' general familiarity with the defendant's appearance, the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken, a change in the defendant's appearance between the time the surveillance video or photographs were taken and the time of trial, or the subject's use of a disguise in the surveillance footage, and the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage; in the present case, S, T and H had sufficient general familiarity with the defendant, as S was the defendant's foster mother, and all three witnesses had known the defendant for many years, and, although the degree of M's general familiarity with the defendant was low, she, T and H were with the defendant on the day of the shooting and were familiar with his appearance at the time that the surveillance footage was taken; furthermore, the fact that the defendant's appearance had changed between the time that the surveillance footage was recorded and the time of trial, as well as the quality of the video, weighed in favor of the admissibility of the challenged testimony.
2. The defendant could not prevail on his claim that the trial court improperly had admitted the expert testimony of E, a forensic examiner, regarding an enhanced video that he compiled from the raw surveillance footage of the nightclub and in which he tracked the movement of certain individuals throughout the nightclub using alphanumeric codes, on the

ground that E's testimony invaded the province of the jury, in violation of § 7-3 (a) of the Connecticut Code of Evidence: this court determined that expert testimony pertaining to the identification of a defendant in surveillance footage is admissible if it comports with the requirements of the provision (§ 7-2) of the Connecticut Code of Evidence governing the admissibility of expert testimony, and the trial court correctly concluded that E's testimony met those requirements, as E's experience and training in the area of forensic video analysis were extensive, his skill and knowledge were directly applicable to the jury's task of interpreting the surveillance footage, his expertise enabled him to analyze the surveillance footage in a manner that was beyond the ability of the average person, and his testimony and the enhanced video itself likely were helpful to the jury; moreover, E never identified the defendant as the shooter, the identity of the defendant as the shooter in the video was a determination left to the jury, and, therefore, E's testimony did not invade the province of the jury; accordingly, the trial court acted within its broad discretion in admitting E's testimony.

3. This court declined to address the defendant's claim concerning whether the trial court had incorrectly concluded that defense counsel opened the door to certain of E's testimony on redirect examination regarding the surveillance footage, because, even if that conclusion had been incorrect, the defendant failed to demonstrate that any error was harmful; although this court found it troubling that the trial court permitted E to testify, during redirect examination, that the notes of a special agent with the Federal Bureau of Investigation indicated that the individual labeled with a certain alphanumeric code in the enhanced video and who shot the victim was the defendant, insofar as the trial court, in doing so, undermined all attempts to distance E's testimony from directly identifying the defendant as the shooter, the state presented overwhelming evidence that the individual in the video who was assigned that specific alphanumeric code shot the victim and that that individual was the defendant.

4. The trial court did not abuse its discretion in denying the defendant's request for a special credibility instruction as to P, a witness who was in prison at the time of the defendant's trial and who, according to the defendant, should have been treated as a jailhouse informant when he testified that, one month before the shooting, he observed the defendant with a gun and acknowledged on cross-examination that he was hoping to receive favorable treatment in exchange for the information he provided: the rule requiring a special credibility instruction for jailhouse informants did not apply to P's testimony, as that testimony did not relate to an inculpatory statement or confession that the defendant made to P while they were incarcerated together but, rather, concerned P's observations of the defendant outside of the prison context; moreover, although this court previously had expanded the special credibility instruction requirement to include informants who receive no promise

from the state in exchange for their testimony and incarcerated witnesses who testify that the defendant confessed or made inculpatory statements to them outside of prison, it declined to adopt a rule requiring such an instruction for testimony regarding observed events but did not foreclose the possibility that a trial court could exercise its discretion to give a special credibility instruction when the witness' testimony relates to an event rather than to a statement; furthermore, defense counsel impeached P's credibility effectively during cross-examination, and counsel presented testimony from an expert witness who testified about the unreliability of jailhouse informants.

(*One justice concurring separately*)

5. The defendant could not prevail on his claim that the trial court improperly had denied his motion to suppress the out-of-court and in-court identifications of the defendant made by W, who was the victim's cousin, was present at the nightclub on the night of the shooting, and had "bad blood" with one of the individuals in the defendant's group, this court having determined that, even if the identifications should have been suppressed, any error in admitting them was harmless: the state's case was strong and did not rely on eyewitness testimony but relied, instead, on the fact that the defendant was captured in the surveillance video shooting the victim; moreover, defense counsel impeached W's credibility thoroughly and effectively during cross-examination, highlighting many inconsistencies in W's stories as they evolved each time he met with law enforcement, and also highlighting that W waited for approximately three and one-half years to come forward to the police, that he was incarcerated and faced a lengthy sentence when he did finally come forward, and that he had a motive to lie because he was testifying pursuant to a cooperation agreement; furthermore, the testimony of the defendant's expert witness concerning the unreliability of jailhouse informant testimony further reinforced W's motivation to lie, the trial court gave a special credibility instruction as to W, reminding the jury that W was testifying pursuant to a cooperation agreement, and W's testimony was cumulative of other, more persuasive evidence.

6. The defendant's claim that the state had presented insufficient evidence to prove beyond a reasonable doubt the element of the crime of criminal possession of a pistol or revolver that the gun in question have a barrel length of less than twelve inches was unavailing: although the gun that the defendant allegedly was holding when he shot the victim was not introduced into evidence and no person testified that he or she saw the gun on the night of the shooting, that gun was visible in the surveillance footage and appeared to be approximately the size of the shooter's hand; moreover, the expert testimony of a firearm and tool mark examiner and the testimony of P that, approximately one month prior to the shooting, he saw the defendant in possession of a semiautomatic hand-

gun that was slightly larger than P's own hand, provided further support for a finding that the gun barrel was the requisite length.

Argued November 19, 2020—officially released February 7, 2022*

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, denied or denied in part the defendant's motions to preclude certain evidence; thereafter, the charge of murder was tried to the jury before *Blue*, *J.*; verdict of guilty; subsequently, the charge of criminal possession of a pistol or revolver was tried to the court; finding of guilty; thereafter, the court, *Blue*, *J.*, rendered judgment of guilty in accordance with the jury's verdict and the court's finding, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Seth R. Garbarsky*, senior assistant state's attorney, and *Lisa M. D'Angelo*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. This is the companion case to *State* v. *Gore*, 342 Conn. 129, A.3d (2022), decided today. In *Gore*, we amended § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate issue rule for opinion testimony that relates to the identification of criminal defendants and other persons

* February 7, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

depicted in surveillance video or photographs.[1] Our decision in *Gore* addresses how the change to our Code of Evidence affects the admissibility of lay opinion testimony identifying a defendant in surveillance video or photographs. In this appeal, we consider how the rule change affects the admissibility of expert opinion testimony relating to the identification of a defendant in surveillance video or photographs. Put simply, we conclude that such testimony is admissible if it meets the requirements of § 7-2 of the Connecticut Code of Evidence.[2]

The defendant, Jean Bruny, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 53a-217c (a) (1).[3] In this appeal, the defendant claims that the trial court (1) improperly admitted testimony from four lay witnesses identifying the defendant in video surveillance footage, (2) improperly admitted expert testimony regarding an enhancement of the video surveillance footage and incorrectly concluded that defense counsel had opened the door to certain testimony elicited during the prosecutor's redirect examination of the expert, (3) improperly denied the defendant's motion to suppress

[1] As we note in *State* v. *Gore*, supra, 342 Conn. 129, "[n]otwithstanding the codification of the common law in the Code of Evidence, this court retains the authority to develop and change the rules of evidence through case-by-case common-law adjudication." (Internal quotation marks omitted.) Id., 149 n.12, quoting *State* v. *DeJesus*, 288 Conn. 418, 421, 953 A.2d 45 (2008).

[2] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

[3] Unless otherwise noted, all subsequent references to § 53a-217c are to the 2013 revision of the General Statutes.

the identifications of the defendant made by Nigel Watts, and (4) improperly denied the defendant's request for a special credibility instruction as to a witness whom the defendant claims should have been treated as a jailhouse informant. Finally, the defendant claims that there was insufficient evidence to support his conviction for criminal possession of a pistol or revolver. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the night of August 10, 2013, the defendant, his foster brother, Teon Simons (Teon), and Teon's cousins, Solomon Graham (Solomon), Tyrone Graham (Tyrone) and Jamal Hopper, were all at Tyrone's home in Waterbury. Also at Tyrone's home were Latoya Maia, Randy Hall and some of Maia's friends. Sometime between 11 and 11:30 p.m., the group decided to go to the Cheetah Club in New Haven, where a rapper, Lil Durk, was performing that night. Traveling in multiple cars, the group left Waterbury sometime after 11:45 p.m. and arrived at the Cheetah Club at approximately 12:30 a.m. While they were at the club, the group spent most of their time in a room called the Cheetah room.

About forty-five minutes after the defendant's group arrived at the club, the victim, Torrance Dawkins, arrived with his cousin, Watts, and a few friends. The victim's group, who were celebrating the victim's birthday that night, walked over to a corner of the Cheetah room near the emergency exit and stood at the end of a long bar that lined a wall in the room. The defendant's group, including Hall, was at the opposite corner of the room, near a door that led to the patio area of the club, where Lil Durk was performing. Watts recognized Hall, with whom he had "bad blood . . . ." He warned the others in his group to expect a fight.

Soon thereafter, the defendant gradually made his way toward the area where the victim's group was standing

and positioned himself at the emergency exit door. From that position, the defendant stood behind the victim's group as they faced Hall. At that point, Hall threw a bottle at the victim's group.

Seconds after Hall threw the bottle, the defendant stepped forward from the emergency exit to within a foot or two from the victim, aimed a handgun at the back of his head and fired. The victim fell to the ground. Almost everyone else, including the defendant, ran from the room. The defendant slid to the floor while he sprinted toward the exit from the Cheetah room, and then jumped up and raced out of the room. He then ran out the front entrance of the club.

Shortly after the New Haven police responded to reports of a shooting at the club, Detective David Zaweski arrived at the scene and reviewed the video surveillance footage, which had captured the shooting. Zaweski downloaded the Cheetah Club surveillance videos to a thumb drive. A copy of the footage was later sent to Anthony Imel, a forensic examiner with the Federal Bureau of Investigation (FBI).

On January 15, 2015, Zaweski, Special Agent Jonathan Lauria of the FBI and a third investigator interviewed the defendant. During the interview, the defendant declined to identify photographs of Tyrone and Solomon and denied having been at the Cheetah Club on the night of the shooting. He claimed that he had visited Connecticut only once, when he was younger, with his foster mother, Stephanie Simons (Stephanie).

On April 6, 2016, while the defendant was in federal custody, Lauria again interviewed him. When Lauria showed the defendant still photographs from the surveillance videos, the defendant denied seeing himself in the photographs and claimed that he did not recall being present at the Cheetah Club. While he was in federal custody, the defendant's phone calls were recorded.

During a phone call he placed sometime after his interview with Lauria, the defendant said that he had seen the video surveillance footage, and "it's looking real bad." When the person on the other end of the line asked if the video footage was "clear as day," the defendant responded that it was not, but that it was "clear enough, damn it." Speculating on his chances of securing a plea deal, the defendant stated that he "might be lucky" if he received "fifteen."

The defendant was subsequently charged with murder in violation of § 53a-54a (a), criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[4] Following a jury trial, he was found guilty of murder. The trial court subsequently found him guilty of criminal possession of a pistol or revolver. The court imposed a total effective sentence of fifty years of incarceration.

I

The defendant contends that the trial court abused its discretion in admitting the testimony of four lay witnesses, Tyrone, Hopper, Stephanie and Maia, identifying him as one of the persons depicted in the surveillance video of the interior and exterior of the Cheetah Club. In his original brief to this court, the defendant claimed that the lay opinion testimony improperly embraced an ultimate issue to be decided by the jury and, therefore, violated § 7-3 of the Connecticut Code of Evidence.[5] Following oral argument, we ordered the

[4] The state entered a nolle prosequi as to the charge of carrying a pistol without a permit.

Moreover, although § 29-35 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-193, § 9; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] Section 7-3 of the Connecticut Code of Evidence provides: "(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that

parties to submit supplemental briefs addressing two issues: (1) "Whether this court should adopt rule 704 (a) of the Federal Rules of Evidence and overrule *State* v. *Finan*, 275 Conn. 60, 61, 881 A.2d 187 (2005)?" And (2) "[i]f the court adopts rule 704 (a) of the Federal Rules of Evidence, what standard should govern the admission of expert opinion testimony, relating to the identification of a defendant in surveillance photographs or video, that embraces an ultimate issue?" As we explain in *State* v. *Gore*, supra, 342 Conn. 134–35, rather than adopt rule 704 (a) of the Federal Rules of Evidence, we amend § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ban on lay opinion testimony that embraces an ultimate issue for opinion testimony that relates to the identification of criminal defendants and other persons depicted in surveillance video or photographs.[6] Applying that rule, we conclude that the trial court did not abuse its discretion in admitting the testimony.

embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

"(b) Mental state or condition of defendant in a criminal case. 'No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.' General Statutes § 54-86i."

The rule change we announce today effects no change to § 7-3 (b) of the Connecticut Code of Evidence.

[6] The change we make today to § 7-3 (a) of the Connecticut Code of Evidence addresses the majority of the concerns raised by the defendant in his supplemental brief arguing against the adoption of rule 704 (a) of the Federal Rules of Evidence. As for the defendant's arguments concerning our abandonment of the ultimate issue rule in this narrow context, we disagree with the defendant that the rule change will result in testimony that invades the province of the jury. The rule that we have crafted, as set forth in *State* v. *Gore*, supra, 342 Conn. 129, ensures that only witnesses whose familiarity with the defendant puts them in a better position than the jurors to do so will be allowed to identify a defendant in surveillance footage.

The following additional facts and procedural background are relevant to our resolution of this issue. There were multiple video surveillance cameras at the Cheetah Club, including cameras that captured video of the exterior of the building, the interior entrance and two different angles of the interior of the Cheetah room. Prior to trial, the defendant moved to preclude the state from presenting any testimony from witnesses identifying him in the video surveillance footage. Relying on § 7-3 (a) of the Connecticut Code of Evidence and this court's decision in *State* v. *Finan*, supra, 275 Conn. 67, the defendant argued that any testimony identifying him in the video footage would constitute improper lay opinion embracing an ultimate issue to be decided by the trier of fact.

During argument on the motion to preclude opinion testimony, defense counsel did not dispute that Stephanie, Tyrone and Hopper had general familiarity with the defendant.[7] The debate instead focused on the timing of the identifications. Specifically, the parties disagreed regarding whether witness testimony that identified the defendant in the video surveillance footage, but did not identify him in the footage covering the shooting or the few seconds preceding and following it, would embrace an ultimate issue, in violation of *Finan*. The trial court ruled that *Finan* did not bar the state from presenting testimony that identified the defendant in the surveillance video while engaged in noncriminal activity before and after the shooting.

Stephanie was the only one of the four lay witnesses identifying the defendant in the surveillance video who did not accompany him to the Cheetah Club that night. She had known the defendant since his placement as

[7] Because Maia was unavailable to testify at the suppression hearing, the trial court postponed its ruling as to her identification of the defendant in the surveillance video until the time of trial. The court subsequently ruled that Maia's identification of the defendant was admissible.

her foster son in her home when he was twelve years old, approximately nine years before the video surveillance footage was recorded. She identified the defendant entering the club, immediately behind Tyrone, at 7:03:55 a.m.[8] in the video surveillance footage and at 7:03:54 a.m. in a still photograph from the video footage. She also identified the defendant running out of the club in the video footage and in a corresponding still photograph.

The remaining three witnesses who identified the defendant in the video, Tyrone, Maia and Hopper, were with the defendant at the club on the night of the shooting. Tyrone identified himself in line entering the club at 7:03:53 a.m. in the video surveillance footage and identified the defendant as the person immediately behind him. Tyrone had known the defendant for approximately nine years, since the defendant became Stephanie's foster son. Although the defendant lived in Brooklyn and Tyrone lived in Waterbury, they often saw each other on weekends. Tyrone considered the defendant to be his cousin and referred to him by the nicknames "Cuz" and "L. B.," short for "Little Blood." Tyrone explained that "Little Blood" referred to the defendant's status as Tyrone's family, his "blood."

Hopper identified the defendant as the person walking immediately behind Tyrone, whom Hopper identified as entering the club at 7:03:53 a.m. in the video surveillance footage. Hopper first met the defendant when Hopper moved to Connecticut, sometime around 2011. The record is unclear as to how frequently he saw the defendant during the two years leading up to the murder, but Hopper testified that he occasionally vis-

[8] Zaweski testified that the time stamped on the video surveillance footage was "approximately six hours and thirty-four minutes ahead of the actual time." For simplicity, we refer to the time stamped on the video surveillance footage, not the actual time.

ited the home of Stephanie, who was Hopper's aunt, and that he lived with her for a few months.

Like Tyrone, Hopper and Stephanie, Maia identified Tyrone in the video surveillance footage entering the club at 7:03:53 a.m., immediately followed by the defendant at 7:03:54 a.m. Maia admitted that she "didn't really know" the defendant. She met the defendant through Solomon, whom she had been dating for only a few months by the time of the shooting. During those months, Maia had seen the defendant approximately five or six times. She had interacted and spoken with him enough on those occasions to describe him as a "quiet guy" who went by the nickname, "L. B." Maia did not know the defendant's real name.

As we explain in *State* v. *Gore*, supra, 342 Conn. 134–35, we have amended § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate issue rule for lay opinion testimony that relates to the identification of criminal defendants or other persons depicted in surveillance video or photographs. Accordingly, "[l]ay opinion testimony identifying a person in surveillance video or photographs is admissible if that testimony meets the requirements of § 7-1 of the Connecticut Code of Evidence. That is, such testimony is admissible if the opinion is 'rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.' Conn. Code Evid. § 7-1." (Footnote omitted.) *State* v. *Gore*, supra, 148.

Testimony identifying a defendant as depicted in surveillance video or photographs meets the requirements of § 7-1 of the Connecticut Code of Evidence and is therefore admissible " 'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than is the jury.' *United States* v. *Farnsworth*, 729 F.2d 1158,

1160 (8th Cir. 1984)." *State* v. *Gore*, supra, 342 Conn. 150. In making this determination, we evaluate the following four factors, considering the totality of the circumstances: "(1) the witness' general level of familiarity with the defendant's appearance . . . (2) the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken . . . (3) a change in the defendant's appearance between the time the surveillance video or photographs were taken and trial, or the subject's use of a disguise in the surveillance footage . . . and (4) the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage." (Citations omitted.) Id., 151.

Three of the four witnesses had sufficient general familiarity with the defendant to support admissibility. As we explain in *Gore*, we depart from the majority of jurisdictions that have set a low bar for general familiarity. See id., 163–64. Pursuant to our decision in *Gore*, "[i]n order for the witness' general familiarity with the defendant's appearance to weigh in favor of admitting such testimony, the proponent of the testimony must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. Some illustrative examples of persons who may satisfy this standard are friends, longtime acquaintances, neighbors, coworkers, family members, and former classmates." Id., 164.

This factor is satisfied as to Stephanie, Tyrone and Hopper. Stephanie's relationship with the defendant—he was placed in her home as her foster son approximately nine years prior to the shooting—easily supports admissibility. As his foster mother, Stephanie is precisely the type of witness whose testimony best aids the jury. Her familiarity with the defendant's appearance and mannerisms, acquired during the years he

lived in her home, lends reliability to her identification of him in the surveillance footage. Similarly, Tyrone's degree of general familiarity with the defendant is more than sufficient to support admissibility. He testified that he and the defendant knew each other since the defendant's placement in Stephanie's home, and that they were close. They saw each other often, and Tyrone considered the defendant a cousin. Although Hopper did not have a relationship with the defendant that anyone would describe as "close," he certainly had more than a minimal degree of familiarity with the defendant. Hopper had known the defendant for approximately two years, had visited Stephanie's home during that time, and had lived with Stephanie for a few months. His degree of general familiarity, therefore, supports admitting his testimony identifying the defendant in the surveillance footage.

This factor is not satisfied as to Maia. She knew the defendant only through Solomon, whom she had been dating for a scant few months. During that period, she saw the defendant approximately five or six times, and the record is unclear as to the length of each of these encounters, the viewing conditions, or the nature of her interaction with the defendant on those occasions. Maia admitted that she did not "know" the defendant and did not even know his real name. On the basis of this record, we cannot say that she had more than a minimal degree of familiarity with the defendant. As we explain in *Gore*, "the concept of familiarity encompasses a broad range of possibilities." *State* v. *Gore*, supra, 342 Conn. 162. Along that continuum of possibilities, Maia barely qualifies as a casual acquaintance. Her low degree of familiarity with the defendant casts doubt on the reliability of her identification of him in the surveillance footage, particularly considering that more than one and one-half years had passed between the

last time she saw him and the first time she viewed the surveillance footage.

With respect to the second factor, Tyrone, Hopper and Maia were with the defendant on the day of the shooting—both at the club and beforehand, in Waterbury. All three, therefore, were familiar with his appearance at the time that the surveillance footage was taken. Although Stephanie did not see the defendant on the day of the shooting, and the record is unclear regarding the last time she saw him prior to that day, her high degree of general familiarity with the defendant more than offsets this factor. Moreover, as we explain in *Gore*, because we evaluate the factors under the totality of the circumstances, the failure to satisfy a single factor is not fatal. Id., 165 n.19.

With respect to the third factor, the defendant's appearance had changed between the time that the surveillance footage was recorded and the time of trial. In the video surveillance footage, the defendant wore his hair very short. Although he had some facial hair, he wore that short as well. Witnesses who identified the defendant in court at the time of trial described him as having dreadlocks, a beard and a mustache. Courts have considered changes in a criminal defendant's hairstyle or facial hair between the recording of the surveillance video and the time of trial to weigh in favor of admissibility. See, e.g., *United States* v. *Farnsworth*, supra, 729 F.2d 1160–61 (defendant wore scarf over his face at time of robbery and had grown beard by time of trial); see also, e.g., *United States* v. *Towns*, 913 F.2d 434, 445 (7th Cir. 1990) (defendant shaved his moustache between robbery and criminal trial); *United States* v. *Lucas*, 898 F.2d 606, 610–11 (8th Cir.) (defendant had facial hair in surveillance photographs but none at trial), cert. denied, 498 U.S. 838, 111 S. Ct. 112, 112 L. Ed. 2d 81 (1990).

Finally, as for the quality of the video, it fell within the range that favors admissibility. That is, the video, in which the defendant frequently appeared, was " '[neither] so unmistakably clear [nor] so hopelessly obscure that the witness is no [better suited] than the jury to make the identification.' *United States* v. *Jackman*, [48 F.3d 1, 5 (1st Cir. 1995)]." *State* v. *Gore*, supra, 342 Conn. 165.

We conclude that, viewed under the totality of the circumstances, the trial court acted within its discretion in admitting the testimony of all four witnesses, which was rationally based on their perception and helpful to the jury. See Conn. Code Evid. § 7-1. The trial court properly allowed those witnesses to identify the defendant in the surveillance video footage and still photographs from the video. All four factors supported admitting the testimony of Tyrone and Hopper. As to Stephanie, we have noted that, although she did not see the defendant on the night of the shooting, her high degree of general familiarity more than offsets the failure to satisfy that single factor. With respect to Maia, although her level of general familiarity is low, she was with the defendant on the night of the shooting and therefore was familiar with his appearance at the time of the surveillance footage. That, taken together with the remaining two factors, supports admitting her testimony identifying the defendant in the surveillance video and the still photographs.[9]

[9] Although we reach our conclusion by applying the rule that we announced today in *State* v. *Gore*, supra, 342 Conn. 129, we emphasize that we would have arrived at the same result by applying § 7-3 (a) of the Connecticut Code of Evidence, as interpreted by *State* v. *Finan*, supra, 275 Conn. 60. The testimony of the witnesses did not embrace an ultimate issue to be decided by the trier of fact. None of the witnesses testified that they saw the defendant shoot the victim. No witness identified the defendant in the surveillance video or still photographs from the video at the time of the shooting. Evidence that the defendant entered the Cheetah Club approximately fifty minutes before the shooting and was one of many, presumably hundreds, of people who ran out of the club after the shooting does not establish that he was the shooter and, therefore, would not have violated *Finan*.

II

A

The defendant claims that the trial court abused its discretion in allowing the state's expert, Imel, a forensic examiner, to testify regarding an enhanced video he compiled from the raw video surveillance footage, tracking the movement of certain individuals through the club. The defendant contends that Imel's testimony invaded the province of the jury, in violation of § 7-3 (a) of the Connecticut Code of Evidence, as interpreted by this court in *State* v. *Finan*, supra, 275 Conn. 60. We conclude that the trial court acted within its discretion in admitting the testimony.

We emphasize, at the outset, that Imel never identified the defendant as the shooter and was never asked to do so. In his testimony, Imel explained, instead, how he tracked the movements of various individuals, who, except for the victim, were identified only by alphanumeric code, using video surveillance footage of the Cheetah Club gathered from multiple camera angles. Although the defendant was depicted in the video footage, and Imel tracked images of the defendant using the alphanumeric code, the identity of the defendant was left to the jury. Against this backdrop, we hold that expert opinion testimony that pertains to the identification of a defendant in surveillance footage is admissible if it comports with the requirements of § 7-2 of the Connecticut Code of Evidence, which provides: "A wit-

Because our application of the new rule does not change the result of the appeal, we disagree with the defendant's claim, in his supplemental brief, that we should not apply the new rule in this appeal. As we explained in *Gore*, "[r]ather than apply an analysis that we have determined to be grounded on artificial and illusory distinctions, we believe that the better approach is to provide the trial courts with an illustration of the application of the totality of the circumstances test that we adopt today." *State* v. *Gore*, supra, 342 Conn. 139.

ness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, *if the testimony will assist the trier of fact* in understanding the evidence or in determining a fact in issue." (Emphasis added.)

Our task, therefore, is to consider whether the trial court correctly determined that Imel's testimony comported with the requirements of § 7-2 of the Connecticut Code of Evidence. The legal principles that guide our review of the trial court's ruling on the admissibility of expert testimony are well settled. "The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law. . . . Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *State* v. *Leniart*, 333 Conn. 88, 142, 215 A.3d 1104 (2019), quoting *State* v. *Taylor G.*, 315 Conn. 734, 760, 110 A.3d 338 (2015). "It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience . . . be directly applicable

to the matter specifically in issue." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 142. "To the extent the trial court makes factual findings to support its decision, we will accept those findings unless they are clearly improper." (Internal quotation marks omitted.) *Fleming* v. *Dionisio*, 317 Conn. 498, 505, 119 A.3d 531 (2015).

In his motion to preclude the expert testimony, the defendant argued that it improperly invaded the province of the jury and violated this court's decision in *Finan*. Following the state's proffer, and after hearing argument on the motion, the trial court ruled that the testimony was admissible. The court began by considering the requirements of § 7-2 of the Connecticut Code of Evidence. The court was satisfied that Imel possessed knowledge, skill, experience, training and education that were both directly applicable to the matter at issue and not common to the average person. The court also found that the testimony would be helpful to the jury. In order to avoid any conflict with § 7-3 (a) and *Finan*, however, the court required Imel to remove all identifying labels over the subjects in the video in the seconds immediately before and after the shooting. The court reasoned that, if the enhanced video did not display a label over any persons depicted in the video at the actual time of the shooting, the video and Imel's testimony would not invade the province of the jury.

The trial court correctly concluded that Imel's testimony met the standards of § 7-2 of the Code of Evidence. Imel's testimony regarding tracking individuals in the surveillance video footage is akin to expert testimony regarding facial and clothing comparison and photogrammetry[10] applied to surveillance video and

[10] Photogrammetry is the science of "calculating the heights of objects from their photographic images." *United States* v. *Everett*, 825 F.2d 658, 662 (2d Cir. 1987), cert. denied, 484 U.S. 1069, 108 S. Ct. 1035, 98 L. Ed. 2d 999 (1988).

photographs. Those types of expert testimony have generally been held to be admissible under rule 702 of the Federal Rules of Evidence, which "treat[s] expert opinion testimony similarly to the Connecticut Code of Evidence."[11] *State* v. *Favoccia*, 306 Conn. 770, 837 n.8, 51 A.3d 1002 (2012) (*Zarella*, *J.*, dissenting); see, e.g., *United States* v. *Everett*, 825 F.2d 658, 662 (2d Cir. 1987) (trial court did not abuse discretion in admitting testimony of photogrammetry expert interpreting bank surveillance photographs), cert. denied, 484 U.S. 1069, 108 S. Ct. 1035, 98 L. Ed. 2d 999 (1988); *United States* v. *Alexander*, 816 F.2d 164, 167 (5th Cir. 1987) (exclusion of facial comparison testimony of defense expert interpreting bank surveillance video and photographs was clearly erroneous); *United States* v. *Green*, 525 F.2d 386, 391–92 (8th Cir. 1975) (expert testimony comparing clothing in bank surveillance photographs with clothing worn by model in photographs taken by law enforcement was admissible). But see, e.g., *United States* v.

[11] Rule 702 of the Federal Rules of Evidence provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

"(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

"(b) the testimony is based on sufficient facts or data;

"(c) the testimony is the product of reliable principles and methods; and

"(d) the expert has reliably applied the principles and methods to the facts of the case."

Compare rule 702 of the Federal Rules of Evidence with § 7-2 of the Connecticut Code of Evidence; see footnote 2 of this opinion; and § 7-4 of the Connecticut Code of Evidence, which provides in relevant part: "(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

"(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence. . . ."

Brown, 501 F.2d 146, 149–50 (9th Cir. 1974) (trial court abused its discretion in admitting facial comparison testimony when comparisons testified to by expert were too general to be considered to require special expertise), rev'd on other grounds sub nom. *United States* v. *Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

One state appellate court recently rejected a challenge to expert testimony strikingly similar to that at issue in the present case. In *People* v. *Tran*, 50 Cal. App. 5th 171, 263 Cal. Rptr. 3d 740 (2020), review denied, California Supreme Court, Docket No. S263358 (August 19, 2020), the California Court of Appeal for the Fourth District held that the trial court did not abuse its discretion in admitting the testimony of a forensic video analyst, Grant Fredericks, who created an enhanced video of an assault in a crowded outdoor restaurant dining area, compiled from videos taken from surveillance cameras of nearby businesses and from the cell phones of bystanders who witnessed the incident. See id., 174–76, 179, 180, 188.

As Imel did in the present case, Fredericks added markings to the video to track certain individuals and to aid the jury in its task of interpreting the video. Id., 188. The Court of Appeal reasoned that the "challenged evidence was relevant, useful, and highly probative of the circumstances that led to [the victim's] paralysis. [Fredericks'] testimony helped the jury to identify what portions of the video evidence required closer examination and to interpret some of the information conveyed by the video evidence. His expertise was necessary for the [members of the] jury to accurately evaluate the videos to appreciate who and what they were watching as well as the chronology and relationship between each video. As the trial court noted, the individuals in the videos were very difficult to track 'even with the benefit of [Fredericks'] colored indicators,' and 'impos-

sible' to track without his expert assistance." Id., 188–89.

Imel's experience and training in the area of forensic video and image analysis were extensive. As of the time of trial, Imel had been analyzing video for approximately thirty years, approximately eight years of which were for the FBI as a forensic examiner with the forensic audio, video and image analysis laboratory. Over the years, he had taken and taught many classes on and conducted training in video forensics and image enhancement, including teaching a course on the subjects for the United States Department of State. He was the primary forensics examiner for the Boston Marathon bombing and performed video tracking analysis for that investigation, as well as for the Pulse nightclub shooting in Florida. In the Boston Marathon investigation, he tracked the movements of the bombing suspects among thousands of individuals, utilizing multiple camera views.

Imel's skill and knowledge were directly applicable to the jury's task in the present case. Like the Boston Marathon and Pulse nightclub investigations, the present case involved video surveillance footage from multiple cameras covering many individuals moving about in a crowded area. The lighting was low, and individuals moved in and out of view of the cameras—creating the need for a significant amount of cross-referencing of the footage from the various cameras. In order to create his fifty-two minute enhanced video, Imel compiled footage from multiple cameras, lightened images, added alphanumeric labels over certain individuals, including the defendant, tracked those individuals throughout the enhanced video, inserted "halos" over images at crucial points during the video in the minute leading up to and including the shooting, and simultaneously displayed coverage from two cameras in a slow motion, split screen image. All of those enhancements were directly applica-

ble to the jury's task of interpreting the surveillance footage.

Imel's training and expertise enabled him to analyze the video surveillance footage in a manner that was beyond the ability of an average person. He distilled the enhanced video from hours of raw video surveillance footage. The methodology that he used to accomplish the task involved both his specialized experience in tracking analyses and the adaptation of computer technology to enhance the video surveillance footage. His analysis took hundreds of hours, over the course of four months.

Imel described his methodology for undertaking a tracking analysis. Once individuals have been identified as the subjects of tracking, Imel tracks their movement through the video surveillance footage by relying on the appearance of the individuals and their clothing, how they move, the direction in which they are moving, and their positions and movement relative to other individuals depicted in the footage. Computer software enables him to review the video surveillance footage frame by frame. For each subject, Imel reviews that individual's movement forward—then backward—multiple times to confirm that subject's movement throughout the footage, one frame at a time. Once he has completed his analysis of one subject's movement throughout the entire course of the raw video surveillance footage, he performs the same analysis for the next subject.

Given the difficulty of reviewing hours of video surveillance footage from multiple camera angles, Imel's testimony, as well as the enhanced video itself, was likely helpful to the jury. During Imel's testimony, the prosecutor played the enhanced video, which was marked for identification only, periodically stopping the playback to ask Imel questions. At the start of the video,

Imel identified the first labels on the video, FW-1 and FW-2, which appeared above two women entering the club. He explained that these tags would follow the same two individuals throughout the video, marking their movement through the club. The majority of the footage in the enhanced video showed the Cheetah room, which was covered by two different surveillance cameras.

At about seven minutes before the end of the enhanced video, Imel identified a subject standing in front of the bar, tagged as "victim." As with all the other subjects, Imel tracked the victim from the entrance of the club. Less than one minute before the shooting, the image in the enhanced video split into two screens in order to show the Cheetah room from both camera angles, thus providing a fuller view of the scene. Seconds before the shooting, Imel inserted a halo over an individual labeled "MS-4," who stood behind the victim and appeared to be holding an object in his right hand. Per the trial court's ruling, the alphanumeric labels did not appear in the few seconds before and after the shooting. Immediately after the shooting, MS-4 could be seen running across the Cheetah room, and Imel inserted a halo over the right hand of MS-4 to highlight that he appeared to be holding something in that hand. The video shows that MS-4 then ran out of the front door of the club, along with many other patrons.

At no point during Imel's testimony did he state that he believed that MS-4 was the defendant.[12] Although

[12] We emphasize that, because Imel did not identify MS-4 as the defendant, we need not address in this opinion under what circumstances, if any, an expert witness may be permitted to do so. Imel's testimony merely served to explain the enhanced video and the nature of the tracking analysis Imel performed. Certainly, although the tracking labels, except for the victim's, were removed in the seconds immediately preceding and following the shooting, the video leaves little doubt that, whoever MS-4 may be, he shot the victim. Before the alphanumeric labels disappear, the video shows MS-4 aiming what appears to be a gun at the back of the victim's head. After the victim falls to the ground and the alphanumeric labels reappear, MS-4

Imel's testimony, understood in conjunction with the video, constituted persuasive proof that MS-4 shot the victim, the state was still required to prove that MS-4 was the defendant. Moreover, the tracking information depicted in the enhanced video, and Imel's expert testimony explaining it, could not have been developed by the average juror. That information thus assisted the jury in carrying out its task, without allowing the expert to identify the shooter. Accordingly, Imel's testimony did not invade the province of the jury. See, e.g., *State* v. *Guilbert*, 306 Conn. 218, 251–52, 49 A.3d 705 (2012) (expert testimony regarding reliability of eyewitness identifications did not invade province of jury because reliability of eyewitness identifications is not within knowledge of average juror); *State* v. *Borrelli*, 227 Conn. 153, 174, 629 A.2d 1105 (1993) (expert testimony regarding general characteristics of victims of domestic abuse did not invade province of jury because information testified to by expert was "beyond the jury's experience and knowledge"); see also, e.g., *United States* v. *Green*, supra, 525 F.2d 392 (expert testimony regarding detailed comparison of articles of clothing did not invade province of jury because average juror lacks skill and experience necessary to make such comparisons).

Accordingly, our review of the record persuades us that the trial court acted within its broad discretion in permitting Imel's testimony, which the court correctly concluded would assist the jury in its task of interpreting the surveillance footage. Imel's expertise was directly applicable to the jury's task, not common to the average person, and likely was helpful to the jury.

B

The defendant next claims that the trial court incorrectly concluded that defense counsel opened the door

is seen running away from the direction of the victim's body. Accordingly, Imel's testimony would be valid even under § 7-3 (a) of the Connecticut Code of Evidence, as interpreted by *Finan*.

to certain of Imel's testimony on redirect examination. Specifically, during redirect, Imel testified that Lauria's notes, which Lauria had sent to Imel along with the video surveillance footage, indicated that the individual labeled MS-4 was the defendant, who shot the victim. Even if we assume, without deciding, that the defendant is correct, we conclude that any error was harmless.

During cross-examination of Imel, defense counsel attempted to demonstrate that Lauria had influenced Imel's analysis of the raw video surveillance footage. Defense counsel elicited testimony from Imel that, when Lauria sent him the raw footage, he also included his notes, indicating his beliefs regarding the identity of certain individuals depicted in the video. In Lauria's notes, with respect to at least some of those individuals, he tracked their movements and incorporated specific time references from the raw video surveillance footage for those movements. For example, defense counsel asked Imel whether Lauria's notes indicated that, at 7:08:36 a.m., and, again, at 7:47:37 a.m., the individual labeled as MS-4 exited the Cheetah room to the patio. Imel answered that the notes had so indicated.

During redirect examination, the prosecutor asked Imel whether defense counsel had correctly stated during cross-examination that Lauria had noted that, at 7:08:36 a.m., "MS-4 exits bar." Over defense counsel's objection, Imel answered that Lauria actually had written: "Jean Bruny exits bar and goes to patio." Imel also testified, over defense counsel's objection, that Lauria's notes indicated that, at 7:56:53 a.m., "Jean Bruny shoots Torrance Dawkins and exits toward hallway."

Because we conclude that any error was harmless, we do not reach the question of whether the trial court abused its discretion in allowing the testimony. We emphasize, however, that the court's ruling was troubling. The ruling undermined all attempts to distance

Imel's testimony from an identification of the defendant. Additionally, although Imel did not testify that he believed that MS-4 was the defendant, his testimony that Lauria's notes indicated that the defendant was the shooter indirectly introduced the opinion of a law enforcement officer that the defendant was depicted in the video surveillance footage.[13] Although we conclude that the state's overwhelming evidence proving that MS-4 was the defendant rendered any error harmless, we reiterate our concerns regarding testimony by members of law enforcement identifying a defendant as depicted in video surveillance footage, as we explain more fully in *State* v. *Gore*, supra, 342 Conn. 158 n.16. See generally G. Bach, "Moderating the Use of Lay Opinion Identification Testimony Related to Surveillance Video," 47 Fla. St. U. L. Rev. 445 (2020) (highlighting problems presented by law enforcement testimony identifying defendants in surveillance video).

Even if the trial court's ruling constituted an abuse of discretion, the defendant has failed to demonstrate that the error was harmful. "The law governing harmless error for nonconstitutional evidentiary claims is well settled. When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal

[13] We question whether Lauria would have been permitted—either under the *Finan* rule or under the rule we announced today in *Gore*—to testify regarding his opinion that the defendant was depicted in the video. The indirect manner in which his opinion was introduced circumvented the protections that would have been afforded to the defendant under either *Finan* or *Gore*.

quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019).

The defendant has not demonstrated that the jury's verdict was substantially swayed by the admission of Imel's testimony regarding Lauria's hearsay statements. Under the circumstances of this case, the fact that Lauria opined that the defendant was the individual depicted in the video who shot the victim had little impact on the jury making that determination itself.

Indeed, the state presented overwhelming evidence both that the individual labeled as MS-4 shot the victim and that MS-4 was the defendant. The video surveillance footage provided powerful proof that the individual labeled as MS-4 in the enhanced video shot the victim. In the minutes preceding the shooting, the enhanced video shows MS-4 moving from the corner near the patio door and the raised platform, where his group congregated, toward the emergency exit door, near the victim's group. When the enhanced video displays a split screen in the minute before the shooting, both camera angles are shown. On the right side of the screen, MS-4 remains by the emergency door exit until the individual labeled MS-1, shown on the left side of the screen, throws a bottle in the direction of the victim's group. At that point in the enhanced video, with the exception of the victim, the labeling over individuals no longer is displayed.

On the right side of the screen, immediately after the bottle lands near the victim, however, an individual in the exact spot where MS-4 had just been standing by the emergency exit door moves a couple of feet away from the wall to a spot just behind the victim. This particular individual is highlighted by a halo of light in the enhanced video, making it easy to see that, as he moves, he reaches with his right hand to grab something at his waist. As he raises his right arm, the video shows

that he is holding a small, dark object, which he points at the back of the victim's head. A small plume of light shoots from the dark object in his hand, then dissipates. As the victim immediately crumbles to the ground, the individual begins to run away. As he crosses over from the right side of the screen to the left side, the label MS-4 appears above him. The enhanced video highlights MS-4's right hand, which is still holding the small, dark object.

Although the enhanced video was a demonstrative exhibit only, the jury watched it as Imel testified about it. After having watched that video, the jury then was able to review the raw video surveillance footage, which was introduced as full exhibits, with a greater understanding of what to look for, from which camera angle, and when, in the raw footage. The raw video surveillance footage displays all of the same events as shown in the enhanced video, including the moment when MS-4 shoots the victim. Accordingly, the raw video surveillance footage, as understood with the assistance of the enhanced video and Imel's testimony, provides overwhelming proof that MS-4 shot the victim.

The state also produced strong evidence, through the raw video surveillance footage, the enhanced video and the testimony of Stephanie, Tyrone and Hopper, that the defendant was the individual labeled as MS-4 in the enhanced video. The enhanced video shows MS-4 entering the club at 7:03:54 or 7:03:55 a.m., immediately behind a heavyset individual, whom the jury reasonably could have identified as Tyrone.[14] Because of his size, Tyrone was particularly easy to identify in the surveillance footage. Tyrone, Stephanie and Hopper each identified the defendant in the raw video surveillance footage as he was entering the club, immediately behind Tyrone, just as MS-4 did in the enhanced video.

[14] Witnesses consistently described Tyrone as being overweight. He also testified at trial, so the jury was able to observe his physical characteristics.

All three of the witnesses identified the defendant entering the club immediately behind Tyrone, at 7:03:54 or 7:03:55 a.m., precisely the same time that MS-4 entered the club in the enhanced video. Stephanie also identified the defendant running out of the club at 7:56:59 a.m., at precisely the same time that the enhanced video shows MS-4 running out of the club. All of this testimony, understood in conjunction with the raw video surveillance footage and the enhanced video, proved that the defendant was MS-4. Finally, we observe that the defendant's physical characteristics matched those of MS-4, a fact the jury could observe for itself. Understood within this context, Lauria's opinion that MS-4 was the defendant, who shot the victim, was insignificant and cumulative in the midst of all the other evidence establishing the same point.

Further evidence of the unlikelihood that Lauria's opinion substantially swayed the jury's verdict was the strength of the state's case. As we just explained, the video provided powerful evidence of the defendant's guilt. In addition to the video surveillance footage, the state produced the call detail records of the cell phones used by the defendant and members of his group, showing that they went to the Cheetah Club that night, and DNA evidence proving that the defendant was inside the Cheetah room that night. The state also produced the testimony of a witness that established that the defendant possessed a handgun approximately one month prior to the shooting. See part III of this opinion.

Finally, the state produced substantial consciousness of guilt evidence. In his two interviews with detectives, the defendant claimed he was not at the Cheetah Club on the night of the shooting, even when confronted with the presence of his DNA in the Cheetah room. He claimed that he had been to Connecticut only once, with Stephanie, when he was much younger. And he did not identify his "cousins" Tyrone and Solomon,

despite the fact that Tyrone testified that he knew the defendant well. The defendant also claimed not to recognize himself when detectives showed him still photographs of the surveillance footage. The state produced evidence that, after the defendant saw the video surveillance footage, he placed a phone call, during which he said to the person on the other end of the line that he had seen the video, that "it's looking real bad," and that he would be lucky if he received fifteen years of imprisonment. During the call, the defendant said that, although the video was not "clear as day," it was "clear enough, damn it."

Given the overall strength of the state's case, the overwhelming evidence that the state produced that the defendant was the individual designated in the enhanced video as MS-4, who shot the victim, and the relative insignificance of Lauria's opinion on that issue, we conclude that the defendant has failed to demonstrate that any error was harmful.

III

The defendant next claims that the trial court abused its discretion in denying his request for a special credibility instruction as to Leon Pruden, a witness who the defendant claims should have been treated as a jailhouse informant. The defendant contends that Pruden was a self-interested witness who had a motive to testify against the defendant. Pruden's credibility, therefore, was inherently suspect. The defendant argues that, because Pruden was the only witness who testified that he had seen the defendant in the possession of a gun on a prior occasion, the admission of Pruden's testimony was harmful error. We conclude that the trial court acted within its discretion in declining to give the requested instruction.

The following additional facts are relevant to our resolution of this issue. At the time of the defendant's

trial, Pruden was serving a sentence of six years of imprisonment with ten years of special parole. He testified that, during the summer of 2013, he saw the defendant on about five or six occasions at the home of Michelle Saunders, in Waterbury. Pruden knew the defendant only as "Gunner." About one month prior to the shooting, Pruden, Solomon and the defendant were at Saunders' home. When Solomon asked the defendant to "show . . . something" to Pruden, the defendant "pulled out a black handgun from his waist" and "handed it" to Solomon. Solomon then handed the gun back to the defendant, who said nothing. Pruden saw the weapon only briefly and did not know specifically what type of gun it was, only that it was a semiautomatic handgun, "[a] little bigger than [Pruden's] hand."

During cross-examination, defense counsel elicited testimony from Pruden that, although he became aware of the shooting at the Cheetah Club almost immediately, he did not approach the police with the information about his encounter with the defendant until more than six months later, on March 5, 2014, the day that Pruden was arrested. Pruden admitted that he hoped to receive favorable treatment in exchange for the information.

During the charge conference, defense counsel requested a special credibility instruction as to both Watts and Pruden. The trial court granted defense counsel's request as to Watts but denied it as to Pruden. The court observed that, because Watts had testified pursuant to a cooperation agreement, it was reasonable to infer that he was hoping for favorable treatment in exchange for his testimony. By contrast, the court reasoned, at the time of trial, Pruden had already been sentenced.[15]

[15] The defendant contends that the trial court gave the instruction as to Watts because it believed it had discretion to do so but did not believe the law gave it discretion to give the same charge as to Pruden. Upon our review of the record, we find this contention, at best, arguable. It is axiomatic that "we read an ambiguous trial court record so as to support, rather than

We begin our analysis of the defendant's claim with the well established standard of review. "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Arroyo*, 292 Conn. 558, 566, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) *State* v. *Patterson*, 276 Conn. 452, 467, 886 A.2d 777 (2005). "This court has held, however, that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses, accomplices and jailhouse informants." (Footnotes omitted.) *State* v. *Diaz*, 302 Conn. 93, 101–102, 25 A.3d 594 (2011).

We previously have defined a "classic jailhouse informant" as "a witness who has testified that the defendant has confessed to him or had made inculpatory statements to him while they were incarcerated together." Id., 99 n.4. In *Patterson*, when we first recognized the exception for jailhouse informants, we applied it to a witness who testified that, while he and the defendant were cellmates in prison, the defendant, who had been

contradict, [the trial court's] judgment." *Walton* v. *New Hartford*, 223 Conn. 155, 167, 612 A.2d 1153 (1992). Therefore, we will not lightly conclude that the trial court erroneously read the case law to deprive it of discretion. Regardless, for the reasons we have discussed in part II B of this opinion, we find any possible error in the trial court's failure to give the requested charge as to Pruden undoubtedly harmless.

charged with murder, confessed to the witness that he had killed the victim. *State* v. *Patterson*, supra, 276 Conn. 459, 469–70. In exchange for his testimony, the informant in *Patterson* was promised certain benefits. Id., 465. We explained that "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect." Id., 469; see *State* v. *Diaz*, supra, 302 Conn. 102–103 (same).

Since *Patterson*, we have twice expanded the jailhouse informant exception to the general rule against requiring a special credibility instruction. In *State* v. *Arroyo*, supra, 292 Conn. 558, we extended *Patterson* to require a special credibility instruction for all jailhouse informants, regardless of whether they had received a promise of a benefit in exchange for their testimony. See id., 561. The mere expectation of a benefit, we reasoned, is sufficient to render the testimony of a jailhouse informant suspect. See id., 568.

Then, more recently, in *State* v. *Jones*, 337 Conn. 486, 254 A.3d 239 (2020), we expanded the definition of "jailhouse informant" to include "witnesses . . . who were incarcerated at the time they offered or provided testimony regarding a defendant's inculpatory statements, regardless of the location where those statements were made." Id., 501. In extending the exception to incarcerated witnesses who testify regarding inculpatory statements that a defendant made to the witness outside of prison, we were guided by two primary principles.

First, we emphasized that "[t]he grave risks posed by false confession testimony from incarcerated informants, and the difficulty of mitigating those risks through meaningful cross-examination, do not depend on the

location where the allegedly false confession occurs." Id., 502. False confession evidence, we explained, "is difficult to impeach effectively because it is invariably of the he said-she said variety. As long as the [incarcerated informant] can plausibly testify that he had an opportunity—no matter how fleeting—to speak with the defendant, the [informant's] claim that the defendant confessed to him is practically unverifiable." (Internal quotation marks omitted.) Id., 503.

Second, we recognized the wisdom of harmonizing our definition of jailhouse informants with the legislature's recent definition of a "jailhouse witness" as "a person who offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, *or an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense*." (Emphasis in original; internal quotation marks omitted.) Id., 506–507, quoting Public Acts 2019, No. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d).

In summary, since our initial recognition that a special credibility instruction should be required for jailhouse informants, we have expanded that requirement to include informants who receive no promise of benefits from the state in exchange for their testimony and incarcerated witnesses who testify that the defendant confessed or made inculpatory statements to them outside of prison. Just as important as understanding what has changed in our definition of jailhouse informants, however, is understanding what has not. For purposes of the exception to the general rule against requiring special credibility instructions, as harmonized with the definition of "jailhouse witness" in General Statutes § 54-86o (d), a jailhouse informant is a person who testifies regarding *statements* made by the defendant.

That is, the rule does not extend to testimony regarding observed events.

Limiting the requirement for a special credibility instruction to jailhouse informant testimony concerning a defendant's inculpatory statements is consistent with one of the rationales underlying our adoption of the rule. We repeatedly have emphasized "[t]he grave risks posed by false confession testimony" of jailhouse informants. *State* v. *Jones*, supra, 337 Conn. 502. Indeed, in *Patterson*, we recognized that "testimony about an admission of guilt by the accused may be the most damaging evidence of all . . . ." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 470 n.11.

In *State* v. *Diaz*, supra, 302 Conn. 93, we delineated some limitations as to how far we will expand the jailhouse informant exception. See id., 106–13. In that case, we declined to expand the jailhouse informant exception to "whenever a witness in a criminal case is incarcerated or is serving out a sentence, or otherwise is in a position to receive a benefit from the state in exchange for testifying, as long as there is some additional evidence indicating that the witness is not wholly reliable or that he expects some benefit from this testimony." Id., 106. We specifically declined in *Diaz* to expand the exception to include the testimony of "witnesses who are not classic jailhouse informants because they have testified about events that they observed rather than inculpatory statements made by the defendant." Id., 107. We agreed with the defendant that some of the same concerns about reliability are present for witnesses who are involved with the criminal justice system, yet are not treated as jailhouse informants because they testify about observed events rather than the defendant's statements. Id., 109. We emphasized, however, that those concerns are not "as weighty in cases [in which] the witness is not testifying about a . . . con-

fession, but is testifying about events concerning the crime that the witness observed." Id.

We explained: "Testimony by a jailhouse informant about a . . . confession is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested. Accordingly, cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth in these cases than in cases involving jailhouse confessions." (Citations omitted.) Id., 109–10.

We therefore reject the defendant's invitation to adopt a rule requiring trial courts to give a special credibility instruction in the present context. In so holding, we do not foreclose the possibility that a trial court may exercise its discretion to give a special credibility instruction even when the jailhouse informant's testimony relates to an event rather than a statement. For example, if the trial court in the present case had determined that a special credibility instruction was warranted as to Pruden, it had the discretion to give one.

It is well established that "it is within the discretion of a trial court to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel. In determining whether to give such an instruc-

tion, the trial court may consider the circumstances under which the witness came forward; the seriousness of the [crimes] with which the witness has been charged or convicted [of]; the extent to which the state is in a position to provide a benefit to the witness and the potential magnitude of any such benefit; the extent to which the witness' testimony is corroborated by other evidence; the importance of the witness' testimony to the state's case; and any other relevant factor." Id., 113.

Because Pruden's testimony did not relate to a statement made by the defendant, the trial court acted within its discretion in declining to give a special credibility instruction. Pruden did not testify that the defendant made any statement, incriminating or otherwise, to him. Indeed, he could not, because the events to which Pruden testified occurred prior to the shooting. Although he was incarcerated when he testified, Pruden did not testify that the defendant confessed to him. Instead, Pruden testified that he saw the defendant in possession of a handgun approximately one month before the shooting. Thus, the present case is distinguishable from *Jones*, which involved testimony concerning statements made by the defendant. See *State* v. *Jones*, supra, 337 Conn. 488.

Moreover, defense counsel impeached Pruden's credibility effectively during cross-examination. Defense counsel elicited testimony from Pruden that he did not come forward with the information until the very day that he was arrested, more than six months after he heard about the shooting. Defense counsel also elicited testimony from Pruden that, when he reached out to law enforcement, he knew he was facing a possible thirty years of imprisonment on drug charges and five years of imprisonment for failing to appear. Pruden admitted that he came forward because he was hoping to obtain a benefit for himself. With respect to Pruden's motivation to testify at the time of trial, Pruden admitted

that, although he was already sentenced, he was aware of the possibility of a sentence modification.

Defense counsel presented testimony from an expert witness who testified about the unreliability of jailhouse informants and specifically testified regarding benefits, such as sentence modification, that incarcerated informants who are already sentenced may receive. Defense counsel highlighted the problem during closing argument, saying of Pruden, "it is the hope for benefits that causes the problem, the unreliability. Pruden had an incentive to lie that is different from an ordinary witness; that's why you need to look carefully at this testimony."

In light of this record and our applicable precedent, we conclude that the trial court acted within its discretion in declining to give a cautionary instruction as to Pruden.

IV

The defendant next claims that the trial court improperly denied the defendant's motion to suppress the out-of-court and in-court identifications of the defendant made by Watts. Even if we assume, without deciding, that the identifications should have been suppressed, we conclude that any error was harmless.[16]

The following additional facts and procedural background are relevant to our resolution of this issue. The defendant moved to suppress Watts' out-of-court identification of the defendant and to preclude him from making an in-court identification, claiming that the identifications resulted from unduly suggestive procedures.

[16] Because we resolve the defendant's claim on the basis that any error was harmless, we need not address the parties' arguments regarding whether this court should revisit its holding in *State* v. *Holliman*, 214 Conn. 38, 46, 570 A.2d 680 (1990), that the admissibility of identification evidence resulting from the actions of private citizens turns on the same due process analysis that applies to identifications that are the result of state action.

The trial court conducted a hearing on the motion prior to trial but continued it until the day that Watts was scheduled to testify. During the hearing, the court heard testimony from Watts and Detective Zaweski, which we summarize.

Zaweski first spoke to Watts on the night of the shooting. At that time, Watts told Zaweski only that he and the victim had arrived at the club minutes before Watts heard a gunshot. Watts ran out of the club and realized only afterward that the victim had been shot.

Zaweski next interviewed Watts more than one year later, on November 18, 2014, when Watts had been subpoenaed to testify before a federal grand jury. During this interview, Watts told Zaweski that his group had just arrived at the club and that they were waiting at the bar for their drinks when Watts saw Hall, whom he recognized. Hall saw Watts' group, left the Cheetah room through the patio door, and returned minutes later with a number of people who Watts claimed he did not recognize. Hall held a bottle in his hand. He splashed liquid at the victim, who asked Watts to give him his knife, which Watts had on his person. With the exception of a man wearing a red shirt, the men with Hall began to form a semicircle in front of Watts' group. The man in the red shirt, who was with Hall's group, moved away from his associates and positioned himself near the emergency exit door. He wore a hat with the brim low over his face, obscuring it. When Watts heard the shot, he ran out of the club.

In January, 2017, Watts, who was in custody at the time on pending criminal matters, told Zaweski that he wanted to cooperate. During a meeting with Zaweski that month, Watts told him that, a few days after the shooting, when Watts was searching for the shooter, an acquaintance of his texted Watts a photograph of the defendant.

On July 26, 2017, Zaweski met with Watts for a fourth time. For the meeting, Watts was transported to the courthouse from prison and then placed in the courthouse lockup. On that same day, the defendant, who was in custody for the murder of the victim, also was being transported to the same courthouse. When Watts was being placed in his cell in the lockup, the defendant was already there, in another cell. Although the defendant attempted to hide his face, Watts saw him, and he recognized the defendant from the night of the shooting. Although Watts consistently stated that he did not see the shooting, he claimed that he was certain that the defendant was the person who shot the victim.

When Watts arrived at the meeting with Zaweski, he informed him that he had just seen the defendant. He told Zaweski that he now realized that he had seen the defendant not only on the night of the shooting, but also on a prior occasion. In July, 2013, Watts attended a memorial service in Waterbury. As Watts sat in his car, about to leave the event, the defendant approached the passenger door and looked into the vehicle. It was nighttime, but there were streetlights, so Watts could see the defendant's face clearly. At that moment, the police were driving down the street, so the defendant walked away. Watts told Zaweski that the person he saw at the memorial service was the same person he saw at the Cheetah Club wearing a red shirt and hat. Watts was not shown any photographs or any portion of the surveillance video during this meeting.

On August 29, 2017, Zaweski showed Watts a photographic array. Because Zaweski was the investigating officer for the case, he conducted the array using a procedure called the blind folder shuffle method.[17] Dur-

[17] See General Statutes § 54-1p (c) (2) ("[t]he identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup or live lineup is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be

ing the procedure, which was not recorded, Watts identified the defendant. On the defendant's photograph, Watts wrote, "I'm very certain this person killed my cousin, August 11, 2013."

During the August, 2017 interview, Watts likely also viewed, for the first time, the enhanced video created by Imel. Although Watts could not recall whether he was shown the video during the July or the August, 2017 meeting, he acknowledged that he viewed it during one of the two meetings. Detective Zaweski testified that Watts was not shown any video surveillance footage during the July 26, 2017 meeting. Watts admitted that, by the time of trial, he had viewed the enhanced video an additional three or four times during meetings with the prosecutors in the case.

The trial court allowed Watts to testify regarding the identifications but precluded him from referring to the defendant as "the shooter." The trial court reasoned that the defendant's objections to the identifications went to their weight, not admissibility.

Even if we assume, without deciding, that the trial court abused its discretion in admitting Watts' identification of the defendant, we conclude that any error was harmless. We are not persuaded that the jury's verdict was swayed by the claimed error. See, e.g., *State* v. *Fernando V.*, supra, 331 Conn. 215. As we explained in part II B of this opinion, the state's case was strong—we need not reiterate that portion of our analysis. We emphasize, however, that the strength of the state's case did not stem from the testimony of any eyewitnesses to the shooting. There were no such eyewitnesses. The overwhelming nature of the state's case hinged, instead,

conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure").

on the fact that the defendant was captured on the surveillance video shooting the victim.

Defense counsel impeached Watts' credibility thoroughly and effectively during cross-examination, highlighting the many inconsistencies in Watts' various stories as they evolved each time he met with law enforcement. Defense counsel particularly emphasized Watts' testimony before a federal grand jury in November, 2014, during which Watts stated that, with the exception of Hall, he had never seen anyone in the defendant's group before.[18] Before the grand jury, Watts made no mention either of receiving a text message with the defendant's photograph, or of seeing the defendant at a memorial service. He also testified before the grand jury that the shooter wore a brimmed, black hat.

At trial, Watts claimed that, after he heard the gun shot, he saw the defendant run and fall. When the defendant fell, Watts saw that the defendant held a gun in his hand. Watts admitted during cross-examination, however, that he said nothing to the grand jury about seeing a gun on the night of the shooting. He also admitted that, by the time of trial, he had viewed the video multiple times.

Defense counsel also highlighted, during cross-examination, that Watts waited for approximately three and one-half years to come forward, even though the victim was his "favorite little cousin," whom he had known his entire life. When Watts finally came forward, he was incarcerated for various offenses, including assault in the first degree, criminal possession of a firearm and violation of probation—he admitted he could have received up to forty years of imprisonment for the charges. Defense counsel emphasized Watts' motive to lie because Watts was testifying pursuant to a coopera-

[18] At the time of his testimony before the grand jury, Watts was not incarcerated, and he had no pending criminal charges.

tion agreement, had not yet been sentenced and expected that the prosecutor would inform the sentencing court about his cooperation in the present case.

The testimony of the defendant's expert witness on the unreliability of jailhouse informant testimony further reinforced Watts' motivation to lie. The expert witness also described the ways in which jailhouse informants are able to learn information about a defendant's case that the informant may use to his benefit. During closing argument, defense counsel once again laid out the many inconsistencies in Watts' various stories and emphasized the correspondence between the change in Watts' version of events and his need for assistance with his own pending criminal matters.

The trial court gave a special credibility instruction as to Watts, reminding the jury that Watts was testifying pursuant to a cooperation agreement: "A witness who has entered into such an agreement has an interest in this case different from any ordinary witness. A witness who realizes that he may be able to receive a lighter sentence by giving testimony favorable to the state has a motive to testify falsely. You must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight you find it deserves, and all of these are factors that you may consider in finding the facts."

Watts' testimony was also cumulative of other, more persuasive evidence. As we already observed, the video surveillance footage displayed the defendant shooting the victim. Three witnesses, including the defendant's foster mother and his cousin, who had both known him for nine years, identified the defendant in the video footage. Watts' testimony—that he recognized the defendant as one of the people in the club on the night of the shooting, observed the defendant move to a position

behind the victim and saw a gun in the defendant's hand when he fell while running out of the Cheetah room—merely echoed what the jurors saw with their own eyes. Even if we assume that the trial court admitted the identifications in an abuse of discretion, any error was harmless.[19]

V

Finally, we address the defendant's claim that there was insufficient evidence to support his conviction for criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1). Specifically, the defendant contends that the state failed to prove that the gun used in the shooting had a barrel length of less than twelve inches. We disagree.

We begin with the well established principles governing our review of a claim that there is insufficient evidence to support a conviction. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the [jury's] verdict [or the trial court's finding]. Second, we determine whether upon the facts so construed and the

[19] The defendant also claims that Watts' identification of the defendant was "so unreliable that it deprived [the defendant] of his due process right to a fair trial." *State* v. *Johnson*, 312 Conn. 687, 705 n.20, 94 A.3d 1173 (2014). For claims of constitutional magnitude, the state bears the burden of proving that any error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Joseph A.*, 336 Conn. 247, 268, 245 A.3d 785 (2020). We conclude that that standard has been met in the present case. As we explained, defense counsel successfully attacked Watts' credibility on numerous fronts during cross-examination and in closing argument. The defendant's expert witness cast further doubt on Watts' testimony, and the trial court gave a special credibility instruction as to Watts. More important, the persuasive force of Watts' cumulative testimony paled in comparison to the video surveillance footage showing the defendant shooting the victim. For all these reasons, we are "persuaded 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State* v. *Cushard*, 328 Conn. 558, 582, 181 A.3d 74 (2018), quoting *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Davis*, 324 Conn. 782, 793, 155 A.3d 221 (2017).

As we noted previously in this opinion, the criminal possession of a pistol or revolver count was tried to the court. Section 53a-217c provides in relevant part: "(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and (1) has been convicted of a felony . . . ." General Statutes § 29-27 defines "pistol" or "revolver" as "any firearm having a barrel less than twelve inches in length." The parties stipulated to the trial court that the defendant was a convicted felon prior to August 11, 2013. The court addressed the criminal possession of a pistol or revolver count after the jury had found the defendant guilty of murdering the victim in the shooting on August 11, 2013. Therefore, to secure a conviction under § 53a-217c (a) (1), the state was required to prove that the gun the defendant used in the shooting had a barrel length of less than twelve inches.

In addressing a defendant's sufficiency of the evidence challenge to a conviction for carrying of a pistol or revolver without a permit in violation of § 29-35 (a), we expressly have held that "direct, numerical evidence is not required to prove barrel length. . . . In the absence of direct, numerical evidence of barrel length, this element may be satisfied by evidence that is sufficiently indicative of the size of the firearm so as to permit the jury to reasonably and logically infer beyond a reasonable doubt that its barrel is less than twelve inches in length." (Citation omitted; emphasis omitted.) *State* v. *Covington*, 335 Conn. 212, 220, 229 A.3d 1036 (2020). In *Covington*, we held that the barrel length element had been proven by sufficient evidence when

the state presented testimony from a witness who observed the gun in question inside an average sized glove compartment in a sedan and later observed the defendant's friend pull the gun "out of his waistband and hand it to the defendant." (Internal quotation marks omitted.) Id., 221–22; see, e.g., *State* v. *Williams*, 231 Conn. 235, 252, 645 A.2d 999 (1994) (evidence was sufficient to prove barrel length was less than twelve inches when state presented witnesses who testified that defendant pulled " 'small handgun' " from his " 'waist length jacket' "), overruled in part on other grounds by *State* v. *Murray*, 254 Conn. 472, 757 A.2d 578 (2000); *State* v. *Miles*, 97 Conn. App. 236, 242, 903 A.2d 675 (2006) (evidence was sufficient to prove barrel length was less than twelve inches when witnesses testified that they saw defendant with small, silver handgun).

In the present case, the state produced sufficient evidence that the barrel length of the gun was less than twelve inches. Although the gun was not introduced into evidence and no person testified that he or she saw the gun on the night of the shooting, the gun can be seen in the video surveillance footage. Specifically, in the video, when the shooter aims the gun at the victim's head, the weapon is visible in the shooter's hand and appears to be approximately the size of his hand. James Stephenson, a firearm and tool mark examiner at the state's forensics lab, examined the bullet fragments that were removed from the victim's body. He testified that the rifling characteristics of the bullet jacket were consistent with that of a .38 caliber firearm. He further testified that he entered the lands and grooves on the surface of the bullet, as well as the diameter of the bullet, into a general rifling characteristics file compiled by the FBI, which yielded a nonexhaustive list of fifteen possible manufacturers that made firearms that could have fired the bullet. All of those firearms were pistols with a barrel length of less than

twelve inches. Finally, the state introduced the testimony of Pruden, who testified that, approximately one month prior to the shooting, he saw the defendant in possession of a semiautomatic handgun, "[a] little bigger than [Pruden's] hand."

From this evidence, the trial court reasonably could infer that the barrel of the handgun used by the defendant was less than twelve inches long. It is highly unlikely that Pruden would describe the gun as a little bigger than his hand if the barrel was more than one foot long. Stephenson's testimony, although not conclusive, does provide additional support for the finding that the gun barrel was the requisite length. This finding is further supported by the video surveillance footage, which shows the shooter wielding a small handgun. Accordingly, we conclude that the state produced sufficient evidence to prove the barrel length element beyond a reasonable doubt.

The judgment is affirmed.

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

ECKER, J., concurring. I agree with, and join, parts I, II and IV of the majority opinion, and I concur in the result reached in part III regarding the trial court's failure to issue a special credibility instruction with respect to the state's witness, Leon Pruden. In my view, the trial court should have instructed the jury that Pruden was a jailhouse informant whose testimony should be examined with greater scrutiny than that of an ordinary witness because, as Justice Palmer explained in his concurring opinion in *State* v. *Diaz*, 302 Conn. 93, 121, 25 A.3d 594 (2011), "informers seeking a benefit from the state have a strong motive to falsely inculpate the accused, and because the state has a strong incentive not to enter into an express or explicit agreement

with such witnesses, preferring, instead, to keep any such understanding unstated . . . .'' Nonetheless, I conclude that the instructional error was harmless on the present factual record, and I therefore agree with the majority that the judgment of conviction should be affirmed.

The majority grounds its decision in part III on the putative distinction between a jailhouse informant who hopes for beneficial treatment from the state in exchange for testimony ''regarding *statements* made [to the informant] by the defendant,'' on the one hand, and an informant who seeks the very same benefit in exchange for testimony regarding ''events'' that were ''observed'' by the informant, on the other. (Emphasis in original.) Part III of the majority opinion. The majority points out that this distinction derives from the majority opinion in *State* v. *Diaz*, supra, 302 Conn. 93, which concluded that it was not plain error for the trial court to fail to give a special credibility instruction, in the absence of a request by the defendant, if the informants ''testified only about the events surrounding the shooting'' as opposed to the defendant's statements about those events. Id., 104. The *Diaz* majority also declined to exercise its supervisory authority to require a special credibility instruction for all incarcerated informants who testify about ''events surrounding the crime that [they] observed . . . .'' Id., 110.

Despite the broad language in *Diaz*, our holding in that case was quite narrow—a trial court is not required, sua sponte, to issue a special credibility instruction for incarcerated witnesses who testify about events they observed if such an instruction has not been requested by the defendant.[1] The present appeal is distinguishable

[1] I understand that this court stated in *Diaz* that ''the trial court's failure to give a special credibility instruction . . . would not have been improper even if the defendant had requested such an instruction''; *State* v. *Diaz*, supra, 302 Conn. 104; but that statement was made in the context of plain error analysis, and I take it to mean simply that, even if the request had

from *Diaz* because the defendant in this case, unlike the defendant in *Diaz*, filed a timely and otherwise proper request for a special credibility instruction at trial and, therefore, does not seek relief on appeal under either the plain error or supervisory authority doctrine. The procedural point is significant because reversal for plain error "is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Fagan*, 280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Again, a defendant cannot establish plain error when, as in *Diaz*, the substantive legal right urged by the defendant would have required an *extension* of existing law. See *State* v. *Diaz*, supra, 302 Conn. 104 n.8 ("[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine"). Likewise, the majority's refusal to exercise its supervisory authority in *Diaz* does not determine the result here because this court's supervisory powers represent "an extraordinary remedy that should be used sparingly . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014). *Diaz*, in short, does not control the open issue of whether a trial court must give a special credibility instruction when requested by a defendant in

been made by the defendant, an adverse ruling by the trial court would not have been improper *under existing law*. See id., 104 n.8 ("[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine"). To the extent that the quoted language was intended to signal that this court would have rejected the defendant's argument for an extension of the existing law if, hypothetically, his claim had been properly preserved for appellate review, the statement was pure dictum and does not bind us. See, e.g., *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 810, 855 A.2d 174 (2004) (statements that are not essential to court's holding "may be regarded as dicta and, thus, not binding").

the case of an informant who hopes to obtain favorable treatment from the state in exchange for testimony about an event that he or she claims to have witnessed.

Turning to that open issue, I do not find the distinction between informants who testify about events perceived and those who testify about statements overhead to be a persuasive basis on which to deny a timely requested special credibility instruction. The *Diaz* majority cited absolutely *no* authority in support of this distinction, and my research has uncovered none.[2] In language quoted and adopted by the majority in this case; see part III of the majority opinion; the majority in *Diaz* baldly asserted that "[t]estimony by a jailhouse informant about a . . . confession is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . *In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested. Accordingly, cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth in these cases than in cases involving jailhouse confessions*." (Cita-

[2] The other cases on which the majority in the present case relies, namely, *State* v. *Jones*, 337 Conn. 486, 254 A.3d 239 (2020), *State* v. *Arroyo*, 292 Conn. 558, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), and *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), lend no support to its conclusion that a special credibility instruction is unnecessary when an incarcerated informant testifies about an event rather than a statement. These cases did not involve or discuss jailhouse informant testimony regarding an event; they involved only jailhouse informant testimony regarding a defendant's statements and hold that a special credibility instruction is necessary in that context. Nothing in *Jones*, *Arroyo*, or *Patterson* implies that a special credibility instruction is unnecessary, inappropriate, or inadvisable in the present context.

tions omitted; emphasis added.) *State* v. *Diaz*, supra, 302 Conn. 109–10.

Again, *Diaz* provided no legal authority to establish the truth or accuracy of the italicized assertion. Nor does the majority in the present case identify any basis for the conclusion. It is, of course, true that testimony about a confession *sometimes* may be more difficult to verify or to discredit than testimony about an event. But the converse is also true: testimony about an event may be more difficult to verify or to discredit than testimony about a statement. This should not surprise us because a statement *is* an event, and the ease or difficulty of proving any event will depend on the circumstances. Spoken words are intangible and evanescent, and they leave no mark unless recorded. Many events—including the momentary display of a gun in a private space, which allegedly occurred in Pruden's presence—are equally impermanent. The relative difficulty of testing the credibility of an informant who testifies regarding such statements or events will depend on the underlying factual circumstances. Was it physically possible that the informant was in the particular location at the particular time of the alleged statement or event? Was there anyone else present to corroborate the informant's testimony? Does the content of the informant's testimony (including the level of detail, corroborating facts, etc.) help establish or undermine the claim of veracity? Did the informant make a record or tell anyone about the statement or event soon after its occurrence? In more concrete terms, if Pruden testified that he had heard the defendant confess one month after the shooting instead of testifying that he had seen the defendant's gun one month before the shooting, why would it be so much more difficult to cross-examine him about the veracity of that testimony? Alternatively, if he had testified that

he saw the defendant in possession of the gun when no one else was present, why would it be any less difficult to cross-examine him about the veracity of that testimony? These questions may help to explain why the distinction articulated by the majority in *Diaz* and relied on by the majority in the present case lacks supporting authority.

Even accepting, purely for the sake of argument, the claim that testimony about past statements is harder to disprove than testimony about past events, I would still disagree that this thin distinction justifies a different rule governing special credibility instructions. For the reasons explained in Justice Palmer's compelling concurring opinion in *Diaz*; *State* v. *Diaz*, supra, 302 Conn. 115–22 (*Palmer*, *J.*, concurring); the majority is mistaken when it asserts that the central rationale animating the cases adopting the special credibility instruction is inapplicable in the present context. See part III of the majority opinion. This misapprehension derives from a misidentification of that rationale. The need for a special credibility instruction is not driven primarily by concerns about the relative difficulty involved in disproving the informant's testimony. Rather, as we explained in *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), the primary and predominant concern at stake is that "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect. As the United States Supreme Court observed . . . years ago, [t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are dirty business may raise serious questions of credibility. *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). The United States Supreme Court therefore has allowed defendants

broad latitude to probe [informants'] credibility by cross-examination and ha[s] counseled submission of the credibility issue to the jury *with careful instructions*. . . . *Banks* v. *Dretke*, 540 U.S. 668, 702, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), quoting *On Lee* v. *United States*, supra, 757; see *Hoffa* v. *United States*, 385 U.S. 293, 311–12, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966). Indeed, the court recently has characterized such instructions as one of the customary, truth-promoting precautions that generally accompany the testimony of informants. *Banks v. Dretke*, supra, 701. Because the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state . . . the defendant was entitled to an instruction substantially in accord with the one that he had sought." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Patterson*, supra, 469–70.

This fundamental rationale applies when an incarcerated informant, hoping for a benefit from the state in exchange for his or her testimony, testifies about any past event, whether it be a statement or some other alleged occurrence. "A special credibility instruction, which cautions the jury to review the testimony of such an informer with particular scrutiny and to weigh his or her testimony with greater care than the testimony of an ordinary witness, is important in such circumstances because a defendant has a strong interest in ensuring that the jury appreciates the potential that exists for false testimony due to the informer's self-interest." *State* v. *Diaz*, supra, 302 Conn. 115 (*Palmer*, *J.*, concurring). It is that simple.[3]

[3] The second ground on which the majority relies is "the wisdom of harmonizing our definition of jailhouse informants with the legislature's recent definition of a 'jailhouse witness' as 'a person who offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, or an incarcerated person who offers or provides testimony concerning statements made to such person

Applying these principles to the present case, I conclude that Pruden was a jailhouse informant and, therefore, that the defendant was entitled to the requested special credibility instruction. Pruden observed the defendant with a semiautomatic, black handgun one month before the shooting, but he did not approach the police with this inculpatory information until March 5, 2014—the day he was arrested in connection with a pending drug case. Pruden admitted that he hoped that, by sharing this information with the police, he would receive favorable treatment in his own criminal proceeding. Under these circumstances, it is beyond dispute that Pruden had "a powerful incentive, fueled by self-interest, to implicate falsely the accused," and his testimony, therefore, was "inevitably suspect." *State* v. *Patterson*, supra, 276 Conn. 469. Accordingly, I would hold that the trial court abused its discretion in denying the defendant's request for a special credibility instruction.

Nonetheless, I also would conclude that the trial court's failure to issue the requested instruction was

by another person who is suspected of or charged with committing a criminal offense." (Internal quotation marks omitted.) Part III of the majority opinion, quoting *State* v. *Jones*, 337 Conn. 486, 506–507, 254 A.3d 239 (2020). The court in *Jones* expanded the definition of a jailhouse informant for purposes of a special credibility jury instruction and explained that one reason to do so was to adopt a definition matching the legislative definition of a "jailhouse witness" set forth in § 6 of No. 19-132 of the 2019 Public Acts, which is codified at General Statutes § 54-86o (d). See *State* v. *Jones*, supra, 505–507. In *Jones*, however, we could "think of no reason to employ a *more restrictive definition than the one adopted by the legislature to address precisely the same policy concern, namely, the potential unreliability of a jailhouse witness' testimony* . . . ." (Emphasis added.) Id., 507 n.12. Nothing in the logic or reasoning of *Jones* requires the rule to remain forever frozen thereafter or prevents the legislature or this court from adopting a more expansive definition of "jailhouse informant" or "jailhouse witness" to protect against the potential unreliability of such a witness' testimony. Indeed, in *Jones*, we recognized that it was not "necessary to harmonize the definitions" but that it was "preferable to do so unless there is a good reason" to depart from the legislative definition. (Emphasis omitted.) Id. In my view, there is good reason to depart from the legislative definition to address the situation presented in this case, and I see this departure as wholly consistent with the policy underlying the statute.

harmless. Such an error "is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . Several factors guide our determination of whether the trial court's failure to give the requested instruction was harmful. These considerations include: (1) the extent to which [the jailhouse informant's] apparent motive for falsifying his testimony was brought to the attention of the jury, by cross-examination or otherwise; (2) the nature of the court's instructions on witness credibility; (3) whether [the informant's] testimony was corroborated by substantial independent evidence; and (4) the relative importance of [the informant's] testimony to the state's case." (Internal quotation marks omitted.) *State* v. *Jones*, 337 Conn. 486, 509, 254 A.3d 239 (2020).

As the majority points out, "defense counsel effectively impeached the credibility of Pruden during cross-examination" by eliciting "testimony from Pruden that he did not come forward with this information until the very day that he was arrested, seven months after he heard about the shooting," and that he only "came forward because he was hoping to obtain a benefit for himself." Part III of the majority opinion. Indeed, the defendant presented expert testimony regarding the unreliability of jailhouse informant testimony, and "[d]efense counsel highlighted the problem during closing argument, saying of Pruden, 'it is the hope for benefits that causes the problem, the unreliability. Pruden had an incentive to lie that is different from an ordinary witness; that's why you need to look carefully at this testimony.' " Id. The jury was made well aware of Pruden's apparent motive to testify falsely.

The trial court also gave a general credibility instruction that directed the jury to consider, among other things, whether a witness had "an interest in the outcome of the case or any bias or prejudice concerning any party or any matter involved in the case . . . ." The

trial court did not name Pruden in its special credibility instruction, but it did instruct the jury on the dangers posed by jailhouse informant testimony, and the expert witness and defense counsel both urged the jury to consider these dangers when assessing the credibility of Pruden's testimony. In combination with the other information made available to the jury regarding the potential unreliability of this testimony, the jury had the tools at its disposal to scrutinize Pruden's testimony more carefully than that of an ordinary witness.

Admittedly, Pruden's testimony regarding the defendant's possession of a gun one month before the shooting was not corroborated, but Pruden was not an eyewitness to the crime, nor was his testimony necessary to convict the defendant. Indeed, Pruden's testimony was relatively unimportant to the state's case, which relied predominately on the video footage of the Cheetah Club, as well as the eyewitness and DNA evidence placing the defendant at the club on the night of the murder, despite the defendant's contrary statements to the police. On the whole, I am confident that the trial court's failure to issue the requested special credibility instruction did not substantially affect the jury's verdict.

For the foregoing reasons, I concur in the result reached in part III of the majority opinion.

RONALD G. CAVERLY, ADMINISTRATOR (ESTATE OF JAMES B. CAVERLY) *v.* STATE OF CONNECTICUT (SC 20577)

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

Syllabus

Pursuant to statute ((Rev. to 2017) § 4-160b (a)), "[t]he Office of the Claims Commissioner shall not accept or pay any subrogated claim or any claim directly or indirectly paid by or assigned to a third party."

The plaintiff, the administrator of the estate of the decedent, J, sought to recover damages from the state for the allegedly wrongful death of J, who died while under the medical care of certain of the state's employees at a state university hospital. The plaintiff had filed a notice of claim with the claims commissioner, seeking permission to bring a medical malpractice action against the state for the alleged negligence of those state employees in prescribing certain medications to J, which allegedly resulted in J's death. Before the plaintiff received a decision from the claims commissioner, however, he filed a separate negligence action against the pharmacy that had filled J's prescriptions, C Co., and certain of C Co.'s corporate affiliates. Thereafter, the plaintiff received authorization from the claims commissioner and commenced the present action. Subsequently, the plaintiff's action against C Co. was settled for $2 million. The state then moved to dismiss the present action for lack of subject matter jurisdiction on the ground of sovereign immunity, claiming that, in light of the settlement with C Co., the medical malpractice claim against the state had been "indirectly paid by . . . a third party" within the meaning of § 4-160b (a). The trial court denied the state's motion to dismiss, concluding that § 4-160b (a) applies only to subrogated or assigned claims and not to payments made by joint tortfeasors. On appeal from the trial court's denial of the state's motion to dismiss, *held* that the trial court correctly determined that the plaintiff's medical malpractice claim against the state was not "indirectly paid by . . . a third party" within the meaning of § 4-160b (a) by virtue of the plaintiff's settlement with C Co., and, accordingly, this court upheld the trial court's denial of the state's motion to dismiss: the plaintiff's medical malpractice claim against the state was not paid indirectly by a third party when C Co. paid the plaintiff $2 million to settle the plaintiff's action against C Co., as this court previously had concluded that the term "claim," which is defined in relevant part by statute (§ 4-141 (1)) as "a petition for the payment or refund of money by the state," must be read to refer to claims for monetary damages against the state, the negligence action against C Co. was not a "claim," as defined by § 4-141 (1), because it was an attempt to recover monetary damages from a private corporation for its own independent acts of alleged negligence in causing J's death instead of a request for monetary damages from the state, and the settlement proceeds the plaintiff received in the plaintiff's action against C Co. constituted a direct payment to the plaintiff in satisfaction of the plaintiff's separate and distinct claim for monetary damages against C Co.; moreover, the common-law prohibition against double recovery, which precludes a plaintiff from recovering twice for a single loss, did not bar the plaintiff's claim against the state, as the amount of the plaintiff's loss had not been adjudicated on the merits, a judgment in damages had not been rendered in favor of the plaintiff, and no such judgment had been paid in full; furthermore, a plaintiff's settlement with

one tortfeasor does not necessarily represent the plaintiff's fair, just and reasonable damages or constitute full compensation for the entire amount of his loss, and, to the extent the state believed that the plaintiff had been fully compensated for J's death in light of the settlement with C Co., the state could file a notice of apportionment or introduce evidence of that settlement in a trial to the court.

Argued October 18, 2021—officially released February 9, 2022*

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, denied the defendant's motion to dismiss, and the defendant appealed. *Affirmed.*

Michael G. Rigg, with whom, on the brief, was *Robert D. Silva*, for the appellant (defendant).

Marc J. Ubaldi, with whom, on the brief, were *Leslie Gold McPadden* and *Adele R. Jacobs*, for the appellee (plaintiff).

Opinion

ECKER, J. The decedent, James B. Caverly, died while under the medical care of the employees of the John Dempsey Hospital at the University of Connecticut Health Center. The plaintiff, Ronald G. Caverly, administrator of the decedent's estate, subsequently received authorization from the Office of the Claims Commissioner to file a medical malpractice action against the defendant, the state of Connecticut, doing business as UCONN Health Center/John Dempsey Hospital, pursuant to General Statutes (Rev. to 2017) § 4-160 (b).[1] The plaintiff filed the present medical malpractice action,

* February 9, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Hereinafter, all references to § 4-160 are to the 2017 revision.

which the state moved to dismiss on the basis of sovereign immunity. The state argued that, because the plaintiff had received a settlement payment from a joint tortfeasor[2] in connection with the decedent's death, the plaintiff's action was barred by General Statutes § 4-160b (a), which provides that "[t]he Office of the Claims Commissioner shall not accept or pay any subrogated claim or any claim directly or indirectly paid by or assigned to a third party." The trial court denied the state's motion to dismiss on the ground that § 4-160b (a) applies only to subrogated or assigned claims and not to payments made by joint tortfeasors. We affirm the trial court's denial of the state's motion to dismiss.

The operative complaint alleges the following relevant facts.[3] On December 5, 2016, the doctors and/or nurses at John Dempsey Hospital prescribed warfarin, an anticoagulant medication, to the decedent. The prescription was filled at a CVS Pharmacy in Mansfield. According to the instructions printed on the prescription label, the decedent was directed to "take four and one-half 3 milligram tablets on Monday and Thursday and three 3 milligram tablets on the other days of the week." On December 8, 2016, the decedent was seen at the anticoagulation clinic at John Dempsey Hospital, at which time "he was directed to take the warfarin 3 milligram, four days per week, and the warfarin [4.5] milligram three days per week."

[2] "Joint tortfeasors are persons who have acted in concert in committing the wrong or have engaged in independent conduct that has united to cause a single injury, thus making them jointly and severally liable for the wrongful conduct." *Robbins* v. *Physicians for Women's Health, LLC*, 311 Conn. 707, 720–21, 90 A.3d 925 (2014).

[3] "In reviewing a denial of a motion to dismiss, we take the facts as expressly set forth, and necessarily implied, in the plaintiff's complaint, construing them in the light most favorable to the pleader." (Internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 385, 978 A.2d 49 (2009).

On December 16, 2016, the decedent returned to the anticoagulation clinic, complaining of "bruising and swelling on his arm and elbow, indicative of recent bleeding." The decedent's international normalized ratio (INR)[4] was tested, "which revealed that his INR was greater than 8, with normal limits considered to be between 2 and 3." The decedent underwent a second blood test to ascertain a more specific INR value. "The [second] blood test documented an INR result that was dangerously high at 14.1. . . . As a result of the dangerously high INR level, the . . . decedent was instructed to [stop taking] the warfarin and to return to the anticoagulation clinic on December 19, 2016, for a repeat INR test, and to go to the emergency room if any bleeding event occurred." Additionally, the decedent was prescribed one 5 milligram dose of vitamin K. Two days later, after taking the vitamin K, the decedent "was taken emergently to Hartford Hospital," where he "died from hemorrhagic complications of Coumadin/warfarin administration from his blood being too thin."

On December 14, 2017, the plaintiff filed a notice of claim with the claims commissioner, alleging that "employees of the state of Connecticut employed by the John Dempsey Hospital at the University of Connecticut Health Center deviated from the standard of care . . . while [the decedent] was a patient [at] the hospital," resulting "in the decedent experiencing a hemorrhage that caused his death." Attached to the plaintiff's notice of claim was "a certificate of good faith and an opinion letter in accordance with [General Statutes] § 52-190a." The claims commissioner granted the plaintiff "permission to sue the state of Connecticut for damages of up to $5 million for acts of alleged medical negligence" in

[4] INR "is the standard by which the anticoagulant activity of warfarin therapy is monitored." K. Anderson & K. Smith, "Anticoagulants and Antiplatelet Agents," in Lippincott Illustrated Reviews: Pharmacology (K. Whalen et al. eds., 7th Ed. 2019) p. 279.

accordance with § 4-160 (b). The plaintiff thereafter filed the present medical malpractice action against the state.

Meanwhile, in March, 2019, prior to receiving a decision from the claims commissioner, the plaintiff had filed an action in the Superior Court against CVS Pharmacy and certain of its corporate affiliates (collectively, CVS Pharmacy), alleging that CVS Pharmacy's negligence in filling the decedent's warfarin and vitamin K prescriptions caused the decedent's death. See *Caverly* v. *CVS Health Corp.*, Superior Court, judicial district of Rockville, Docket No. TTD-CV19-6017238-S (March 22, 2019) (CVS action). The CVS action, which was removed to federal court, settled in January, 2020, for $2 million.

On June 30, 2020, the state moved to dismiss the present case for lack of subject matter jurisdiction, arguing that the plaintiff's receipt of the settlement funds in the CVS action vitiated the claims commissioner's grant of authorization allowing the plaintiff to sue the state. Specifically, the state claimed that, in light of the settlement, the plaintiff's medical malpractice claim against the state had been "indirectly paid by . . . a third party" within the meaning of § 4-160b (a).

The plaintiff opposed the state's motion to dismiss, arguing that § 4-160b (a) was inapplicable to the present case because the plaintiff's medical malpractice claim against the state had not been subrogated or assigned to a third party and was separate and distinct from its claim against CVS Pharmacy. Alternatively, the plaintiff argued that the timing of the claims commissioner's authorization to sue the state was dispositive of the state's motion because "the claims commissioner granted permission to sue *before* the settlement was paid," and, therefore, "the claims commissioner accepted a claim

that was at the most payable, rather than paid," under § 4-160b (a). (Emphasis in original.)

The trial court denied the state's motion to dismiss. The court found that the plain language of § 4-160b (a) demonstrated "that the legislature meant simply to limit its waiver of sovereign immunity by excluding from its application subrogees and assignees of claims." The trial court observed that "[t]he statute is silent as to any subsequent forfeiture or revocation of the claim upon payment by a joint tortfeasor" and concluded that, "if the legislature intended to either require the absence of joint tortfeasors before a claim is accepted, or to withdraw a waiver of sovereign immunity upon the payment of a common harm or injury by such joint tortfeasor, it could have done so but did not." Accordingly, the trial court concluded that the plaintiff's medical malpractice action was not barred by the doctrine of sovereign immunity. The state appealed from the decision of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.[5]

It is well established that "[t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . .

[5] Although the denial of a motion to dismiss generally is a nonappealable interlocutory ruling, "[t]he denial of a motion to dismiss based on a colorable claim of sovereign immunity, by contrast, is an immediately appealable final judgment because the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 303 n.2, 828 A.2d 549 (2003). We have explained that "a colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the . . . court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019). The plaintiff does not dispute that the state has raised a colorable claim of sovereign immunity under § 4-160b (a).

A determination regarding a trial court's subject matter jurisdiction is a question of law," over which we exercise plenary review. (Citation omitted; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 313, 828 A.2d 549 (2003). More specifically, whether § 4-160b (a) waives the state's sovereign immunity with respect to a claim for damages against the state when the plaintiff has received or will receive compensation for his or her loss by way of a settlement with a joint tortfeasor is a question of law subject to plenary review. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 416, 195 A.3d 664 (2018) (whether statute operates as waiver of sovereign immunity is "a question of statutory construction that constitutes a question of law over which our review is plenary").

To ascertain the meaning of § 4-160b (a), we apply the principles of statutory construction set forth in General Statutes § 1-2z. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141–42, 210 A.3d 1 (2019). We are also guided by the "principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect [that] makes the least rather than the most change in sovereign immunity." (Emphasis omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 388, 978 A.2d 49 (2009).

Section 4-160b (a) provides that "[t]he Office of the Claims Commissioner shall not accept or pay any subrogated claim or any claim directly or indirectly paid by or assigned to a third party." It is undisputed that the plaintiff's medical malpractice claim against the state was not "subrogated" or "assigned to a third party." Instead, the parties dispute whether the plaintiff's medical malpractice claim against the state was indirectly

paid by a third party when CVS Pharmacy paid the plaintiff $2 million to settle the CVS action.[6]

Chapter 53 of the General Statutes, entitled "Claims Against the State," defines the term "claim" as "a petition for the payment or refund of money *by the state* or for permission to sue *the state* . . . ." (Emphasis added.) General Statutes § 4-141 (1);[7] see General Statutes § 4-141 (2) (defining "just claim" as "a claim which in equity and justice *the state should pay*, provided *the state* caused damage or injury or has received a benefit" (emphasis added)); see also General Statutes § 4-165 (a) (providing that "[a]ny person having a complaint for" damage caused by state officer or employee "in the discharge of his or her duties or within the scope of his or her employment . . . shall present it as *a claim against the state* under the provisions of this chapter" (emphasis added)). As we explained in *Bloom* v. *Gershon*, 271 Conn. 96, 856 A.2d 335 (2004), "chapter 53 pertains exclusively to claims for monetary damages against the state, and, therefore, any reference to the word 'claim' in chapter 53 must be read to refer to claims for monetary damages" against the state. Id., 112. Thus, "§ 4-141 [1], which defines the word 'claim' as a petition 'for permission to sue the state,' as well as a petition for the payment or refund of money by the state, by virtue of pertaining to the provisions of chapter 53, necessarily means a petition for permission to sue *the*

[6] We note that § 4-160b applies only to the claims commissioner's "accept[ance] or pay[ment]" of a claim. General Statutes § 4-160b (a). The claims commissioner did not pay the plaintiff's claim, and, therefore, the statute is applicable to the present case only if the claims commissioner accepted the plaintiff's claim. The plaintiff does not challenge the state's contention that the claims commissioner accepted the plaintiff's claim by granting the plaintiff authorization to sue the state. There is no occasion for us to address the state's argument that permission to sue the state constitutes the claims commissioner's "acceptance" of a claim under these circumstances.

[7] Section 4-141 was the subject of amendments in 2018. See Public Acts 2018, No. 18-50, § 25. They have no bearing on this appeal. In the interest of simplicity, we refer to the current revision of the statute.

state for the payment or refund of money." (Emphasis altered.) Id., 112–13.

The plaintiff's negligence action against CVS Pharmacy was not a "claim," as defined by § 4-141 (1), because it was not a request for monetary damages from the state. Instead, in the CVS action, the plaintiff sought monetary damages from CVS Pharmacy, a private corporation, for its own independent acts of alleged negligence in causing the decedent's death. Thus, the settlement proceeds that the plaintiff received in the CVS action did not constitute an indirect payment of the plaintiff's claim for monetary damages against the state but, rather, constituted a direct payment to the plaintiff in satisfaction of the plaintiff's claim for monetary damages against CVS Pharmacy. Because the plaintiff's claims against CVS Pharmacy and the state are separate and distinct, we conclude that the plaintiff's medical malpractice claim in the present case was not "indirectly paid by . . . a third party" within the meaning of § 4-160b (a).

The state contends that the term "claim" in § 4-160b (a) must be construed consistently with the common-law prohibition on double recovery, which precludes a plaintiff from recovering twice for a single loss.[8] We

[8] The state also claims that § 4-160b (a) should be construed to preserve the common-law rule that "a release of one joint tortfeasor operated as a release of all joint tortfeasors." *Sims* v. *Honda Motor Co., Ltd.*, 225 Conn. 401, 406, 623 A.2d 995 (1993). The state recognizes that this common-law rule was abrogated by General Statutes § 52-572e, which provides in relevant part that a release of one joint tortfeasor "does not discharge the other tortfeasors unless, and only to the extent, the release so provides"; General Statutes § 52-572e (b); but contends that the legislature, in enacting § 4-160b (a), intended to exempt the claims commissioner's waiver of sovereign immunity from the operation of § 52-572e. We reject this claim because, as we previously explained, the term "claim" in § 4-160b (a) plainly and unambiguously refers only to a plaintiff's request for monetary damages from the state for injury or loss caused by the state through the action or inaction of its agencies, officers, or employees. Nothing in the statute refers, either explicitly or implicitly, to the release of joint tortfeasors or § 52-572e. In light of the plain and unambiguous language of § 4-160b (a), we decline to adopt the state's proffered construction of the statute.

agree with the state that the plaintiff may not recover double damages for the death of the decedent under "the simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury." (Internal quotation marks omitted.) *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 71, 557 A.2d 540 (1989). We disagree, however, that our construction of § 4-160b (a) permits a double recovery.

As we recently explained in *Meribear Productions, Inc.* v. *Frank*, 340 Conn. 711, A.3d (2021), "[p]laintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint [or successive] tortfeasors. . . . This rule is based on the sound policy that seeks to ensure that parties will recover for their damages. . . . The possible rendition of multiple judgments does not, however, defeat the proposition that a litigant may recover just damages only once. . . . Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments. . . . In general, a loss is satisfied when a judgment . . . rendered in favor of the plaintiff in compensation for the loss has been paid in full." (Citations omitted; internal quotation marks omitted.) Id., 749–50. In the present case, the amount of the plaintiff's loss has not been adjudicated on the merits, a damages judgment has not been rendered in favor of the plaintiff, and no such judgment has been paid in full. Compare id., 751–52 (plaintiff's action against coobligors was not barred by double recovery rule because "[i]t is undisputed that the plaintiff's loss was wholly unsatisfied when the trial court rendered judgment"), with *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 69, 75 (plaintiff's second action against joint tortfeasor was barred by double recovery rule because, "[a]fter a jury

trial, the plaintiff received compensatory, exemplary and treble damages in the amount of $1,187,763 . . . and the defendants therein . . . satisfied that judgment in full" (citation omitted)). Accordingly, the prohibition against double recovery does not bar the plaintiff's medical malpractice claim against the state.

We recognize that the plaintiff received $2 million from CVS Pharmacy as compensation for the death of the decedent. "A plaintiff's settlement with one tortfeasor in a multitortfeasor context, however, does not necessarily represent a claimant's fair, just and reasonable damages but, rather, represents, in part, the parties' assessments of the risks of litigation. Once having undertaken to bargain regarding those risks, the plaintiff receives the benefit or burden of the settlement." *Collins* v. *Colonial Penn Ins. Co.*, 257 Conn. 718, 735–36, 778 A.2d 899 (2001); see *Black* v. *Goodwin*, *Loomis & Britton*, *Inc.*, 239 Conn. 144, 168, 681 A.2d 293 (1996) ("[w]hen an award is made pursuant to a settlement . . . the underlying issues have not been fully and fairly litigated, and, therefore, the earlier award can have no preclusive effect on a subsequent action"). A negotiated settlement "represent[s] a surrender of a cause of action, perhaps for a consideration less than the injury received"; it does not equate to a satisfaction of a judgment "represent[ing] full compensation for injuries." *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 74 n.8. Accordingly, the settlement the plaintiff received in the CVS action does not necessarily constitute full compensation for the entire amount of the plaintiff's loss.

To the extent that the state believes that the plaintiff has been fully compensated for the death of the decedent, it is not without recourse. The state, like any other litigant in a negligence action seeking damages for personal injury, wrongful death or property damage, may at the appropriate time file a notice of apportion-

ment pursuant to General Statutes §§ 52-572h (c)[9] and 52-102b (c),[10] or introduce evidence of the plaintiff's settlement with a joint tortfeasor in a trial to the court[11] pursuant to General Statutes §52-216a.[12] We therefore

[9] General Statutes § 52-572h (c) provides that, "[i]n a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages except as provided in subsection (g) of this section."

The state contends that, pursuant to *Bloom* v. *Gershon*, supra, 271 Conn. 96, it is precluded from filing a notice of apportionment against CVS Pharmacy. The state misconstrues our holding in *Bloom*. In *Bloom*, we held that the claims commissioner lacks jurisdiction "to waive the state's sovereign immunity and [to] grant a claimant permission to file an apportionment complaint . . . *against* the state of Connecticut in the Superior Court"; (emphasis added; footnote omitted) id., 99; because "the commissioner's jurisdiction to authorize suit against the state extends only to claims for monetary damages"; id., 111; and because "apportionment claims are claims for the apportionment of liability and are, therefore, separate and distinct from claims for monetary damages." Id., 110. *Bloom* thus holds that apportionment claims *against the state* are barred by the doctrine of sovereign immunity; it contains no suggestion that the state is barred from filing a notice of apportionment against a joint tortfeasor who was not made a party to the action and with whom the plaintiff previously had entered into a settlement and release agreement. Indeed, in *Babes* v. *Bennett*, 247 Conn. 256, 721 A.2d 511 (1998), we recognized that "the legislature intended that the state be permitted to apportion damages to other liable codefendants pursuant to § 52-572h (c) . . . ." Id., 268; see *Rodriguez* v. *State*, 155 Conn. App. 462, 468, 110 A.3d 467 (in negligence action against state, "the state filed a notice of apportionment against [the joint tortfeasors], alleging . . . that any damages should be apportioned between the state and those nonparties"), cert. granted, 316 Conn. 916, 113 A.3d 71 (2015) (appeal withdrawn, December 15, 2015). Our holding in *Bloom*, in short, would not bar the state from filing a notice of apportionment against CVS Pharmacy in the present case.

[10] General Statutes § 52-102b (c) provides in relevant part: "If a defendant claims that the negligence of any person, who was not made a party to the action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice specifically identifying such person by name and last-known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis of the defendant's claim that the negligence of such person was a proximate cause of the plaintiff's injuries or damage. . . ."

[11] Section 4-160 (f) provides that claims against the state authorized by the claims commissioner must be "tried to the court without a jury."

[12] General Statutes § 52-216a provides: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action

reject the state's argument that our construction of § 4-160b (a) permits the plaintiff to recover twice for a single loss, in violation of the prohibition against double recovery.

The trial court's denial of the state's motion to dismiss is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* MELINDA CHANTEA FISHER
(SC 20559)

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

Syllabus

Convicted of the crime of assault in the second degree in connection with an incident in which she attacked the victim, causing her to suffer a concussion and facial disfigurement, the defendant appealed, claiming, inter alia, that there was insufficient evidence to support her conviction on the ground that there was no evidence that she intended to cause

shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury. If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. If the court concludes that the verdict is inadequate as a matter of law, it shall order an additur, and upon failure of the party so ordered to add the amount ordered by the court, it shall set aside the verdict and order a new trial. *This section shall not prohibit the introduction of such agreement or release in a trial to the court.*" (Emphasis added.)

As this court observed in *Peck* v. *Jacquemin*, 196 Conn. 53, 491 A.2d 1043 (1985), "[i]t is readily apparent that, in cases tried to the court to which this statute applies, the legislature intended . . . to permit the introduction of any such agreement or release" with a joint tortfeasor to "[assist] the court . . . in arriving at an award of fair and just compensation where liability is found . . . ." Id., 73; see id. (because "it is assumed that the trial court will utilize only competent evidence in arriving at its decision and will disregard that which is incompetent . . . the matter of an agreement or release is handled under § 52-216a in a trial to the court with no substantive difference from the way it is handled in a trial to a jury" (citations omitted)).

the victim serious physical injury. The defendant had been employed as a technology assistant at a school, and the victim was her supervisor. On the day of the incident, the defendant arrived late to work and was informed that the victim had the key to the information technology laboratory. When the defendant located the victim in a hallway, the victim asked her if she just arrived at work and advised her that, if she was having trouble getting to work on time, they could arrange a different schedule for her. The defendant became agitated and, putting her face directly in the victim's face, stated that she was not "going to kill herself" to get to work on time. When the victim told the defendant to "get out of [her] face," the defendant called the victim a "fucking bitch," punched her in the nose, and threw a cup of coffee at her. The victim tried to get away from the defendant, but the defendant pursued her down the hallway and, when the defendant caught up with her, began to scratch and punch the victim, as the victim pleaded with her to stop. When the victim fell to the floor, the defendant grabbed her by the hair and repeatedly slammed her head against a cinder block wall, causing the victim to black out. The defendant then stood over the victim and repeatedly kicked her in the side. Eventually, M, a paramedic who had just dropped off his son at the school, was able to pull the defendant off of the victim, after which the defendant became compliant and cooperative. The victim was subsequently diagnosed by medical personnel with a nondisplaced fracture of the right nasal bone, a concussion, and severe postconcussion syndrome. At trial, the defendant testified that it was never her intention to cause the victim serious physical injury, explaining that, on the day of the incident, she was tired and experiencing considerable physical pain, that, when the victim, with whom she did not get along, confronted her in the hallway about being late, she became enraged, and that she could not recall most of what had transpired during the incident because she had blacked out. *Held*:

1. The evidence was sufficient to support the defendant's conviction of assault in the second degree, as the jury reasonably could have found beyond a reasonable doubt that the defendant had intended to cause the victim to suffer serious physical injury and, acting with such intent, caused her to suffer two such injuries, namely, a concussion and facial disfigurement: there was sufficient circumstantial evidence to support the jury's finding that the defendant had intended to cause the victim to suffer serious physical injury, as the defendant, after expressing anger toward the victim and calling her a "fucking bitch," committed numerous acts that indicated such intent, including punching the victim in the nose, throwing coffee at her, scratching the victim, grabbing the victim by the hair and repeatedly slamming her head against a cinder block wall, and kicking the victim while she was knocked down; moreover, the jury was not required to credit the defendant's testimony that, although she intended to hurt the victim, she did not intend to cause her serious physical injury, and was free to disbelieve the defendant's

testimony that she did not recall most of what transpired after the assault began because she blacked out or because she was seized by uncontrollable rage.

2. The defendant could not prevail on her claim that the trial court improperly limited defense counsel's cross-examination of the victim regarding her pending civil action against the defendant, which arose out of the same incident that gave rise to the defendant's conviction, and improperly declined to admit into evidence the complaint in that civil action:

a. Contrary to the defendant's claim, the trial court's alleged error was not of constitutional magnitude, as the defendant's right to cross-examination was not unduly restricted under either the federal or state constitution: defense counsel was permitted to question the victim about the fact that she had filed a civil action against the defendant seeking money damages, about the allegations in the civil complaint pertaining to both the assault and her physical injuries, and about any inconsistencies between those allegations and her statements to the police and her testimony at trial; accordingly, the jury was able to appropriately draw inferences relating to the victim's credibility and reliability as a witness, as well as any financial interest that she may have had in the outcome of the case; moreover, there was no merit to the defendant's claim that the alleged error was of constitutional magnitude insofar as the trial court did not permit defense counsel to question the victim about the amount of damages that she sought in her civil action, as this court and the Appellate Court previously have sustained similar limitations on cross-examination regarding civil actions that arose out of the same circumstances that precipitated the criminal charges against the defendants in those cases.

b. The trial court did not abuse its discretion in precluding defense counsel from questioning the victim more extensively about the specific details of the victim's civil action against the defendant, as it reasonably could have determined that allowing defense counsel to probe the victim regarding the specific dollar amount claimed in the civil action and to introduce the complaint itself into evidence could have led to a more extensive inquiry by both parties regarding the basis for the victim's damages claims, thereby opening the door to collateral evidence concerning the victim's claims for past and future medical expenses, lost earnings and earning capacity, pain and suffering, and emotional distress, the latter a subject that the defendant herself sought to preclude the admission of, in her prior motion in limine, due to the prejudicial nature of that evidence; accordingly, the trial court struck an appropriate balance between the defendant's right to cross-examination and her own effort to preclude evidence of the emotional impact of the assault on the victim and her family, and defense counsel's inquiry, taken as a whole, was sufficient to establish the victim's potential interest or financial motive in testifying as she did.

3. The trial court correctly determined that M, a paramedic with ten years of experience and special training in diagnosing concussions, was qualified to testify as an expert witness regarding signs a paramedic looks for in evaluating a patient for a concussion: the court acted within is discretion in concluding that M had special knowledge suitable to aiding the jury in deciding the issue of whether the victim had sustained a serious physical injury as a result of the defendant's attack on her, and the fact that M did not physically examine the victim did not render his expert testimony inadmissible; moreover, even if the trial court had abused its discretion in admitting M's expert testimony, any error was harmless, as M's testimony was merely cumulative of the testimony of three other expert witnesses.

Argued October 22, 2021—officially released February 10, 2022*

Procedural History

Substitute information charging the defendant with two counts of assault in the first degree, one count of attempt to commit assault in the first degree, and three counts of assault in the second degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Oliver*, *J.*; verdict and judgment of guilty of two counts of assault in the second degree; thereafter, the court conditionally vacated the conviction as to one count of assault in the second degree, and the defendant appealed. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Ronald Dearstyne*, former senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Melinda Chantea Fisher, appeals[1] from the judgment of conviction, rendered fol-

* February 10, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

lowing a jury trial, of two counts of assault in the second degree in violation of General Statutes § 53a-60 (a) (1).[2] The defendant claims that (1) there was insufficient evidence to sustain the jury's verdict of guilty of assault in the second degree,[3] (2) the trial court erred in denying the defendant's request to cross-examine the victim more extensively regarding her civil action against the defendant, and (3) the trial court erred in allowing a paramedic, testifying as a fact witness, to testify regarding symptoms of a concussion. We disagree with each of these claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural history. On April 21, 2016, the defendant had been employed as a technology assistant for the Southington public schools for approximately five weeks. That morning, she was assigned to work at South End Elementary School (school). Although she was supposed to report to work at 8 a.m., she did not arrive until around 8:15 a.m. due to a prior work commitment and because she was experiencing considerable dental pain. Upon arrival,

[2] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, the actor causes such injury to such person or to a third person . . . ."

[3] Count four of the operative information alleged that the defendant committed assault in the second degree when, with the intent to cause serious physical injury to another person, she caused the victim to suffer a concussion, and count five alleged that the defendant committed assault in the second degree when, with the intent to cause serious physical injury to another person, she caused the victim's face to be disfigured. The trial court vacated the conviction as to count five pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), "subject to being reinstated should count four be overturned on appeal," and sentenced the defendant on only count four. Nevertheless, the defendant argues that, because count five also required the state to prove that she intended to cause serious physical injury, and because reversal of her conviction on count four would require reinstatement of count five, the sufficiency of the evidence argument applies to both counts.

the defendant went to the main office to get the key for the information technology laboratory (lab) but was told that her supervisor, Lura Terrace, the victim in this case, had the key. Melanie Krupinski, a second grade teacher at the school, saw the defendant outside the locked lab and offered to let her leave her things in Krupinski's classroom while she looked for the key to the lab. The defendant told Krupinski how angry and upset she was that her "boss"[4] had insisted that she come to work, despite her dental pain. While speaking to Krupinski, the defendant appeared quite angry and stated that "she didn't want to see [the victim's] face."

After leaving Krupinski's classroom, the defendant found the victim in the hallway outside of the gymnasium. The victim asked the defendant if she had just arrived at work and advised her that, if she was having trouble getting to work on time, they could try to figure out a different work schedule for her. At that point, the defendant became "agitated" and, putting her face directly in the victim's face, stated that "she wasn't going to kill herself" to get to work on time. When the victim told the defendant to "get out of [her] face," the defendant responded by calling her a "fucking bitch" and punching her in the nose with her right fist. The defendant, who until this point had been holding a cup of coffee and a laptop in her left hand, threw the laptop to the ground, causing it to break, and then threw the cup of coffee at the victim. The victim tried to get away from the defendant, but the defendant pursued her down the hallway. When the defendant caught up with her, she began punching and scratching the victim,

[4] Krupinski testified that she was not sure who the defendant's boss was at the time. The victim, however, who had worked for the Southington public school district for sixteen years, testified that she supervised only one employee at the time, and that was the defendant. Moreover, the school's principal at the time, Erin Nattrass, testified that the victim was responsible for supervising the school's technology assistants and that, on the date in question, the defendant was the school's technology assistant.

while the victim pleaded with her to stop. When the victim fell to the floor, the defendant grabbed her by the hair and slammed her head against a cinder block wall, causing the victim to black out. When the victim came to, the defendant was standing over her and repeatedly kicking her in the side.

Erin Nattrass, the school's principal, and Patrick J. Myers, a parent, witnessed the attack. Nattrass testified at trial that she was standing in a classroom doorway talking to a teacher when she saw the defendant pursuing the victim down the hallway. The victim was walking away from the defendant with her hands up, saying things like "[s]top, get away from me," but the defendant kept hitting her in her face, neck, and arms. When the victim fell to the ground, the defendant grabbed her by the hair and slammed her head into the wall at least twice and then started kicking her. Although Nattrass attempted to intervene both verbally and physically, she was unable to stop the assault.

Myers, who was a paramedic, testified that he had just dropped off his son at preschool when he heard the defendant and the victim yelling at one another in the hallway and saw the defendant throw her coffee at the victim. As Myers approached the two women, the defendant threw the victim to the ground and started kicking her. Myers then saw the defendant bang the victim's head into the wall several times. Eventually, Myers was able to pull the defendant off the victim, at which point the defendant became compliant and cooperative.[5] The defendant told Myers that she had done what she had done because "[the victim] was harassing her," "she was very sick and should not have

[5] Myers testified that, as he removed the defendant from the victim, she turned and saw his paramedic uniform, "stopped . . . what she was doing . . . [and became] compliant with [him]." Myers indicated that it "is not uncommon" for this to occur when he is in uniform.

been at work in the first place," and "she [was] working multiple jobs and [was] extremely tired."

After the assault, Nattrass helped the victim off the floor and escorted her to the nurse's office. There, Nattrass observed scratches on the victim's neck and chest, and blood on her ear. Nattrass then returned to where the defendant and Myers were waiting and asked them to accompany her to her office, which they did. When the police and paramedics arrived, the defendant was placed under arrest, and the victim, based on her injuries, was transported by ambulance to a hospital.

At the hospital, the victim was treated by Douglas Whipple, the supervising emergency room physician. Whipple's initial triage notes indicated that the victim was "very shaken up and . . . crying," that she had "generalized achiness and facial discomfort," and that she denied loss of consciousness. Whipple ordered a computerized tomography scan to assess if there was bleeding or skull or facial fractures, which came back negative. Whipple nevertheless diagnosed the victim with a nondisplaced fracture of the right nasal bone at the junction with the maxilla and soft tissue swelling in the right infraorbital region. He instructed her to return to the hospital if her headache worsened or if she experienced vomiting or dizziness, all of which are symptoms of a "delayed bleed" or concussion. He also recommended that she follow up with a neurologist and not return to work.

That evening, the victim woke up with severe dizziness, vomiting, and a worsened headache. The next day, she visited her primary care physician, Pei Sun, informing Sun of the emergency room visit and about her symptoms, which included vomiting, dizziness, headache, and an inability to concentrate. Sun diagnosed the victim with a brain concussion, nausea, and a nasal fracture. When the victim returned to Sun for a follow-

up visit on May 3, 2016, she was experiencing nausea, headaches, and new lower back pain, so Sun referred her to Kwame O. Asante, a head injury specialist at Hartford Hospital. The victim saw Asante on May 6, 2016, and, after performing a number of tests on her, including neurological, sensory, and cranial nerve accommodation examinations, Asante diagnosed the victim with severe postconcussion syndrome.

On the basis of the aforementioned events, the defendant was charged with one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), one count of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1), one count of assault in the first degree in violation of § 53a-59 (a) (2), two counts of assault in the second degree in violation of § 53a-60 (a) (1), and one count of assault in the second degree in violation of § 53a-60 (a) (2). A jury trial was held before the trial court. At the conclusion of the state's case-in-chief, the defendant filed motions for a judgment of acquittal as to all five charges, which the court denied.

At trial, the defendant testified in her own defense that it was never her intention to cause the victim serious physical injury. She explained that she was tired and in a great deal of physical pain when she arrived to work on the day in question. She further stated that, although she had been employed by the Southington public school district for only a brief period of time, she and the victim had already been in prior "verbal altercations," during which the victim called her "names" and was "very verbally abusive." The defendant also accused the victim of saying "mean things to other people" about her. The defendant testified that, when she found the victim in the hallway that morning, another verbal altercation ensued, during which the defendant became enraged. The defendant stated that she could not recall all of the details of what transpired

during the altercation because she "blacked out" but that she was certain it was not her intention to disfigure the victim. Although the defendant admitted to wanting to hurt the victim during the altercation,[6] she denied any recollection of kicking the victim or slamming her head against a wall.

The jury returned a verdict of guilty on the two counts of assault in the second degree in violation of § 53a-60 (a) (1) and not guilty on the remaining counts. On February 1, 2019, the trial court sentenced the defendant to a term of ten years of imprisonment, execution suspended after two and one-half years, and five years of probation. See footnote 3 of this opinion.

On appeal, the defendant claims that (1) there was insufficient evidence to support the jury's verdict of guilty of assault in the second degree, (2) the trial court erred in denying the defendant's request to cross-examine the victim more extensively regarding her civil action against the defendant, and (3) the trial court erred in allowing Myers, a paramedic testifying as a fact witness, to testify regarding symptoms of a concussion.

I

We begin with the defendant's claim that there was insufficient evidence to support the jury's verdict of

[6] On cross-examination, the following exchange took place between the prosecutor and the defendant:

"Q. Okay. Did you pursue [the victim] down the hallway when she tried to get away?

"A. Yes.

"Q. Yes, you went after her. Is that correct?

"A. Yes.

"Q. And when you went at her, were you still swinging your arms at her?

"A. Yes.

"Q. You were very angry, yes or no?

"A. At that point, yes.

"Q. Yes. And you wanted to hurt her, did you not? You just punched her in the nose, she was trying to get away, you continued to go at her with your arms swinging at her, so, were you trying to hurt her, yes or no?

"A. Yes."

guilty of assault in the second degree. See footnote 3 of this opinion. The defendant contends that, although the evidence supported a finding that she caused the victim serious physical injury, there was no evidence—circumstantial or direct—that she *intended* to cause her serious physical injury, as required by § 53a-60 (a) (1). The defendant argues that, in fact, there was uncontroverted direct evidence—the defendant's own testimony—that she did not intend to cause such injury. The state responds that the evidence was more than sufficient to support the defendant's conviction, arguing that "[t]he jury could reasonably have inferred that the defendant intended to cause [the victim] serious physical injury when she punched [the victim] in the face, pushed her to the ground, and repeatedly banged her head into a cinder block wall." We agree with the state.

"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." (Internal quotation marks omitted.) *State* v. *James E.*, 327 Conn. 212, 218, 173 A.3d 380 (2017). 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." (Internal

quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

To convict the defendant of assault in the second degree under § 53a-60 (a) (1), the state was required to prove that (1) the defendant intended to cause serious physical injury to another person, and (2) acting with such intent, the defendant caused serious physical injury to that person. For purposes of that statute, "serious physical injury" means "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4). A person acts with the requisite intent under § 53a-60 (a) (1) when that person's "conscious objective" is to cause serious physical injury. General Statutes § 53a-3 (11). "[T]he 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, [in the absence of] an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). We previously have explained that a defendant's state of mind may be proven by, for example, "his conduct before, during and after [an assault]" because "[s]uch conduct yields facts and inferences that demonstrate a pattern of behavior and attitude toward the victim by the defendant that is probative of the defendant's mental state." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 766, 59 A.3d 221 (2013). Indeed, "[i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The

use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 756–57, 250 A.3d 648 (2020).

The defendant concedes that, if the jury credited the medical evidence and testimony indicating that the victim suffered a severe concussion and facial disfigurement as a result of the assault, then it reasonably could have found that the defendant caused serious physical injury to the victim. She contends, however, that the jury could not reasonably have found that she *intended* to cause such injury. Specifically, she contends that, "[w]hile the evidence shows [that she] and the victim engaged in a fracas, [her] actions were clearly not the result of calculated planning but, rather, a spontaneous outburst of anger and loss of control . . . [that] constitute[s] 'recklessly' causing serious physical injury (assault in the third degree), not intentionally causing it (assault in the second degree)." In support of this contention, the defendant relies primarily on her own testimony concerning her physical exhaustion and the extreme pain that she was in on the morning in question, factors that she contends combined to provoke "an extreme reaction" when the victim, with whom she did not get along, confronted her in the hallway about being late.

Notwithstanding the defendant's contentions, the jury-jywas not required to credit her testimony regarding her state of mind on the morning in question. See, e.g., *State* v. *Ayala*, 333 Conn. 225, 237, 215 A.3d 116 (2019) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and [to] make determinations of credibility, crediting some, all or none of any given witness' testimony" (internal quotation marks

omitted)). In particular, the jury was not required to credit her testimony that, although she intended to hurt the victim, she did not intend to cause her serious physical injury. The jury also was free to disbelieve the defendant's testimony that she did not recall most of what transpired after the assault began, either because she "blacked out" or because she was seized by uncontrollable rage. Certainly, it is quite likely that the jury did believe that the defendant flew into an unanticipated and uncontrolled rage when confronted by the victim. The fact that the defendant became so enraged, however, did not preclude a finding that the defendant intended to inflict serious physical injury on the victim. To the contrary, uncontrolled rage precedes or gives rise to many assaults of this nature, with the rage precipitating the intent. Our courts previously have held that evidence of a defendant's anger or rage toward a victim—which the defendant admitted was significant in this case—supported the jury's finding that a defendant intended to inflict serious physical injury on the victim. See, e.g., *State* v. *Perugini*, 153 Conn. App. 773, 782–83, 107 A.3d 435 (2014) (evidence of intent was sufficient to support defendant's conviction of assault in second degree when record reflected that defendant " 'wasn't happy' " about victim's statements to defendant's fiancée, sped to bar where victim was working, threw beer bottle at wall near victim, slammed victim into table, punched and choked victim, hit victim with mop handle, and left without summoning medical assistance), cert. denied, 315 Conn. 911, 106 A.3d 305 (2015); *State* v. *Aviles*, 107 Conn. App. 209, 218–19, 944 A.2d 994 (evidence of intent was sufficient to support defendant's conviction of murder when record reflected that defendant was angry at victim for taking his money and refusing to give him marijuana, and for swearing at defendant's girlfriend and slamming door in her face), cert. denied, 287 Conn. 922, 951 A.2d 570 (2008); *State*

v. *Corona*, 69 Conn. App. 267, 269, 277–79, 794 A.2d 565 (evidence of intent was sufficient to support defendant's conviction of manslaughter in first degree when record reflected that defendant was angry at victim for telling defendant's girlfriend to "shut up," was initial aggressor, approached victim in threatening manner with his hands in fists, knocked victim to ground, kicked and punched victim, and subsequently renewed his attack while victim was unsteady on his feet and not making any effort to struggle or resist attack), cert. denied, 260 Conn. 935, 802 A.2d 88 (2002).

In every such case, it is the role of the jury to determine whether the state has proven beyond a reasonable doubt that the defendant both intended to and did cause serious or deadly physical injury to the victim. Our only task on appeal is to determine whether, on the basis of the record before us, the jury reasonably could have found as it did. See, e.g., *State* v. *Taupier*, supra, 330 Conn. 187. Performing that task here, we conclude that the jury reasonably could have found that, after expressing anger toward the victim and calling her a "fucking bitch," the defendant committed numerous acts that further indicated her intent to cause the victim serious physical injury. Specifically, after she punched the victim in the nose and threw coffee at her, the defendant chased the victim down the hallway, punched and scratched the victim repeatedly, and, most significantly, grabbed the victim by the hair, slammed her head repeatedly into a cinder block wall, and kicked the victim while she was knocked down, all while ignoring the victim's pleas to stop and Nattrass' attempts to intervene. These acts provide sufficient circumstantial evidence to support the jury's finding that the defendant intended the natural consequence of those actions, namely, the victim's two serious physical injuries.

II

The defendant also claims that the trial court erred in limiting defense counsel's cross-examination of the

victim regarding her pending civil action against the defendant arising out of the same incident and in precluding admission of the complaint in that action. Specifically, the defendant claims that she was prevented from adducing evidence regarding the amount of damages sought in the civil action and the fact that the complaint included claims for pain and suffering and for punitive damages. The defendant contends that the absence of this evidence impaired her ability to demonstrate that the victim had a significant financial motive to exaggerate the extent of her injuries to her treating physicians, who relied on her reported symptoms to diagnose her concussion, and to the jury in her testimony at the criminal trial. Because the issue of whether the victim sustained *serious* physical injury was an essential element in dispute in the case, the defendant contends that the trial court's ruling was not only an abuse of discretion but an error of constitutional magnitude. We disagree.

The following additional facts are relevant to our review of this claim. Prior to trial, the defendant filed a motion in limine to preclude evidence from the victim pertaining to the emotional impact of the assault on her and her family, arguing that such evidence was unduly prejudicial and would outweigh any probative value. The trial court granted the motion in part, agreeing with the defendant that testimony relating to the emotional impact of the assault would be unduly prejudicial but clarifying that it would still allow testimony from the victim and her husband relating to the impact of the victim's injuries on her ability to do certain things because such evidence was relevant and "an essential element . . . in dispute."

After trial began, and before the victim took the witness stand, the prosecutor sought a ruling from the trial court precluding the defendant from cross-examining the victim regarding a civil action she had filed against

the defendant pertaining to the same incident underlying the criminal case, or at least limiting the inquiry to the sole question of whether there was a civil action pending. Defense counsel argued that he should be permitted to expose any inconsistencies between the statements made in the victim's civil complaint and other statements made in connection with the criminal proceedings, that the civil action was a proper basis for cross-examination with respect to bias, and that the complaint itself should be allowed into evidence as a "judicial pleading."[7] The court agreed with defense counsel that the existence of the civil action was a proper subject for cross-examination, as it would tend to expose any potential bias;[8] however, it reserved judgment on specific questions until they arose.

During the victim's ensuing testimony, she admitted on cross-examination that she had filed a civil action against the defendant and had hired an attorney to represent her in that action. Defense counsel thereafter

[7] The defendant also asserts that the trial court erred in failing to take "judicial notice" of the civil complaint but provides no analysis of that issue independent of her claim that the court improperly precluded admission of the complaint. Accordingly, we view the former to be subsumed in the latter.

[8] At trial, the trial court and the parties used the terms "bias" and "interest" interchangeably to refer to the victim's alleged motivation to exaggerate her injuries during her testimony in this case. The parties also use the terms interchangeably in their briefs to this court in referring to the victim's alleged motive to testify falsely regarding the extent of her injuries. Although the terms have been used interchangeably, we note that they have slightly different meanings and that, in the present context, any motivation the victim may have had to exaggerate her testimony or to testify falsely for financial gain would, in our view, be indicative of her *interest*, not her bias. See Conn. Code Evid. § 6-5 ("[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely); Conn. Code Evid. § 6-5, commentary ("[a] witness may be biased by having a friendly feeling toward a person or by favoring a certain position based [on] a familial or employment relationship . . . [or a] witness may have an interest in the outcome of the case independent of any bias or prejudice when, for example, he or she has a financial stake in its outcome" (citations omitted)).

asked the court to take judicial notice of the complaint filed in that action. The prosecutor objected, and the court excused the jury to hear argument on the issue. Defense counsel argued that the entirety of the civil complaint should be made an exhibit because it was a proper area of cross-examination as to bias and it also contained some inconsistent statements. He further argued that the specific fact that the victim was seeking damages from the defendant in excess of $15,000 was relevant because it demonstrated the victim's bias in the form of a financial interest. Defense counsel asserted that "the jury has the right to know that there is a [civil action] pending in this case, that [the victim] is suing [the defendant] for a large sum of money, and that she has an interest in her testimony today showing that her injuries are quite significant because she has a financial interest in that with regard to a civil [action]." In response, the prosecutor acknowledged that the court could allow the defendant to ask some follow-up questions regarding the action but contended that it would not be appropriate to question the victim extensively about it or to enter the complaint itself into evidence. The prosecutor pointed out that, because the complaint asserted a claim for intentional infliction of emotional distress, its admission would conflict with the court's earlier ruling granting the defendant's motion in limine to preclude testimony regarding the emotional impact of the assault on the victim and her family on the ground that such evidence would be unduly prejudicial.

The trial court then ruled that defense counsel could ask the victim certain questions regarding the contents of the civil complaint but that it would not allow the complaint itself to come into evidence. Specifically, the court permitted defense counsel to ask the victim about (1) the fact that she filed a civil action against the defendant for money damages, (2) allegations in the complaint pertaining to both the assault and the victim's

injuries, and (3) any inconsistencies between her testimony at the criminal trial, her statements to the police, and the allegations in her civil complaint. The court made clear, however, that defense counsel could inquire only about the claim for money damages, not the fact that the victim was seeking compensatory and punitive damages in excess of $15,000. The court further cautioned that defense counsel could address the allegations of pain and suffering but that doing so would "open the door" to matters that the court had precluded in its ruling on the defendant's motion in limine.

When the victim returned to the witness stand, she again acknowledged that she had filed a civil action against the defendant seeking money damages. She acknowledged that the complaint alleged that she lost consciousness and sustained scars on her face and lips, and that the defendant threw hot coffee on her face and body. The victim further admitted that, although she believed that she told the police that she thought she had lost consciousness or blacked out during the incident, no such statement was reflected in her written statement to the police. In closing argument, defense counsel conceded that the victim had been injured but argued that there was a reasonable doubt that the head injury she sustained resulted in a condition sufficient to support the criminal charges, given her financial interest in the civil action and the fact that the severity of her symptoms "seem[ed] to increase over time . . . ."

Our analysis of the defendant's claim is guided by the following well settled legal principles. "[A] defendant has the right to confront witnesses against him as guaranteed by the confrontation clauses of both our federal and state constitutions." (Internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 821, 970 A.2d 710 (2009); see also U.S. Const., amends. VI and XIV; Conn. Const., art. I, § 8. "Cross-examination

[to elicit facts tending to show] motive, bias, interest and prejudice is a matter of right and may not be *unduly* restricted." (Emphasis added.) *State* v. *Milum*, 197 Conn. 602, 609, 500 A.2d 555 (1985). Notwithstanding this important right, however, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (Internal quotation marks omitted.) *State* v. *Cecil J.*, supra, 822. "[T]rial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [T]he [c]onfrontation [c]lause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Internal quotation marks omitted.) *State* v. *Bermudez*, 341 Conn. 233, 271, A.3d (2021).

In reviewing claims of this nature, "[t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and, if so, whether the court nonetheless abused its discretion . . . in which case, in order to prevail on appeal, the

defendant must show that the restrictions imposed [on] the cross-examination were clearly prejudicial." (Citations omitted; internal quotation marks omitted.) *State* v. *Clark*, 260 Conn. 813, 826–27, 801 A.2d 718 (2002). Specifically, in determining whether a restriction on cross-examination violates the constitutional protection of the confrontation clause, we look at a number of factors, including "the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) Id., 828. If this constitutional standard has been met, the defendant must, in order to prevail on appeal, "show that the restrictions imposed by the trial court were harmful. . . . In order to do so, the defendant must establish that the impropriety was so prejudicial as to undermine confidence in the fairness of the verdict . . . ." (Citation omitted; internal quotation marks omitted.) Id., 830. Alternatively, if the constitutional standard is not met, and "an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 706, 224 A.3d 504 (2020).

A

As a general rule, "cross-examination of the prosecuting witness should be allowed to show the pendency, existence and status of [a] civil action . . . arising out of the same set of circumstances as those [that] served as the basis for the criminal prosecution." (Internal quotation marks omitted.) *State* v. *Milum*, supra, 197 Conn. 610; see *State* v. *Arline*, 223 Conn. 52, 61, 612 A.2d 755 (1992); see also *State* v. *Colton*, 227 Conn. 231, 250–51, 630 A.2d 577 (1993). Such evidence provides the jury with "significant information to aid in assessing

the bias, motive, interest and prejudice of the victim for testifying as she did." *State* v. *Milum*, supra, 609.

In the present case, defense counsel was permitted to adduce not only all of this essential information but also to probe the particulars of the allegations made in the pending civil action as to the victim's claims concerning physical injuries, all of which were probative of the credibility and reliability of the victim's testimony. See *State* v. *Clark*, supra, 260 Conn. 827. Defense counsel, through cross-examination, was allowed to question the victim to establish that the victim's civil action sought money damages for her alleged injuries. He was also permitted to ask the victim about the allegations in her complaint and any inconsistencies between those allegations and her statements regarding the incident to the police and in court. On the basis of these facts, and taking into account all relevant considerations; see id., 828; we cannot conclude that the defendant's right to cross-examination was unduly restricted under either the United States constitution or the Connecticut constitution. From the inquiries allowed, it is clear that the jury was able to appropriately draw inferences relating to the victim's credibility and reliability as a witness, as well as any financial interest she may have had in the outcome of the case.

Conceding that "[t]his case does not involve a complete bar of evidence concerning the civil [action]," the defendant nevertheless argues that the claimed error is of constitutional magnitude because the trial court "declined to allow the defense to question the victim concerning the *amount* of damages sought . . . ." (Emphasis added.) In particular, the defendant contends that the scope of examination permitted defense counsel to inquire into the civil action as evidence of the victim's bias or animosity toward the defendant, but not as evidence of the victim's financial motivation

for portraying her symptoms as severely as possible. We are not persuaded.

Our appellate courts previously have sustained similar limitations on cross-examination regarding civil actions that arose out of the same circumstances that precipitated the criminal case against the defendant. In *State* v. *Ballas*, 180 Conn. 662, 433 A.2d 989 (1980), this court held that the defendant was adequately "permitted to impugn the credibility and [to] explore the bias of the [prosecuting] witnesses when the [trial] court permitted [one of them] to testify on cross-examination that a civil action was pending"; id., 676–77; despite the trial court's refusal to permit cross-examination of him with regard to the specific amount sought in damages in the civil action against the defendant. Id., 676. In *State* v. *Reis*, 33 Conn. App. 521, 636 A.2d 872, cert. denied, 229 Conn. 901, 640 A.2d 118 (1994), the Appellate Court deemed cross-examination constitutionally adequate when the trial court permitted the defendant to cross-examine the victim regarding the fact that the victim had retained a lawyer to bring an action against the defendant "to get his [medical] bills paid and to be compensated for his pain and suffering," but did not allow the defendant "to expose the extent of [the victim's] pecuniary interest by cross-examination concerning the amount of damages [he] was seeking." Id., 524. The Appellate Court determined that the limitation did not violate the defendant's constitutional rights because "the issue of the victim's [interest] arising from his civil [action] against the defendant was adequately covered by other questions allowed by the [trial] court." Id., 526.

The defendant attempts to distinguish *Reis* and *Ballas* by arguing that evidence of the civil actions in those cases was only relevant to show bias against the defendants, not to show a financial interest, in part because the extent of the victims' injuries was not in dispute. We disagree. This court previously has acknowledged

that "[a] pending civil [action], or even a contemplated [action], arising out of the same incident that gave rise to the criminal charges is *almost always* relevant to the credibility of a prosecuting witness because it gives her a financial interest in the outcome of the criminal prosecution. Such evidence has great probative value because it shows that the state's prosecuting witness may have been actuated by personal considerations instead of [by] altruistic interest generated solely from motives in the public interest to bring a criminal to justice." (Emphasis added; internal quotation marks omitted.) *State* v. *Milum*, supra, 197 Conn. 611–12. That the extent of the prosecuting witness' injuries was not a contested issue in *Reis* and *Ballas* was not, in our view, outcome determinative for the courts in deciding these cases. Rather, the courts in both cases considered the defendants to have had a right to cross-examine the witnesses regarding financial interest, which they adequately were permitted to do, just as the defendant was adequately able to do in the present case.

The defendant also argues that, "to the degree that this court should hold that [*Reis* or *Ballas*] stands for the proposition that the admission of a complaint or an inquiry into the exact amount or type of damages sought in a civil [action] is always precluded, the defendant would respectfully request that that case be overruled." We do not read either case to stand for any such proposition. Rather, in each case, the court merely concluded that the cross-examination permitted was constitutionally sufficient in light of the circumstances of the case. See *State* v. *Ballas*, supra, 180 Conn. 676–77; *State* v. *Reis*, supra, 33 Conn. App. 524–26. It could very well be that, in certain circumstances and cases to come, the allegations in a civil complaint regarding the nature, extent, or amount of damages, or other allegations, could be sufficiently extreme, incongruous, or inconsistent that it would be an abuse of discretion

or an error of constitutional magnitude not to permit cross-examination as to those issues. This simply is not such a case.

The defendant also cites three cases for the proposition that the right to confront prosecuting witnesses includes the right to put into evidence the amount of damages sought in the civil action or the complaint. In none of these cases did the court conclude that excluding evidence of the amount of damages was itself reversible error, and, in two of the cases, the defendant was not permitted *any* cross-examination on the subject of the victim's pending action. See *United States* v. *Cohen*, 163 F.2d 667, 668–69 (3d Cir. 1947); *Maslin* v. *State*, 124 Md. App. 535, 541–42, 723 A.2d 490, cert. denied, 354 Md. 115, 729 A.2d 406 (1999). The third case, *State* v. *Murdick*, 23 Conn. App. 692, 583 A.2d 1318, cert. denied, 217 Conn. 809, 585 A.2d 1233 (1991), is entirely distinguishable. In that case, the Appellate Court concluded that there was no abuse of discretion in allowing evidence of a civil action—filed before the conduct that led to the criminal charges and not arising out of the same circumstances as the criminal case—to be introduced because "[e]vidence of motive is a highly relevant factor for assessing the guilt or innocence of a defendant." Id., 696. Because the civil action did not arise from the same circumstances as the criminal proceedings, and because the evidence was admitted to show the defendant's motive for *committing the crime*, not the victim's motive to lie or exaggerate injuries for financial gain, we find *Murdick* wholly inapposite.

Finally, the defendant cites *State* v. *Tiernan*, 941 A.2d 129 (R.I. 2008), for the proposition that other jurisdictions "have acknowledged that a financial interest will justify an inquiry into the details, including the amount at issue, in the civil [action]." In that case, however, the trial court had allowed defense counsel to ask only a single question regarding the victim's action against

the defendant, namely, "whether or not he had filed or intended to file a civil [action] as a result of the events that occurred . . . ." Id., 132. On appeal, the Rhode Island Supreme Court held that "the scope of cross-examination that the trial [court] allowed—just one question—was so limited as to be insufficient under both the [s]ixth [a]mendment to the United States [c]onstitution and [the confrontation clause] of the Rhode Island [c]onstitution. A defendant in a situation such as this must be provided as a matter of right the opportunity to engage in not just some minimal cross-examination, but rather sufficient cross-examination." (Emphasis omitted; footnote omitted.) Id., 137. In the present case, however, as we explained, the defendant was not limited to a single question about the existence of the civil action but, rather, was permitted to ask the victim a number of questions regarding the action, as well as to probe her for any inconsistencies between her testimony and her civil complaint. Therefore, *Tiernan* is inapposite.

B

Having determined that the trial court's exclusion of the evidence was not of constitutional proportions, we must now determine whether the trial court nevertheless abused its discretion by precluding defense counsel from questioning the victim more extensively regarding her civil action against the defendant. We conclude that the trial court did not.

Section 6-5 of the Connecticut Code of Evidence provides that "[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely." The commentary to § 6-5, however, further provides in relevant part that, "[w]hile a party's inquiry into facts tending to establish a witness' bias, prejudice or interest is generally a matter of right, the

scope of examination and extent of proof on these matters are subject to judicial discretion. . . .'' Conn. Code Evid. § 6-5, commentary. It is well established that ''otherwise [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *Brown*, 273 Conn. 330, 342, 869 A.2d 1224 (2005).

We conclude that the trial court did not abuse its discretion by precluding defense counsel from questioning the victim more extensively about the specific details of her pending civil action against the defendant. As we explained, our trial courts have wide discretion in limiting a defendant's cross-examination, as long as the defendant has been permitted sufficient cross-examination to satisfy constitutional requirements. See, e.g., *State* v. *Clark*, supra, 260 Conn. 826. Here, we cannot say that the trial court abused its discretion in restricting the scope of defense counsel's cross-examination of the victim. The trial court, acting under the specific circumstances present in this case, reasonably could have determined that allowing defense counsel to probe the victim regarding the specific dollar amount claimed in the civil action[9] and to introduce the complaint itself into evidence could have led to a more extensive inquiry by both parties regarding the basis for the victim's damages claims, thereby opening the door to collateral evidence concerning the claims in the action for, inter alia, past and future medical expenses, lost earnings and earning capacity, pain and suffering,

[9] We note that the amount claimed in the civil action—$15,000 or more—merely conformed to the jurisdictional pleading requirements set forth in General Statutes § 52-91, and, therefore, there is no indication that the victim was seeking a particular amount of money.

and emotional distress—the latter a subject the defendant herself sought to preclude in her motion in limine due to the prejudicial nature of that evidence. In light of the foregoing, we conclude that the trial court, in limiting defense counsel's inquiry into the particulars of the victim's civil action, struck an appropriate balance between the defendant's right to cross-examination and her own effort to exclude evidence of the emotional impact of the assault on the victim and her family. In sum, and as we previously explained, defense counsel's inquiry, taken as a whole, was sufficient to show the victim's potential interest or financial motive in testifying as she did.

III

Finally, we turn to the defendant's claim that the trial court erred in allowing Myers, a paramedic testifying as a fact witness, to testify concerning the signs a paramedic looks for in determining whether a patient might have a concussion. The defendant contends that, because Myers did not personally examine the victim following the assault, he should not have been permitted to testify in his capacity as a paramedic regarding the general symptoms of a concussion.[10] We find no merit in this contention.

[10] The defendant also appears to argue that Myers could not properly have testified as both a fact witness and an expert witness. To the extent that this is the defendant's contention, it is wholly lacking in merit. See, e.g., *State* v. *Tomlinson*, 340 Conn. 533, 553 n.7, 264 A.3d 950 (2021) (noting that expert witnesses often testify in dual capacity as both expert and fact witness); see also, e.g., *State* v. *Dawson*, 340 Conn. 136, 141 nn.7 and 8, 263 A.3d 779 (2021) (police officer who testified as fact witness regarding what he observed also testified as expert on criminal behavior generally); *State* v. *Collins*, 206 Conn. App. 438, 443–44, 260 A.3d 507 (police officer who testified as fact witness regarding his execution of search warrant also testified as expert witness about items that crack cocaine and heroin dealers usually have in their homes), cert. denied, 339 Conn. 914, 262 A.3d 135 (2021). Moreover, § 7-2 of the Connecticut Code of Evidence does not "require an explicit offer and acceptance of a witness as an expert in order for the witness to be treated as an expert witness"; *Nicholson* v. *Commissioner of Correction*, 186 Conn. App. 398, 421, 199 A.3d 573 (2018), cert. denied, 330

The following additional facts are relevant to our review of this claim. Prior to Myers' taking the witness stand, the trial court indicated that it understood that Myers might testify regarding not only what he had witnessed, but also about concussion symptoms as they relate to his duties as a paramedic. The court further stated that, before any such questions were asked, the prosecutor must lay the factual foundation for Myers' expert testimony, at which time the court would take up any objection from the defense.

After his initial testimony regarding his observation of the altercation, Myers testified on direct examination that he had been employed in emergency medical services for fourteen years, the first four as an emergency medical technician (EMT) and the last ten as a paramedic. Myers testified that a paramedic has much more training than an EMT. To become an EMT, he had to undergo a six month training program. Then, he had to respond to a certain number of calls as an EMT before he could apply to paramedic school. Once accepted into paramedic school, he underwent a one year long

Conn. 961, 199 A.3d 19, cert. denied sub nom. *Nicholson* v. *Cook*, U.S. , 140 S. Ct. 70, 205 L. Ed. 2d 76 (2019); and, therefore, the trial court did not err in treating Myers as an expert witness—notwithstanding the fact that he was originally testifying as a fact witness—once his qualifications were established on the record. We note, finally, that the defendant does not claim that the state failed to provide her adequate *notice* of its intent to call Myers as an expert witness. Pursuant to Practice Book § 40-11 (a) (3), upon written request by the defendant, the state is required to disclose "[a]ny reports or statements of experts made in connection with the offense charged including results of . . . scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . . ." See also *State* v. *Jackson*, 334 Conn. 793, 812, 224 A.3d 886 (2020) (it was abuse of discretion for trial court to allow state's late disclosed expert witness to testify without first granting defendant reasonable continuance to obtain his own expert). The record before us discloses that the defendant did not file any written discovery request under Practice Book § 40-11 (a) (3) for the reports or statements of the state's experts; nor did she raise an issue of lack of notice before the trial court or anytime thereafter.

program, which included "in excess of 200 hours" of clinical rotations at Saint Francis Hospital and Medical Center. Myers further testified that, as part of his continuing medical education, he was required to complete thirty-six hours of training each year and that he had to maintain certifications in cardiopulmonary resuscitation, advanced cardiovascular life support, and pediatric advanced life support. Myers then testified that, in responding to calls involving motor vehicle accidents or falls, he deals with the possibility of concussions on "a regular basis." He also indicated that, during paramedic school, he was trained in the signs and symptoms of concussions.

At this point, the prosecutor asked Myers what signs he would look for if he were to respond to a scene where the patient may have suffered a concussion. Defense counsel objected to the line of questioning, arguing that Myers was not "in a position to opine on the symptoms and diagnoses of a concussion." The prosecutor, in response, argued that he was not attempting to ask Myers whether the victim sustained a concussion, but, rather, he only intended to ask him about concussion symptoms generally. The court overruled defense counsel's objection and allowed Myers to continue testifying.

Myers then testified that, although the signs and symptoms vary, typically, someone with a concussion would experience nausea, headache, and dizziness. He also testified that there can be other symptoms in addition to those and that symptoms can sometimes manifest later on instead of immediately. Finally, Myers testified that he did not assess or treat the victim in any way on the day in question. He did not opine as to whether the victim sustained a concussion or exhibited any symptoms of one. He stated that, in fact, he did not "notice anything about the victim at all physically" and had no contact with her after separating her from the defendant.

"We review a trial court's decision to preclude [or admit] expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision. . . . Even [i]f we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party. . . .

"The standards for admitting expert testimony are well established. Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . . [See] Conn. Code Evid. § 7-2 ([a] witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue)." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams*, 317 Conn. 691, 701–702, 119 A.3d 1194 (2015). "[T]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . .

Implicit in this standard is the requirement . . . that the expert's knowledge or experience . . . be directly applicable to the matter specifically in issue." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 230, 49 A.3d 705 (2012).

Applying these principles to the present case, we have no difficulty concluding that the trial court correctly determined that Myers, a paramedic with ten years of experience and special training in diagnosing concussions, was qualified to testify as an expert witness regarding signs a paramedic looks for in evaluating a patient for a concussion. We cannot perceive, and the defendant does not explain, why the fact that Myers did not physically examine the victim following the assault renders his expert testimony on the symptoms of a concussion inadmissible. One issue before the jury was whether the victim sustained a serious physical injury—to wit, a concussion—as a result of the defendant's assault on her. The trial court acted well within its discretion in concluding that Myers had special knowledge suitable to aiding the jury in deciding that issue.[11]

Even if the trial court had abused its discretion in admitting Myers' testimony regarding the symptoms he looks for when evaluating a patient for a concussion, the error was entirely harmless. Myers' testimony was

[11] The defendant cites *Kairon* v. *Burnham*, 120 Conn. App. 291, 991 A.2d 675, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010), and *State* v. *Pjura*, 68 Conn. App. 119, 789 A.2d 1124 (2002), in support of his claim that the trial court's decision to admit Myers' testimony was error. We disagree that either case supports the defendant's claim. *Kairon* and *Pjura* both dealt with experts who were called on to opine on the ultimate issue in the case, namely, whether the defendant had committed medical malpractice in *Kairon*; see *Kairon* v. *Burnham*, supra, 295–96; and whether the defendant was intoxicated in *Pjura*. See *State* v. *Pjura*, supra, 121. In the present case, Myers was not asked to and did not testify as to an ultimate issue, namely, whether the victim had sustained a serious physical injury—a concussion. He simply testified regarding the common symptoms of a concussion, on the basis of his ten years of experience as an EMT and a paramedic. *Kairon* and *Pjura* therefore have no bearing on the outcome of this case.

merely cumulative of the testimony of three other witnesses—Whipple, Sun, and Asante—all of whom testified similarly on the general presenting symptoms of a concussion. In addition, Sun and Asante, both of whom examined the victim following the assault, testified that, in their expert opinions, the victim sustained a concussion as a result of the assault. In light of the foregoing, the defendant cannot prevail on her claim that the trial court's admission of Myers' expert testimony entitles her to a new trial.

The judgment is affirmed.

In this opinion the other justices concurred.

IN RE PETITION OF REAPPORTIONMENT COMMISSION EX REL.
(SC 20661)

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

Argued January 27—officially released February 10, 2022*

Procedural History

Submission by the special master appointed by this court for the adoption of the special master's report and plan for the redistricting of the state's congressional districts pursuant to the constitutional requirement of decennial reapportionment, brought to this court, where the Republican members of the Connecticut Reapportionment Commission and the Democratic members of the Connecticut Reapportionment Commission filed briefs.

Proloy K. Das, for the Republican members of the Connecticut Reapportionment Commission.

* February 10, 2022, the date that this order was issued, is the operative date for all substantive and procedural purposes.

Aaron S. Bayer, with whom was *Paul Tuchmann*, for the Democratic members of the Connecticut Reapportionment Commission.

Opinion

PER CURIAM. Pursuant to the authority conferred by article third, § 6, of the constitution of Connecticut, as amended by articles XII, XVI, XXVI and XXX of the amendments, the Court hereby adopts as the established plan of congressional districting the plan depicted and described in exhibits 1 and 4 of the Report and Plan of the Special Master, Nathaniel Persily, dated January 18, 2022. The plan complies in every respect with our Order Appointing and Directing the Special Master, dated December 23, 2021.

Appended hereto is the Report and Plan of the Special Master, including its appendix.[1] The foregoing material, along with the census block equivalency files, will be filed with the Secretary of the State on or before Tuesday, February 15, 2022. Upon publication, the plan of congressional districting shall have the full force of law.

The Special Master has submitted to the Court an itemization of the fees and costs incurred in producing the report and plan. Those charges total $89,800, an amount that this Court finds to be reasonable. Pursuant to this Court's order of December 23, 2021, the charges of the Special Master are to be assessed against the Reapportionment Commission. The Commission shall promptly remit full payment directly to Special Master Persily.

[1] The Report and Plan of the Special Master and its appendix are contained in the file of this case in the Office of the Appellate Clerk and are provided on the website of the Office of the Secretary of the State.

1ST ALLIANCE LENDING, LLC *v.* DEPARTMENT OF BANKING ET AL.
(SC 20560)

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

Syllabus

Pursuant to statute (§ 36a-492 (c)), the Commissioner of Banking "shall automatically suspend the [license] of a mortgage lender" on the date that its surety bond is cancelled, but no automatic suspension shall occur if, prior to that date, the lender either provides proof of reinstatement of the bond or secures a new bond, or the lender "has ceased business and has surrendered [its license] in accordance with subsection (a) of section 36a-490 . . . ."

Pursuant further to statute (§ 36a-490 (a) (1)), any mortgage lender that holds a mortgage lender license and intends to permanently cease engaging in the business of mortgage lending shall file a request to surrender the license, and no surrender is effective until accepted by the Commissioner of Banking.

The plaintiff, a mortgage lender, appealed from the trial court's dismissal of its administrative appeal from the decision of the Commissioner of Banking to revoke the plaintiff's mortgage lender license. In 2018, the plaintiff and the defendant Department of Banking had been engaged in an enforcement proceeding that concerned the revocation of the plaintiff's license for reasons unrelated to the present appeal. In May, 2019, the issuer of the plaintiff's surety bond, which a lender is required to have in order to maintain its mortgage lender license, sent a notice to the plaintiff and the department, stating that the plaintiff's bond was going to be cancelled effective July 31, 2019. Upon receiving that notice, the department created a routine entry in the Nationwide Mortgage Licensing System and Registry (NMLS), indicating that the plaintiff's failure to replace or reinstate the bond would result in an automatic suspension and revocation of the plaintiff's license. The department also sent a letter to the plaintiff on June 7, 2019, stating that its failure to have a bond in effect on July 31, 2019, would result in the automatic suspension of its license. The plaintiff delayed in responding to the letter but ultimately sent an e-mail to the department on July 29, 2019, stating that it was voluntarily surrendering its license. The Commissioner of Banking did not accept the plaintiff's purported surrender of its license and, on July 31, 2019, made an online entry in the NMLS reflecting that the plaintiff's license was suspended. The following day, the department sent a series of notices to the plaintiff informing it that its license was suspended. After a hearing, the commissioner upheld the suspension, concluding that the plaintiff's failure to maintain a surety bond supported

the license revocation. In dismissing the plaintiff's administrative appeal, the trial court concluded, inter alia, that the commissioner had not abused his discretion in declining to accept the plaintiff's purported surrender of its license. On the plaintiff's appeal from the trial court's judgment, *held* that § 36a-492 and the relevant statutory scheme granted the commissioner the legal authority to suspend and revoke the plaintiff's mortgage lender license, and, accordingly, this court affirmed the trial court's judgment: this court, having reviewed the text of § 36a-492 (c), concluded that the use of the word "shall" in that statutory provision was mandatory, and, therefore, the commissioner is statutorily required to suspend a mortgage lender license in the event of a surety bond cancellation unless the lender demonstrates that it had the bond reinstated or secured a new bond, or that it ceased doing business and surrendered its license in accordance with § 36a-490 (a); in the present case, the commissioner was statutorily required to suspend the plaintiff's license insofar as the plaintiff's surety bond was cancelled, the plaintiff did not obtain a letter of reinstatement of the bond or secure a new bond, and it did not effectively surrender its license before the cancellation of the bond, because, even if this court construed the plaintiff's July 29 e-mail to the department as a request to surrender, there was no evidence in the record that the commissioner accepted that surrender, which is a prerequisite to the surrender of a license in accordance with § 36a-490 (a) (1); moreover, in light of the ongoing enforcement proceeding between the plaintiff and the department, any surrender or request to surrender would not have been effective because, pursuant to statute (§ 36a-51 (c) (1)), a surrender or request to surrender a license during an ongoing enforcement action does not become effective "except at such time and under such conditions as the commissioner by order determines," and the commissioner never set the time or conditions for the plaintiff's surrender or purported request to surrender its license; furthermore, there was no merit to the plaintiff's claim that the department or the commissioner should not be permitted to decline to take action on a request to surrender, and, in any event, there was no indication that the department unreasonably delayed in responding to the plaintiff's purported request to surrender; in addition, the trial court correctly concluded that the department was not estopped from suspending and revoking the plaintiff's license on the basis of representations the department made in its June 7 letter to the plaintiff, as it was not reasonable for the plaintiff to interpret that letter as any type of promise or to rely on the letter to the exclusion of the clearly applicable statutory scheme, which was explicitly referenced in that letter.

Argued October 21, 2021—officially released February 16, 2022*

* February 16, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the defendants revoking the plaintiff's license to serve as a mortgage lender in Connecticut, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the plaintiff's appeal, from which the plaintiff appealed. *Affirmed.*

Ross H. Garber, with whom were *Seth R. Klein* and, on the brief, *Craig A. Raabe*, for the appellant (plaintiff).

Patrick T. Ring, assistant attorney general, with whom were *Joseph J. Chambers*, deputy associate attorney general, and, on the brief, *William Tong*, attorney general, and *John Langmaid*, assistant attorney general, for the appellees (defendants).

Opinion

McDONALD, J. This appeal requires us to consider, for the first time, the statutory scheme governing the suspension and revocation of a mortgage lender license. The plaintiff, 1st Alliance Lending, LLC, appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant Jorge Perez, the Commissioner of Banking, revoking the plaintiff's license to serve as a mortgage lender in the state. The principal issue on appeal is whether General Statutes § 36a-492 and the relevant statutory scheme granted the commissioner the legal authority to suspend and revoke the plaintiff's mortgage lender license. We conclude that they did and, accordingly, affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The commissioner, acting through the named defendant, the Department of Banking, is statutorily authorized to license and regulate the residential mortgage loan industry in Connecticut. See General Statutes §§ 36a-485 through 36a-534b. The

plaintiff has been licensed by the commissioner as a mortgage lender in Connecticut for many years. During the period of time relevant to this matter, the plaintiff and the department were engaged in an enforcement proceeding, initiated by the commissioner in 2018, concerning the revocation of the plaintiff's license for reasons separate from and not relevant to this appeal. Although the substance of the allegations in that proceeding is not at issue in this appeal, the existence of that ongoing administrative enforcement proceeding is relevant.

One of the requirements for maintaining a mortgage lender license is that the mortgage lender maintain a surety bond. See General Statutes §§ 36a-488 (b) and 36a-492. The plaintiff's surety bond was issued by the Hartford Fire Insurance Company (The Hartford). In May, 2019, The Hartford issued a notice of cancellation of the plaintiff's surety bond, stating that the bond would be cancelled, effective July 31, 2019. The notice stated that the bond permitted The Hartford, as the surety, to terminate its suretyship by serving notice of its election to do so on the department, as the obligee. The Hartford sent notice of the cancellation to both the plaintiff, as the principal on the bond, and the department, as it was required to do by law. See General Statutes § 36a-492 (c). After receiving The Hartford's notice of cancellation, Amy Grillo, an administrative assistant employed by the department, created a routine entry in the Nationwide Mortgage Licensing System and Registry (NMLS),[1] stating that the notice of cancellation, effective July 31, 2019, had been received, and that the

[1] The defendant's appellate brief notes that the NMLS is "a web based, multistate platform for regulatory agencies to administer initial license applications and ongoing compliance requirements of persons in the mortgage and other financial services industries." See, e.g., General Statutes § 36a-2 (70) (describing NMLS as "multistate system . . . for the licensing and registration of persons in the mortgage and other financial services industries").

failure to replace or reinstate the bond would result in an automatic suspension and revocation of the plaintiff's mortgage lender license. Grillo also sent an e-mail to Heather Sanchez, the plaintiff's chief compliance officer. Attached to the e-mail was a letter, dated June 7, 2019, stating that § 36a-492 required the plaintiff to maintain a surety bond running concurrently with the period of the license for the plaintiff's main office, and that the plaintiff's failure to have a bond in effect on July 31, 2019, would result in the commissioner's automatic suspension of the plaintiff's license and inactivation of the licenses of each Connecticut mortgage loan originator sponsored by the plaintiff. The June 7 letter went on to state, in relevant part, that, "[i]n order to avoid these outcomes, you must submit a letter of reinstatement of the bond from [The Hartford] or a new bond from a surety company, providing for an effective date on or prior to the bond cancellation effective date [of July 31, 2019], or cease doing business and surrender the license on the [NMLS] in accordance with [General Statutes §§] 36a-51 (c) and 36a-490 . . . ." The June 7 letter further stated that, "[i]n the event of automatic suspension," the commissioner shall provide the required notice and an opportunity for a hearing. The June 7 letter concluded by stating that, "if you fail to address this issue," the letter serves as notice required by General Statutes § 4-182 (c) and "provides you an opportunity to show compliance with all lawful requirements for the retention of your license." The June 7 letter was signed by a director of the department, on behalf of the commissioner.

Upon receipt of The Hartford's notice of cancellation and the department's June 7 letter, the plaintiff's chief executive officer, John DiIorio, considered the plaintiff's options. The plaintiff, however, did not immediately respond to the department's June 7 letter, and, approximately one month after the issuance of that

letter, Grillo sent a follow-up e-mail to Sanchez, reminding her of the June 7 letter, notifying her about the bond requirements, and requesting a response. The same day, DiIorio sent Grillo an e-mail, acknowledging receipt of the June 7 letter and representing that the plaintiff was considering its options, understood the relevant deadline, and would communicate its plan to the department prior to the close of business on July 30, 2019.

The plaintiff explored the option of obtaining a replacement surety bond but, on or about July 22 or 23, 2019, ultimately decided to cease doing business in Connecticut and to surrender its license. The plaintiff did not communicate its intention to the department until several days later. More precisely, on July 29, 2019, DiIorio sent an e-mail to Grillo, stating that the plaintiff "is voluntarily surrendering its license. Our licensing manager will enter the information into [the] NMLS before [close of business on July 31, 2019]. The active pipeline contains no Connecticut consumers. Please confirm receipt of this message by reply e-mail."

The commissioner did not accept the plaintiff's purported surrender of its license, and, days later, on July 31, 2019, Grillo made an online entry in the NMLS reflecting that the plaintiff's mortgage lender license was suspended. The next day, the commissioner issued the plaintiff a Notice of Automatic Suspension, Notice of Intent to Revoke Mortgage Lender License, and Notice of Right to Hearing. Through the notices, the commissioner informed the plaintiff that its mortgage lender license was automatically suspended on July 31, 2019, and apprised the plaintiff that it could request an administrative hearing on the allegations contained in the notices. The plaintiff requested a hearing, which was held in September, 2019. Following the hearing, the commissioner upheld the suspension. The commissioner also concluded that, pursuant to General Statutes § 36a-494, the plaintiff's failure to maintain a surety

bond, as required by § 36a-492, supported the revocation of the plaintiff's mortgage lender license. Accordingly, the commissioner ordered the revocation of the plaintiff's mortgage lender license. The suspension and revocation had national ramifications for the plaintiff because they hampered its ability to conduct business in other states and could result in "a series of cross-defaults with other counterparties and [other] revocations." A properly effectuated surrender would not have had these negative ramifications.

The plaintiff filed an administrative appeal from the commissioner's decision with the trial court, pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. See General Statutes § 4-183. The plaintiff argued, among other things, that the governing statutory scheme precluded the department from suspending its license, and that the department should be bound by the plain meaning of its June 7 letter. Following a hearing and postargument briefs, the trial court issued a memorandum of decision, affirming the commissioner's decision and dismissing the plaintiff's appeal. The trial court concluded that (1) the commissioner did not abuse his discretion in declining to accept the plaintiff's license surrender, (2) the June 7 letter did not constitute an offer from the defendants for the plaintiff to surrender its license, and, therefore, the commissioner was not compelled to accept the plaintiff's license surrender under contract principles, and (3) the commissioner was not estopped from declining to accept the plaintiff's license surrender because there was no representation or promise by the commissioner on which the plaintiff could have reasonably relied. This appeal followed.

On appeal, the plaintiff contends that the governing statutes do not permit the defendants to suspend the plaintiff's license. Failing that, the plaintiff further contends that, even if the relevant statutes gave the defen-

dants discretion to suspend its license, the trial court incorrectly concluded that the commissioner lawfully exercised his discretion. Finally, the plaintiff also contends that the defendants were estopped from suspending the plaintiff's license.

"We begin by articulating the applicable standard of review in an appeal from the decision of an administrative agency. Judicial review of [an administrative agency's] action is governed by the [UAPA] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citations omitted; internal quotation marks omitted.) *Celentano* v. *Rocque*, 282 Conn. 645, 652, 923 A.2d 709 (2007). "Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Pasquariello* v. *Stop & Shop Cos.*, 281 Conn. 656, 663, 916 A.2d 803 (2007). Whether the relevant statutory scheme

granted the commissioner the legal authority to suspend and revoke the plaintiff's mortgage lender license is a question of statutory interpretation over which our review is plenary. See, e.g., *LaFrance* v. *Lodmell*, 322 Conn. 828, 833–34, 144 A.3d 373 (2016). We review § 36a-492 and the relevant statutory scheme in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

We have never had occasion to consider the statutory scheme governing the suspension and revocation of a mortgage lender license. Accordingly, a review of the relevant statutes is foundational to our analysis. The plaintiff does not dispute that, in order to engage in the business of mortgage lending in Connecticut, it was required to maintain a surety bond. Specifically, General Statutes (Rev. to 2019) § 36a-486 (a) prohibits a limited liability company, or other "person," from making residential mortgage loans unless that company has first obtained a license from the commissioner. Section 36a-488 sets forth the conditions for obtaining and maintaining a license, and, more specifically, subsection (b) of that statute requires the mortgage lender to maintain a surety bond, as specified in § 36a-492. See General Statutes § 36a-488 (b).

Section 36a-492 sets forth the requirement for maintaining a surety bond; General Statutes § 36a-492 (a); permits the surety company to cancel the surety bond at any time, provided it complies with certain notice requirements; General Statutes § 36a-492 (c); and provides for the automatic suspension of a license in the event of surety bond cancellation. General Statutes § 36a-492 (c). In particular, subsection (c) provides in relevant part: "The commissioner *shall automatically suspend* the licenses of a mortgage lender . . . on such date [of bond cancellation] . . . . *No automatic sus-*

pension . . . shall occur if, prior to the date that the bond cancellation shall take effect, (1) the principal submits a letter of reinstatement of the bond from the surety company or a new bond, [or] (2) the mortgage lender . . . has ceased business and has surrendered all licenses *in accordance with subsection (a) of section 36a-490 . . . .*" (Emphasis added.) General Statutes § 36a-492 (c).

We have explained that, "[i]n interpreting statutory text, this court has often stated that the use of the word shall, though significant, does not invariably create a mandatory duty. . . . The usual rule, however, is that [t]he . . . use of the word shall generally evidences an intent that the statute be interpreted as mandatory." (Internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 332 Conn. 776, 785, 213 A.3d 459 (2019). "The fact that [a statute] uses the term 'shall' in conjunction with the term 'unless' provides further support for our understanding that it creates a mandatory obligation on the part of the [agency] . . . ." Id. "The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory." (Internal quotation marks omitted.) Id., 786. Although the relevant language in § 36a-492 (c) does not contain the word "unless," the legislature did use the word "if," and we see no functional difference as to the mandatory nature of the obligation because the statutory provision establishes the procedure the commissioner must follow regarding the automatic suspension of a mortgage lender license unless, prior to the surety bond cancellation date, the mortgage lender either (1) obtains a letter of reinstatement or a new bond, or (2) ceases doing business in Connecticut and

surrenders its license in accordance with § 36a-490 (a). The legislature's use of the words "automatically" and "automatic" reinforces the mandatory nature of the obligation. See, e.g., Webster's Third New International Dictionary (2002) p. 148 (defining "automatically" as "in an automatic manner" or "without thought or conscious intention"); see also, e.g., id. (defining "automatic" as, among other things, "involuntary either wholly or to a major extent so that any activity of the will is largely negligible"). Moreover, the authority to suspend a mortgage lender license goes to an essential aspect of the commissioner's duty to license and regulate the residential mortgage loan industry in Connecticut. See generally General Statutes §§ 36a-485 through 36a-534b. Thus, we conclude, and the plaintiff does not dispute, that the use of the word "shall" in § 36a-492 (c) is mandatory, and, as a result, the commissioner is statutorily required to suspend a mortgage lender license in the event of surety bond cancellation unless the mortgage lender satisfies one of the two exceptions to the requirement of automatic suspension.[2]

[2] We note that, although mortgage lender licensing requirements throughout the United States have become more uniform in the wake of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), 12 U.S.C. § 5101 et seq., revocation and suspension of licenses remains largely state-specific. Cf. L. Wilson, "All Things Considered: The Contribution of the National Mortgage Licensing System to the Battle Against Predatory Lending," 24 Ga. St. U. L. Rev. 415, 419 (2007) ("[i]t is undeniable . . . that the [NMLS'] accommodation of jurisdiction-specific licensing requirements compromises the goal of uniformity for the license application and renewal forms"). The federal regulations that were issued to implement the SAFE Act require that states "maintain a loan originator licensing, supervisory, and oversight authority"; 12 C.F.R. § 1008.111 (a) (2021); and give states the authority "[t]o suspend, terminate, and refuse renewal of a loan originator license for violation of state or [f]ederal law . . . ." Id., § 1008.111 (b) (5). The applicable federal regulations also require that the supervisory authority created by the state "discipline loan originator licensees with appropriate enforcement actions, such as license suspensions or revocations . . . ." Id., § 1008.113 (a) (3). The SAFE Act and the applicable federal regulations do not, however, provide specific guidance regarding each state's regulatory scheme. Nevertheless, at least two states' statutory schemes closely resemble our revocation and suspension statutory scheme. Although our research

There is no dispute that, in this case, the plaintiff did not obtain a letter of reinstatement from The Hartford or a new surety bond. Thus, the commissioner was required to suspend the plaintiff's license, pursuant to § 36a-492 (c), unless the plaintiff ceased doing business in Connecticut and effectively surrendered its license in accordance with § 36a-490 (a). In order to effectively surrender its license, a mortgage lender must request permission to surrender its license. Specifically, § 36a-490 (a) (1) provides in relevant part: "Any licensee who intends to permanently cease engaging in the business of making residential mortgage loans . . . at any time during a license period for any cause . . . shall file a *request* to surrender the license for each office at which the licensee intends to cease to do business, on the system, not later than fifteen days after the date of such cessation . . . . *No surrender shall be effective until accepted by the commissioner*." (Emphasis added.) As a result, a mortgage lender may *request* to surrender its license but the surrender is effective only upon the commissioner's acceptance of it.

Important to the present case, § 36a-51 further restricts a mortgage lender's ability to surrender its license when that lender is subject to an ongoing administrative enforcement action by the commissioner. Specifically, "[*i*]*f . . . prior to the filing of a request to surrender a license, the commissioner has instituted a proceeding*

has not revealed any cases in those states interpreting their statutes, both statutory schemes also require suspension of a mortgage lender license in the event of surety bond cancellation. See N.J. Stat. Ann. § 17:16F-34 d. (West Cum. Supp. 2020) ("[t]he commissioner shall suspend the license of a mortgage servicer on [the date of surety bond cancellation]" unless lender obtains reinstatement of its bond or new bond or ceases doing business in state and effectively surrenders its license); Haw. Rev. Stat. § 454M-4 (*l*) (Cum. Supp. 2019) ("[t]he commissioner shall automatically suspend the license of a mortgage servicer on [the date of surety bond cancellation]" unless lender obtains reinstatement of bond or new bond or ceases doing business in state and effectively surrenders its license).

to suspend, revoke or refuse to renew such license, such surrender or *request to surrender will not become effective except at such time and under such conditions as the commissioner by order determines*."[3] (Emphasis added.) General Statutes § 36a-51 (c) (1).

In short, whenever a mortgage lender wants to surrender its license, it must request to surrender it. In the event of an ongoing administrative enforcement proceeding, the request is not effective except at the time and under the conditions the commissioner determines. In all other situations, the surrender is not effective until accepted by the commissioner. In either circumstance, the commissioner is always required to take some action before the surrender of the license is effective. Indeed, given that both §§ 36a-490 and 36a-51 use the word "request," it is clear that the statutory scheme does not contemplate a unilateral surrender on behalf of the mortgage lender. See, e.g., The American Heritage College Dictionary (4th Ed. 2007) p. 1182 (defining "request" as "[t]o express a desire for" or to "ask for"); Ballentine's Law Dictionary (3d Ed. 1969) p. 1098 (defining "request" as "[t]o ask or express a wish for something").

[3] Although neither party draws our attention to it, we note that § 36a-51 (c) (1) references both a "surrender or request to surrender . . . ." We have previously explained that "[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings . . . ." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008). Section 36a-51 (c) (1) also explains, however, that, "in the case of a license issued through the system, as defined in section 36a-2, such surrender shall be initiated by filing a request to surrender on the system. No surrender on the system shall be effective until the request to surrender is accepted by the commissioner." The "system" is defined as the NMLS. See General Statutes § 36a-2 (70). In this case, subdivision (1) of § 36a-51 (c) requires a request to surrender because the plaintiff's mortgage lender license was issued through the NMLS. See General Statutes § 36a-488.

With this statutory scheme in mind, we turn to the facts of this case to determine whether the plaintiff effectively surrendered its license in accordance with §§ 36a-490 and 36a-51. Two days before its surety bond was set to be cancelled, the plaintiff sent an e-mail to the department, stating that it was "voluntarily surrendering its license." In the proceedings before the department's hearing officer, the plaintiff, through its counsel and officers, repeatedly emphasized that it had not submitted a *request to surrender* its license, as required by §§ 36a-490 (a) and 36a-51, but, rather, had *surrendered* the license. For example, during his opening statement before the hearing officer at the department's hearing, the plaintiff's counsel stated that "[the June 7] letter does not talk about offering to surrender [the plaintiff's] license; that letter does not talk about the [commissioner's] needing to take a separate step of accepting an offer of a surrender. . . . Prior to the expiration of the bond, [*the plaintiff*] *surrendered its license*; [*it*] *didn't offer to surrender its license, it surrendered its license to the department* . . . ." (Emphasis added.) DiIorio testified that the department "offered us to cease business and surrender our license—*not offer to surrender, surrender our license*—which we did." (Emphasis added.) Similarly, during his closing argument at the hearing, the plaintiff's counsel explained: "[T]he statutes say what they say. The statutes do talk about an offer to surrender a license. The June 7 letter, on the other hand, doesn't talk about an offer at all. The June 7 letter talks about a surrender. Not an offer to surrender, a surrender. . . . And, specifically, you heard testimony that [the plaintiff] did what the letter instructed that it could do." As we discuss later in this opinion, the plaintiff's argument at the department hearing failed to acknowledge that the June 7 letter expressly stipulated that, should the plaintiff want to surrender its license and cease doing business in this

state, it had to do so "in accordance with [§§] 36a-51 (c) and 36a-490 . . . ." These statutory provisions clearly establish that no surrender or request to surrender is effective until accepted by the commissioner. Thus, the plaintiff freely admits that it failed to properly submit a request to surrender to the department.

Even if we assume that DiIorio's e-mail was a request to surrender, there is no evidence in the record that the commissioner accepted the surrender. See General Statutes § 36a-490 (a) (1). Moreover, given the ongoing 2018 enforcement proceeding concerning the revocation of the plaintiff's license for reasons separate from this surety bond issue, the request to surrender did not become effective because the commissioner never set the time or conditions for the request to surrender. See General Statutes § 36a-51 (c) (1). As a result, even if the plaintiff properly submitted a *request* to surrender, the plaintiff failed to effectuate a surrender of its license before the effective date of its surety bond cancellation, and, therefore, the commissioner was statutorily required to suspend the plaintiff's mortgage lender license. See General Statutes § 36a-492 (c).

Following the suspension, the commissioner provided the plaintiff with an opportunity for a hearing, at which it could present evidence and make argument. In compliance with the procedures set forth in the UAPA, the hearing was held, and the plaintiff presented evidence and argued why its license should not be revoked. After considering the substantial evidence in the record, the commissioner revoked the plaintiff's mortgage lender license. Given that the failure to maintain the required surety bond is sufficient cause to revoke a mortgage lender license; see General Statutes § 36a-494 (a) (1) ("[t]he commissioner may . . . revoke . . . any mortgage lender . . . license . . . for any reason which would be sufficient grounds for the commissioner to deny an application for such license"); the

commissioner appropriately revoked the plaintiff's mortgage lender license. See, e.g., *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 453, 984 A.2d 748 (2010) ("[i]f the penalty meted out is within the limits prescribed by law, the matter lies within the exercise of the [agency's] discretion and cannot be successfully challenged unless the discretion has been abused" (internal quotation marks omitted)).

The plaintiff nevertheless maintains that the commissioner "had no legal discretion to suspend [the plaintiff's] license following [its] license surrender." This argument is unavailing for two reasons. First, it assumes that the plaintiff properly effectuated a surrender of its license. As we discussed, given that the commissioner never set the time or conditions for the surrender and never accepted the surrender, the plaintiff did not properly surrender its license before the expiration of the surety bond, and, therefore, the commissioner was statutorily required to suspend the plaintiff's license. The plaintiff's position that it effectively surrendered its license through its unilateral actions on July 29, 2019, ignores the plain language of § 36a-492 (c), which requires a mortgage lender to surrender its license "in accordance with subsection (a) of section 36a-490 . . . ." The plaintiff would have us read out the requirements of § 36a-490. We decline to do so. See, e.g., *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("[I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)).

Second, to the extent that the plaintiff argues that the commissioner was without discretion not to accept

the license surrender, we are not persuaded. The commissioner did not accept the request to surrender expressly because of the ongoing 2018 enforcement proceeding against the plaintiff. Section 36a-51 (c) (1) contemplates that, in the event of an ongoing administrative enforcement proceeding, the request to surrender itself "will not become effective except at such time and under such conditions as the commissioner by order determines." In other words, an ongoing enforcement proceeding precludes a request to surrender from taking effect upon submission, and the commissioner has discretion not to accept a request to surrender based solely on the fact that there is an ongoing enforcement proceeding. Indeed, the record reflects that it is standard practice at the department that a request to surrender will not be accepted until an ongoing enforcement action is resolved.[4]

The plaintiff also argues that the statutory scheme should not be interpreted to permit the department to

[4] The defendants contend that permitting a mortgage lender that is subject to an ongoing enforcement action to unilaterally surrender its license without terms or conditions would frustrate the legislative intent of the statutory scheme by allowing the lender to avoid the consequences of its wrongful conduct. The plaintiff contends that surrendering its license would not have any impact on an ongoing enforcement proceeding because § 36a-51 (c) (1) provides in relevant part that "[s]urrender of a license shall not affect the licensee's civil or criminal liability, or affect the commissioner's ability to impose an administrative penalty on the licensee pursuant to section 36a-50 for acts committed prior to the surrender. . . ." Given that the statutory scheme does not permit the unilateral surrender on the part of a mortgage lender, and that, in the event of an ongoing enforcement proceeding, a request to surrender is effective only at the time and under the conditions the commissioner sets, we need not decide the effect that such a unilateral surrender would have on an ongoing enforcement proceeding. We note, however, that, although General Statutes § 36a-50 permits the imposition of a civil penalty, it does not appear to provide for license revocation. It is logical that the legislature would have created a statutory scheme that encourages—indeed requires—residential mortgage lenders to comply with all statutory requirements, even as a lender is faltering, thereby protecting Connecticut borrowers. It is precisely when a lender is facing difficulties, for whatever reason, that it is most important that a lender not simply be able to unilaterally surrender its license.

decline to take action on a request to surrender, thereby creating a situation in which the lender has a license but no surety bond. In other words, the plaintiff contends, the department's own actions in failing to accept the license surrender created the licensing violation. Neither the plaintiff's brief, nor our independent research, however, indicates that the department is under any statutory or regulatory obligation to take action on a request to surrender within a time certain following receipt of the request. Moreover, in this case, there is no indication in the record that the department unreasonably delayed in taking action on the plaintiff's request; rather, it was the plaintiff that waited to submit its request to surrender until two days before its surety bond was set to be cancelled. After not receiving a response to its June 7 letter, the department even followed up with the plaintiff. The plaintiff was well aware of the ongoing 2018 enforcement proceeding and of the obligation to maintain a surety bond as long as it held a license. At any time following The Hartford's notice of cancellation, the plaintiff could have reached out to the department to discuss the time and conditions for a request to surrender. See General Statutes § 36a-51 (c) (1). The plaintiff failed to do so. To the extent that the plaintiff wants to impose greater time constraints on the department's response to a request to surrender a mortgage license, its recourse is with the General Assembly, not this court. See, e.g., *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988) ("[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (Internal quotation marks omitted.)).

Finally, the plaintiff contends that the trial court incorrectly determined that the department was not estopped from suspending and revoking the plaintiff's

mortgage lender license based on the representations the department made in the June 7 letter. Specifically, the plaintiff argues that the plain language of the June 7 letter provided the plaintiff with three options to avoid license suspension, including permitting it to cease doing business in Connecticut and to surrender its license on the NMLS. The plaintiff further contends that it chose this option in specifically induced reliance on the June 7 letter. We have reviewed this claim and conclude that it is without merit. The June 7 letter was a form compliance letter required by § 4-182 (c), directing the plaintiff to comply with the applicable statutory provisions or risk losing its license. Despite the plaintiff's assertions to the contrary, the June 7 letter specifically provided that the plaintiff could "cease doing business and surrender the license on the [NMLS] *in accordance with* [*§§*] *36a-51 (c) and 36a-490* . . . ." (Emphasis added.) As we discussed, the plaintiff did not surrender its license in accordance with §§ 36a-51 (c) and 36a-490. The trial court thus correctly concluded that it was not reasonable for the plaintiff to interpret the June 7 letter as any type of promise, and it was not reasonable for the plaintiff to rely on the letter to the exclusion of the clearly applicable statutory scheme that was explicitly referenced in the letter. See, e.g., *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 333–34, 220 A.3d 890 (2019) ("[i]t is axiomatic that to prevail on a claim of estoppel, it is not enough that a promise was made; reasonable reliance thereon, resulting in some detriment to the party claiming the estoppel, also is required" (emphasis omitted; internal quotation marks omitted)); see also, e.g., *Chotkowski* v. *State*, 240 Conn. 246, 268–69, 690 A.2d 368 (1997) ("estoppel against a public agency is limited and may be invoked . . . (1) only with great caution . . . (2) only when the action in question has been induced by an agent having authority in such mat-

ters . . . and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency" (internal quotation marks omitted)).

The judgment is affirmed.

In this opinion the other justices concurred.

ALLSTATE INSURANCE COMPANY *v.* DONTE TENN ET AL.
(SC 20586)

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

Syllabus

The plaintiff insurance company brought the present declaratory judgment action in the United States District Court for the District of Connecticut, seeking a determination that it was not obligated to defend and indemnify the defendant T in connection with a civil action brought against T by the defendant M. M's civil action stemmed from an incident in which he sustained injuries after T assaulted him. After the incident, T entered a plea of nolo contendere in a separate criminal prosecution to the charge of first degree assault. The plaintiff filed a motion for summary judgment in the present action, claiming that T's plea of nolo contendere relieved it of its duty to defend and indemnify T in M's civil action under a homeowners insurance policy issued by the plaintiff to T's mother in light of a criminal acts exclusion in that policy. Thereafter, the District Court, pursuant to statute (§ 51-199b (d)) and the rules of practice (§ 82-1), certified to this court the question of whether a plea of nolo contendere could be used by an insurance company in a declaratory judgment action to trigger a criminal acts exclusion to coverage. *Held* that T's plea of nolo contendere was inadmissible in the plaintiff's declaratory judgment action to prove the occurrence of a criminal act and, therefore, could not be used to trigger the criminal acts exclusion of the homeowners insurance policy: under this state's common law, as codified in the Connecticut Code of Evidence (§ 4-8A (a) (2)), a plea of nolo contendere generally cannot be admitted in a subsequent proceeding to prove the occurrence of criminal act, and the court's holding in this case was harmonious with case law from numerous jurisdictions; moreover, the purpose of the plea of nolo contendere is to facilitate the efficient disposition of criminal cases by encouraging plea bargaining, such a plea potentially allows the criminal defendant to avoid the cost of litigating both criminal and civil cases and to consolidate

resources in defense of only the latter, and allowing the use of a nolo contendere plea as proof of underlying criminal conduct in subsequent civil litigation would undermine the very essence of such a plea; furthermore, the plaintiff could not prevail on its claim that it should be permitted to use T's nolo contendere plea to trigger the policy's criminal acts exclusion as a matter of public policy insofar as the general rule against using a such plea could be adequately safeguarded by enforcing the rule in M's civil action, and as T should be not be allowed to benefit from his illegal conduct, this court having concluded that there was no principled reason to rigorously enforce the restrictions imposed by § 4-8A (a) (2) against the victim of a crime in a civil case while simultaneously ignoring that rule for an insurance company in a declaratory judgment action arising out of the same set of facts, and, although no one should be allowed to profit from his or her own wrongdoing, the exclusion of T's plea in no way precluded the plaintiff from seeking to enforce the policy's criminal acts exclusion in its declaratory judgment action by presenting evidence concerning T's criminal conduct, other than T's plea, to establish the applicability of that exclusion.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued September 8—officially released February 23, 2022*

Procedural History

Action for judgment declaring that the plaintiff had no duty to defend and indemnify the named defendant in an action seeking to recover damages for injuries sustained in an assault, brought to the United States District Court for the District of Connecticut, where the court, *Arterton*, *J.*, denied the plaintiff's motion for summary judgment; thereafter, the court, *Arterton*, *J.*, certified a question of law to this court concerning whether a plea of nolo contendere and the resulting conviction can be used to trigger a criminal acts exclusion in an insurance policy.

Paige D. Beisner, with whom, on the brief, was *Michele C. Wojcik*, for the appellant (plaintiff).

Ronald S. Johnson, for the appellee (named defendant).

* February 23, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Eamon T. Donovan, for the appellee (defendant Tailan Moscaritolo).

Opinion

KAHN, J. The question in this case is whether the plaintiff, Allstate Insurance Company (Allstate), can use a plea of nolo contendere entered by the named defendant, Donte Tenn, to trigger a criminal acts exclusion in a homeowners insurance policy governed by Connecticut law. Allstate commenced the present action against Tenn and another defendant, Tailan Moscaritolo, in the United States District Court for the District of Connecticut, seeking a judgment declaring that it has no contractual duty either to defend or to indemnify Tenn in a civil action brought against Tenn by Moscaritolo in Connecticut Superior Court. Allstate subsequently filed a motion for summary judgment in this declaratory judgment action, arguing that Tenn's plea of nolo contendere relieved it of its duty both to defend and to indemnify him as a matter of law. The parties agreed that a ruling on Allstate's motion with respect to indemnification would be premature, and, as a result, the District Court denied Allstate's motion with respect to that issue without prejudice. The only remaining question, which the District Court, in turn, certified to this court pursuant to General Statutes § 51-199b (d) and Practice Book § 82-1, is whether Tenn's plea of nolo contendere relieved Allstate of its duty to defend by triggering the policy's criminal acts exclusion as a matter of law. For the reasons that follow, we conclude that Tenn's plea of nolo contendere is inadmissible to prove the occurrence of a criminal act and, therefore, cannot be used to trigger the policy's criminal acts exclusion.

The following undisputed facts and procedural history, which relate to three distinct judicial proceedings, are relevant to our consideration of the District Court's

certified question. Those three proceedings are (1) the criminal case charging Tenn with an assault on Moscaritolo; *State* v. *Tenn*, Superior Court, judicial district of Middlesex, Docket No. CR-16-0210490-T; (2) the civil action brought by Moscaritolo against Tenn in the Superior Court; *Moscaritolo* v. *Tenn*, Superior Court, judicial district of Middlesex, Docket No. CV-18-6023052-S; and (3) the present declaratory judgment action filed by Allstate against Tenn and Moscaritolo in federal court.[1] See *Allstate Ins. Co.* v. *Tenn*, United States District Court, Docket No. 3:19-cv-00432 (JBA) (D. Conn. March 18, 2021). For the sake of clarity, we briefly review each of these three proceedings in turn.

The facts related to the criminal case against Tenn are straightforward. On October 10, 2016, Moscaritolo was hit repeatedly with a metal baseball bat while walking on a public street in the city of Middletown. Tenn was identified by several witnesses as the perpetrator of that assault and, a few weeks later, was arrested by the police. On November 6, 2018, Tenn entered a plea of nolo contendere to the charge of assault in the first degree in connection with that incident. At the plea hearing, the prosecutor summarized the evidence related to the assault and detailed the agreement the state had reached with Tenn in exchange for his plea. During the court's subsequent canvass, Tenn confirmed that he had heard the charge against him and the evidence recited by the prosecutor, and stated that he elected not to contest that charge.[2] Prior to the court's

[1] Records of these proceedings before the Superior Court are a proper subject of judicial notice. See, e.g., *Shirley P.* v. *Norman P.*, 329 Conn. 648, 660, 189 A.3d 89 (2018); *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527–28, 294 A.2d 633 (1972).

[2] The relevant portions of the canvass conducted by the court, *Keegan*, *J.*, include the following:

"The Court: Now, is this going to be a straight guilty plea, nolo?

"[Defense Counsel]: It's nolo. I filed here, Your Honor."

After confirming the terms of the agreement with Tenn, the court asked the clerk to put Tenn to plea:

"The Clerk: Donte Tenn, in Docket Number CR-16-0210490, to the charge of assault in the first degree, on or about October 10, 2016, in violation of Connecticut General Statutes § 53a-59, how do you plead?

canvass, the defendant completed, signed and submitted the required Plea of Nolo Contendere Form (JD-CR-60), which provides:

"I am the defendant in the case named above and:

"I have personally been in the court and have been advised of my rights;

"I have had the complaint in this case read to me or gave up my right to have the complaint read to me;

"I do not want to contest the claims of the [s]tate of Connecticut that are in the complaint; and

"I will not contend with the [s]tate of Connecticut about the complaint.

"By signing this paper, I plead nolo contendere (no contest) and put myself on the clemency of the court."

During the canvass, the prosecutor informed the court that there was a pending civil case filed by the victim, Moscaritolo, against Tenn and his mother's insurance company. He further advised the court that Tenn was cooperating in that civil lawsuit, and, for that reason, the victim was "not necessarily seeking much jail time" and that he may be monetarily indemnified for the injuries he suffered. Ultimately, Tenn received a sentence of twelve years of imprisonment, execution suspended after two years, and three years of probation in connection with this conviction.

"[Tenn]: No contest."

After confirming with the clerk that the nolo contendere plea form typically completed was in proper form, the court asked the prosecutor to summarize the factual basis of the plea. The court went on to conduct a full canvass of Tenn to ensure that his decision not to contest the charges was, indeed, voluntary. Following the canvass, the court concluded: "[The] court will accept the plea [and] find it knowingly and voluntarily made with the assistance of competent counsel. There is a factual basis, so the plea of nolo contendere is accepted, and a finding of guilty may enter."

Moscaritolo's separate civil action against Tenn sought to recover damages for personal injuries resulting from the same assault.[3] That action, which is presently awaiting trial before the Superior Court, contains four counts: (1) assault, (2) negligent assault, (3) intentional infliction of emotional distress, and (4) negligent infliction of emotional distress. The first and third counts allege that Moscaritolo's injuries resulted from Tenn's "wilful, wanton, intentional and malicious acts . . . ." The second and fourth counts, by contrast, allege that Tenn acted negligently by swinging the baseball bat near Moscaritolo wildly and without warning.[4] Allstate is currently providing a legal defense to Tenn in that civil action subject to a reservation of rights.

Allstate then commenced a third action in District Court, seeking a judgment declaring that it was not contractually obligated to defend or to indemnify Tenn in Moscaritolo's civil action. Allstate conceded that Tenn qualified as an "insured person" within the mean-

[3] Moscaritolo alleged that the assault caused traumatic brain injuries, skull fractures, an intracranial hemorrhage, an epidural hematoma, a left distal tibial shaft fracture, a concussion, posttraumatic stress disorder, and headaches.

[4] We note that, in some jurisdictions, creative pleading alone may not always suffice to avoid an award of summary judgment in favor of an insurer. See, e.g., *United National Ins. Co.* v. *Tunnel, Inc.*, 988 F.2d 351, 354–55 (2d Cir. 1993) (The court concluded that, under New York law, an insurance policy exclusion barred coverage for injuries resulting from an assault by a nightclub bouncer, notwithstanding the fact that the underlying pleading sounded in negligence, stating: "On a motion for summary judgment the court must pierce through the pleadings and their adroit craftsmanship to get at the substance of the claim. . . . [I]t is plain that [the victim] is alleging that the bouncer intentionally struck him. And that makes it a claim for battery—not covered by the insurance policy."); see also E. Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding," 75 Tex. L. Rev. 1721, 1728, 1735 n.45 (1997) (noting that "[m]erely adding an allegation of negligence will not necessarily create a duty to defend" and that, in some cases, "the intentional nature of the harm may be so overwhelming that it resists reshaping, or the physical evidence may be flatly inconsistent with the plaintiff's effort to characterize the injury as negligently inflicted").

ing of a homeowners insurance policy purchased by Tenn's mother, Stephanie L. Patrick, that was in force at the time of the assault. (Internal quotation marks omitted.) It also conceded that the terms of that policy generally obligated it to pay "damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence . . . ." (Emphasis omitted; internal quotation marks omitted.) Allstate nonetheless alleged, inter alia,[5] that it had no duty to defend or to indemnify Tenn because any coverage for his actions was precluded under the policy's criminal acts exclusion. That exclusion provides in relevant part: "[Allstate does] not cover bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts of the insured person. This exclusion applies even if:

"(a) such bodily injury or property damage is of a different kind or degree than that intended or reasonably expected; or

"(b) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

"This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime. . . ." (Emphasis omitted.)

In its motion for summary judgment, Allstate claimed that there were no genuine issues of material fact relating to the application of the criminal acts exclusion and that, as a result, it was entitled to a declaratory ruling

[5] Allstate also alleged that the assault was intentional and, therefore, did not qualify as an "occurrence" and that Tenn had failed to provide it with adequate notice. (Internal quotation marks omitted.) Because the question certified by the District Court relates solely to the impact of Tenn's plea of nolo contendere on the policy's criminal acts exclusion, no further discussion of these additional claims is necessary.

barring coverage as a matter of law. In advancing this argument, Allstate specifically argued that "Tenn's plea of nolo contendere precludes any argument that he did not commit [a] crime." The District Court reserved decision on this point of law and subsequently certified the following question to this court: "Whether a plea of nolo contendere and the resulting conviction can be used to trigger a criminal acts exclusion in an insurance policy." This court accepted that certified question, and this proceeding followed.

The applicable standard of review is well established. "[C]onstruction of a contract of insurance presents a question of law . . . [that] this court reviews de novo. . . . The determinative question is the intent of the parties, that is, what coverage the [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . In evaluating the expectations of the parties, we are mindful of the principle that provisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view. . . . [W]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . When construing exclusion clauses, the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim. . . . While the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hart-*

ford Accident & Indemnity Co., 333 Conn. 343, 364–65, 216 A.3d 629 (2019); see also *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 154, 61 A.3d 485 (2013).

In this state, the general rule is that a plea of nolo contendere in a criminal case is inadmissible in a subsequent proceeding to prove the occurrence of a criminal act. See *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 51, 757 A.2d 501 (2000) ("under our law a prior plea of nolo contendere and a conviction based thereon may not be admitted into evidence in a subsequent civil action or administrative proceeding to establish either an admission of guilt or the fact of criminal conduct"); see also *Lawrence* v. *Kozlowski*, 171 Conn. 705, 711–12 n.4, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); *Krowka* v. *Colt Patent Fire Arm Mfg. Co.*, 125 Conn. 705, 713, 8 A.2d 5 (1939). Indeed, the operation of this principle is what makes a plea of nolo contendere unique. See *State* v. *Martin*, 197 Conn. 17, 21 n.7, 495 A.2d 1028 (1985) ("[t]he only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case"), overruled in part on other grounds by *State* v. *Das*, 291 Conn. 356, 968 A.2d 367 (2009); *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 107 Conn. App. 321, 328 n.7, 945 A.2d 494 (2008) ("A plea of nolo contendere is a declaration by the accused that he will not contest the charge. Its inconclusive and ambiguous nature dictates that it should be given no currency beyond the particular case in which it was entered."), rev'd on other grounds, 298 Conn. 824, 6 A.3d 1142 (2010); *State* v. *Bridgett*, 3 Conn. Cir. 206, 208–209, 210 A.2d 182 (1965) ("[t]he only basic characteristic of the plea of nolo contendere [that] differentiates it from a guilty plea is that the defendant is not estopped from denying the facts to which he pleaded nolo contendere

in a subsequent judicial civil proceeding"); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.13.5 (c) (2), p. 532 ("A plea of nolo contendere is not a confession of guilt, but just a plea that the accused will not contest the issue of guilt and will be sentenced as a guilty person. . . . [It] is not an admission of guilt and cannot be used as an admission in a later proceeding." (Internal quotation marks omitted.)); see also *State* v. *Faraday*, 268 Conn. 174, 204–205 and n.17, 842 A.2d 567 (2004) (concluding that defendant violated terms of probation imposed following *Alford*[6] plea by failing to admit to crime during course of treatment and noting, in dictum, that plea of nolo contendere, like *Alford* plea, has "the same legal effect as a plea of guilty *on all further proceedings within the indictment*" but "may not be used against the defendant as an admission in a subsequent criminal or civil case" (emphasis added; internal quotation marks omitted)); 2 B. Holden & J. Daly, Connecticut Evidence (1988) § 103f, p. 1030 ("[a] plea of nolo contendere is not admissible as an admission by a party").[7]

This common-law rule was ultimately codified in § 4-8A (a) of the Connecticut Code of Evidence, which provides in relevant part: "Evidence of the following shall not be admissible in a civil or criminal case against a person who has entered a plea of guilty or nolo conten-

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

[7] The use of a plea of nolo contendere, thus, in no way limits a trial court's ability to impose forms of financial punishment, such as restitution, in the context of the criminal action in which the plea is entered. See, e.g., *State* v. *Woodtke*, 130 Conn. App. 734, 737–38, 25 A.3d 699 (2011); *State* v. *Daley*, 81 Conn. App. 641, 643 n.2, 841 A.2d 243, cert. denied, 269 Conn. 910, 852 A.2d 740 (2004); *State* v. *Klinger*, 50 Conn. App. 216, 217–18, 718 A.2d 446 (1998); cf. Fed. R. Crim. P. 11 (b) (1) ("[b]efore the court accepts a plea of . . . nolo contendere . . . the court must inform the defendant of . . . (K) the court's authority to order restitution"); see also, e.g., *Baugh* v. *State*, 635 S.W.3d 9, 11 (Ark. App. 2021); *People* v. *Roddy*, 498 P.3d 136, 139 (Colo. 2021).

dere in a criminal case or participated in plea negotiations in such case, whether or not a plea has been entered . . . (2) a plea of nolo contendere . . . or any statement made in conjunction with such a plea . . . ." This language is similar to both the Federal Rules of Evidence and codes of evidence in a number of other states. See, e.g., Fed. R. Evid. 410 (a) (2); Me. R. Evid. 410; N.H. R. Evid. 410; R.I. R. Evid. 410; see also Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, Massachusetts Guide to Evidence (2021) § 410, p. 47.

Consistent with our common law and rules of evidence, our rules of practice vest Superior Court judges with discretion to accept pleas of nolo contendere in criminal cases. See Practice Book §§ 37-7 and 39-18. Specifically, Practice Book § 39-18 provides in relevant part that "[a] plea of nolo contendere shall be in writing, shall be signed by the defendant, and, when accepted by the judicial authority, shall be followed by a finding of guilty." A plea of nolo contendere allows a defendant to accept a punishment, often lighter, as if he or she were guilty, and yet still maintain his or her innocence. See J. Kuss, Comment, "Endangered Species: A Plea for the Preservation of *Nolo Contendere* in Alaska," 41 Gonz. L. Rev. 539, 561–62 (2006) ("The plea was not an express admission of guilt, but rather was viewed as 'a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.' It was 'a mere statement of unwillingness to contest and no more.' In fact, the only time that a plea of nolo contendere had the same effect as a guilty plea was in the criminal case it which it was entered." (Footnotes omitted.)).

The single, narrow question now before this court is whether, under Connecticut law, a plea of nolo contendere can be used by an insurance company in a declaratory judgment action to prove criminal conduct that would trigger a contractual exclusion to coverage. The

simple answer to that question under our common law, as codified in § 4-8A (a) of the Connecticut Code of Evidence, is that a plea of nolo contendere cannot be used as proof of criminal conduct.

Although neither the parties nor the question certified to us by the District Court doubts the wisdom of this rule, we pause to observe the pragmatic and practical considerations underlying the plea itself. Its purpose, at base, is to facilitate the efficient disposition of criminal cases by encouraging plea bargaining. See *Elevators Mutual Ins. Co.* v. *J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010); see also P. Healey, Note, "The Nature and Consequences of the Plea of Nolo Contendere," 33 Neb. L. Rev. 428, 433–34 (1954); 21 Am. Jur. 2d 797–98, Criminal Law § 655 (2016). It provides criminal defendants with a means to resolve the criminal case against them while avoiding the potentially harsher penalties occasioned when a defendant proceeds to trial. See J. Kuss, supra, 41 Gonz. L. Rev. 560 ("a criminal defendant may just find it preferable to accept a light punishment offered by the prosecution in exchange for a nolo contendere plea, rather than face far worse consequences both in terms of criminal punishment and civil liability" (internal quotation marks omitted)). The financial consequences include the costs of litigating both criminal and civil cases, which may lead a defendant who claims innocence to accept a favorable plea in order to consolidate resources in defense of only the latter. Id. ("It is not uncommon for a criminal defendant, even if innocent, to plead nolo contendere—particularly if the overwhelming strength of the state's case makes it futile to go to trial or if the defendant has no basis for pleading guilty because she simply cannot remember committing any crime. Still other defendants may use a nolo plea as a psychological crutch. Whatever the case, there are a litany of reasons why a criminal defendant may accept

a nolo plea and it should not be casually assumed that a defendant has sufficient incentive to litigate merely because she is charged with a serious offense. Even innocent defendants may have a broad range of motivations for entering a plea of nolo contendere rather than contesting a charge." (Footnotes omitted; internal quotation marks omitted.)); see also F. Easterbrook, "Criminal Procedure as a Market System," 12 J. Legal Stud. 289, 320 (1983).

In addition to affording defendants the opportunity to enter into a favorable plea agreement without fearing the financial consequences that would result from an admission of guilt, "the nolo plea facilitates the expeditious administration of criminal justice." J. Kuss, supra, 41 Gonz. L. Rev. 564; see also id. ("[t]he inherent utility of the plea lies in the fact that it encourages plea bargaining and dispenses with lengthy and expensive trials" (internal quotation marks omitted)). Allowing the use of nolo contendere pleas as proof of underlying criminal conduct in subsequent civil litigation would, thus, undermine the very essence of the nolo contendere plea itself. See id., 562.

The parties accurately observe that, notwithstanding this evidentiary limitation and the principles of public policy underlying it, the use of a nolo contendere plea does not always shelter criminal defendants from the collateral consequences triggered by the resulting criminal conviction. Courts have, for example, found that a conviction of operating a vehicle under the influence following a plea of nolo contendere can cause an administrative suspension of a Connecticut driver's license. See, e.g., *Kostrzewski* v. *Commissioner of Motor Vehicles*, 52 Conn. App. 326, 333–35, 727 A.2d 233, cert. denied, 249 Conn. 910, 733 A.2d 227 (1999). Similarly, a conviction of a drug related felony following a plea of nolo contendere can lead to the suspension of a physician's certificate of registration to distribute a con-

trolled substance under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq. See, e.g., *Sokoloff* v. *Saxbe*, 501 F.2d 571, 574–75 (2d Cir. 1974). Still other examples can be listed. See, e.g., annot., "Plea of Nolo Contendere or Non Vult Contendere," 152 A.L.R. 253, 290 (1944) ("Is an individual who has entered a plea of nolo contendere in one proceeding a multi-offender after a subsequent conviction in another proceeding? The answer obviously is yes . . . .").[8] Recognizing the unique nature of pleas of nolo contendere, our legislature has expressly permitted, when deemed appropriate, the existence of a conviction resulting from that plea to have collateral consequences; see, e.g., General Statutes § 36a-489 (a) (conviction following plea of nolo contendere may preclude issuance of mortgage broker license); and has compelled certain procedures governing its use. See, e.g., General Statutes § 54-1j (requiring advisement relating to immigration and naturalization consequences resulting from plea of nolo contendere). The plea of nolo contendere, thus, does not act as an absolute privilege prohibiting all collateral consequences arising from the resulting criminal conviction. See *Sokoloff* v. *Saxbe*, supra, 574 ("[when] . . . a statute (or judicial rule) attaches legal consequences to the fact of a conviction, the majority of courts have held that there is no valid distinction between a conviction upon a plea of nolo contendere and a conviction after a guilty plea or trial").[9]

[8] Although a plea of nolo contendere can also be used by the state to establish a violation of probation; see *State* v. *Daniels*, 248 Conn. 64, 73, 726 A.2d 520 (1999), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005); such a practice is not properly characterized as a policy based exception to the rule set forth in § 4-8A (a) of the Connecticut Code of Evidence. The admissibility of the plea in that particular context results, instead, from the inapplicability of the Code of Evidence to probation matters. Conn. Code Evid. § 1-1 (d) ("[t]he [c]ode, other than with respect to privileges, does not apply in proceedings such as . . . (4) [p]roceedings involving probation").

[9] Our use of this same quotation from *Sokoloff* in *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 51 n.13, should not be read to indicate

The present case does not, however, require us to engage in a lengthy or detailed discussion of the permissible collateral impacts of convictions resulting from pleas of nolo contendere under Connecticut law because, quite simply, the contractual exclusion at issue does not turn on the existence of a criminal conviction. To the contrary, the policy expressly states that this exclusion "applies *regardless of whether or not* such insured person is actually charged with, or convicted of a crime."[10] (Emphasis altered.) This plain and unambiguous language makes either the *existence or absence* of a criminal conviction contractually irrelevant.[11] The provision, instead, is triggered by the commission of the "intentional or criminal acts of [an] insured person." (Emphasis omitted.) Tenn's plea of nolo contendere is inadmissible as proof of criminal acts under § 4-8A (a) of the Connecticut Code of Evidence and our case law.[12]

any specific disagreement with the legal reasoning of the United States Court of Appeals for the Second Circuit. Our remark merely recognized, as we do again today, that the collateral impacts of the plea are not always the subject of unanimous agreement among courts.

[10] Criminal acts exclusions in other insurance policies have occasionally been drafted to turn explicitly on the existence of a criminal conviction, regardless of how that conviction was obtained. See *Sosinski* v. *Unum Life Ins. Co. of America*, 15 F. Supp. 3d 723, 727, 732 (E.D. Mich. 2014) (concluding that exclusion in long-term disability insurance plan precluding coverage for " 'disabilities caused by, contributed to by, or resulting from' the 'commission of a crime for which you have been convicted' " was triggered by conviction resulting from insured's plea of nolo contendere); *Key* v. *Dept. of Administrative Services*, 340 Ga. App. 534, 536, 798 S.E.2d 37 (2017) (referring to contractual provision excluding coverage for " 'any dishonest, fraudulent or criminal act or omission of any [c]overed [p]arty which forms the basis of a criminal conviction, whether by verdict, plea of guilty or plea of nolo contendere' ").

[11] Even if the language of the policy merely rendered the point ambiguous, our rules of construction would still compel us to adopt the reading favoring coverage. See *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 333 Conn. 365 ("the language [of exclusion clauses] should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim" (internal quotation marks omitted)).

[12] Although this court's precedent has addressed the inadmissibility of nolo contendere pleas to prove the occurrence of a criminal act in civil

See *Lawrence* v. *Kozlowski*, supra, 171 Conn. 711–13 (proof of nolo contendere plea and resulting conviction were inadmissible to support factual finding of criminal conduct).

This result is harmonious with case law from numerous other jurisdictions. See, e.g., *Safeco Ins. Co. of Illinois* v. *Gasiorowski*, Docket No. 20-3877, 2021 WL 2853255, *3 (E.D. Pa. July 7, 2021) (insured's plea of nolo contendere did not trigger criminal acts exclusion in homeowners insurance policy); *Lichon* v. *American Universal Ins. Co.*, 435 Mich. 408, 414–15, 459 N.W.2d 288 (1990) (plea of nolo contendere and resulting conviction were inadmissible in subsequent civil litigation to trigger insurance contract's antifraud exclusionary clause); *Safeco Ins. Co. of America* v. *Liss*, 303 Mont. 519, 530–32, 16 P.3d 399 (2000) (previous nolo contendere plea to crime of assault did not preclude insured from contesting insurer's assertion that incident fell within policy's criminal acts exclusion); *Elevators Mutual Ins. Co.* v. *J. Patrick O'Flaherty's, Inc.*, supra, 125 Ohio St. 3d 367 (evidence of insured's no contest pleas and subsequent convictions for arson and insurance fraud was inadmissible in civil action to trigger criminal acts exclusion); *Korsak* v. *Prudential Property & Casualty Ins. Co.*, 441 A.2d 832, 834 (R.I. 1982) (rejecting argument that insured's plea of nolo conten-

actions for damages; see, e.g., *Krowka* v. *Colt Patent Fire Arm Mfg. Co.*, supra, 125 Conn. 713–14; and certain administrative appeals; see, e.g., *Lawrence* v. *Kozlowski*, supra, 171 Conn. 711–13; we have not yet addressed the application of that rule to a criminal acts exclusion in an insurance policy. Superior Court decisions confronted with this particular question have taken divergent approaches. Compare *Allstate Ins. Co.* v. *Simansky*, 45 Conn. Supp. 623, 630, 738 A.2d 231 (1998) (concluding that nolo contendere plea triggered criminal acts exclusion), with *Allstate Ins. Co.* v. *Linarte*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005150-S (May 24, 2007) (43 Conn. L. Rptr. 664, 669) (declining to consider defendant's plea of nolo contendere in determining whether criminal acts exclusions applied). To the extent that the reasoning of *Simansky* is inconsistent with the reasoning of this decision, it is hereby overruled.

dere entitled insurer to summary judgment); see also *Hopps* v. *Utica Mutual Ins. Co.*, 127 N.H. 508, 511, 506 A.2d 294 (1985) (Souter, J.) ("a plea of nolo contendere in an earlier criminal prosecution will raise no estoppel, since that plea neither controverts nor confesses the facts [on] which the conviction must rest").

Cases cited by Allstate reaching the opposite result are distinguishable. Various decisions from the state of California; see, e.g., *20th Century Ins. Co.* v. *Schurtz*, 92 Cal. App. 4th 1188, 112 Cal. Rptr. 2d 547 (2001); *Century-National Ins. Co.* v. *Glenn*, 86 Cal. App. 4th 1392, 104 Cal. Rptr. 2d 73 (2001); are inapposite because those cases involved the commission of felonies and the legislature of that state has, by statute, provided that a plea of nolo contendere to a felony "shall be the same as that of a plea of guilty for all purposes." Cal. Penal Code § 1016 (Deering 2008). An unpublished decision from Kentucky; *Eberle* v. *Nationwide Mutual Ins. Co.*, Docket No. 2013-CA-000898-MR, 2016 WL 2609311 (Ky. App. May 6, 2016), review denied, Kentucky Supreme Court, Docket No. 2016-SC-000299-D (September 15, 2016); is also unpersuasive because that case involved a plea entered pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Although the applicable rule of evidence in that state; see Ky. R. Evid. 410; was amended in 2007 to allow for the admission of *Alford* pleas in subsequent cases, that rule continues to preclude the admission of nolo contendere pleas. *Eberle* v. *Nationwide Mutual Ins. Co.*, supra, *7.[13]

[13] We likewise reject Allstate's reliance on *Auto Club Group Ins. Co.* v. *Booth*, 289 Mich. App. 606, 797 N.W.2d 695 (2010). Approximately one year after the Michigan Supreme Court's decision in *Lichon*, rule 410 of the Michigan Code of Evidence was formally amended to allow use of nolo contendere pleas "to support a defense against a claim asserted by the person who entered the plea . . . ." Mich. R. Evid. 410 (2); see *Akyan* v. *Auto Club Ins. Assn.*, 207 Mich. App. 92, 98, 523 N.W.2d 838 (1994), appeal denied, 450 Mich. 939, 548 N.W.2d 626 (1995). Although that state's intermediate appellate court initially wrestled with the question of whether this language was broad enough to encompass a "claim" made by an insured;

Allstate contends that it should be permitted to use Tenn's plea of nolo contendere to trigger the policy's criminal acts exclusion as a matter of public policy.[14] Specifically, Allstate argues that (1) the general rule against using pleas of nolo contendere can be adequately safeguarded by simply enforcing that rule in Moscaritolo's civil action before the Superior Court, and (2) excluding proof of Tenn's nolo contendere plea will allow him to benefit from his own illegal conduct.

We disagree on both points. First, we see no principled reason to rigorously enforce the restrictions imposed by § 4-8A (a) of the Connecticut Code of Evidence on the victim of a crime in a tort case while simultaneously ignoring that rule for a corporation in a declaratory judgment action arising out of the very same set of facts. The continued, uniform application of that rule ensures that the prospect of civil liability does not control the course of related criminal proceedings. Second, although we wholeheartedly endorse the well established legal maxim that no one should be allowed to profit from his or her own wrongdoing, the exclusion of Tenn's plea of nolo contendere in no way precludes Allstate from vindicating that principle by seeking to enforce the criminal acts exclusion on the basis of the evidence that led to Tenn's prosecution and conviction. Indeed, Allstate is no less able to enforce the exception

(internal quotation marks omitted) *Home-Owners Ins. Co.* v. *Bonnville*, 2006 WL 1566681, *6 (Mich. App.) (Bandstra, J., concurring in part and dissenting in part), appeal denied, 477 Mich. 953, 723 N.W.2d 900 (2006); that court now appears to have implicitly answered the question in the affirmative. See *Auto Club Ins. Assn.* v. *Andrzejewski*, 292 Mich. App. 565, 571, 808 N.W.2d 537 (2011); *Auto Club Group Ins. Co.* v. *Booth*, supra, 615. Because § 4-8A of the Connecticut Code of Evidence more closely resembles the text of the rule examined by the court in *Lichon*, we continue to view the reasoning of that decision to be most persuasive.

[14] Allstate asserts, and we agree, that this court possesses an inherent authority to amend the rules of evidence on a case-by-case basis. See *State* v. *DeJesus*, 288 Conn. 418, 439, 953 A.2d 45 (2008); see also *State* v. *Gore*, 342 Conn. 129, 133, A.3d (2022).

in this case than it would be in a case in which the state declined to pursue a criminal prosecution of the insured party in the first instance.

Of course, neither the District Court's denial of summary judgment on the duty to defend nor the decision that this court reaches today will mark an end to Allstate's ability to seek further relief from liability. Allstate may well still be able to marshal other evidence to establish the applicability of the criminal acts exclusion in a subsequent motion for summary judgment or otherwise establish the same point at trial. For the reasons stated previously in this opinion, however, Tenn's plea of nolo contendere cannot be used by Allstate to satisfy that burden.

The answer to the certified question is: No.

No costs shall be taxed in this court to either party.

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

D'AURIA, J., with whom McDONALD, J., joins, concurring in part and dissenting in part. As the majority recounts, the question that the United States District Court for the District of Connecticut has asked this court to answer is "whether the plaintiff, Allstate Insurance Company (Allstate), can use a plea of nolo contendere entered by the named defendant, Donte Tenn, to trigger a criminal acts exclusion in a homeowners insurance policy governed by Connecticut law." The majority holds that the defendant's "plea of nolo contendere is *inadmissible* to prove the occurrence of a criminal act and, therefore, cannot be used to trigger the policy's criminal acts exclusion." (Emphasis added.) To the extent the District Court's use of the term "trigger" in the certified question suggests that the issue presented is whether the defendant's plea of nolo contendere is

dispositive of whether the policy's criminal acts exclusion applies, I agree with the majority that it is not. I disagree, however, with the majority that this conclusion is compelled by the fact that the defendant's plea of nolo contendere is inadmissible under § 4-8A (a) of the Connecticut Code of Evidence.[1] Because I believe that the policy underpinning the question of a nolo plea's admissibility—encouraging plea bargaining—is attenuated under the circumstances presented, and that the policy of not defending or indemnifying an insured's criminal conduct is squarely implicated, I would answer that, under the current state of our law, the defendant's nolo plea is admissible, although not necessarily dispositive, evidence. Thus, I respectfully dissent in part.

In a lawsuit between an insurance company and an insured regarding whether a criminal acts exclusion applies,[2] and, therefore, whether the insurer owes the insured a duty (either to defend or indemnify), when an injured party has sued the insured, the insured's criminal conviction for the acts leading to the injury is obviously relevant evidence. This includes a conviction

[1] Pursuant to General Statutes § 51-199b (k) and the District Court's order, this court "may reformulate a question certified to it." Because I believe that, before determining whether a nolo plea is dispositive of whether the policy's criminal acts exclusion applies, we must first address the preliminary question of whether a plea of nolo contendere is admissible as *evidence* of the occurrence of a criminal act in an insurance coverage dispute, we should divide the certified question into two reformulated questions: (1) is the defendant's plea of nolo contendere admissible, and (2) if so, is it dispositive of whether the policy's criminal acts exclusion applies.

[2] The exclusion in this case provides in relevant part: "[Allstate does] not cover bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts of the insured person. This exclusion applies even if:

"(a) such bodily injury or property damage is of a different kind or degree than that intended or reasonably expected; or

"(b) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

"This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime. . . ." (Emphasis omitted.)

based on a plea of nolo contendere, which, after a trial court's finding of a factual basis for and acceptance of the plea, is no less a criminal conviction than the conviction that follows from either a straight guilty plea or a verdict of guilty after trial. See, e.g., *State* v. *Faraday*, 268 Conn. 174, 205 n.17, 842 A.2d 567 (2004) (plea of nolo contendere "has the same legal effect as a plea of guilty" (internal quotation marks omitted)).[3]

As a general matter, a court should admit relevant evidence. See Conn. Code Evid. § 4-2. To keep relevant evidence from the fact finder is to inhibit the court's truth seeking function. See *State* v. *Montgomery*, 254 Conn. 694, 724, 759 A.2d 995 (2000) (courts must apply privileges with circumspection, as withholding relevant evidence impedes truth seeking function of adjudicative process). Of course, not all relevant evidence is admissible. See Conn. Code Evid. § 4-2. Our Code of Evidence recites a number of rules that this court has recognized as bearing on whether a trial court should not admit otherwise relevant evidence to advance another judicial or public policy. See, e.g., *Hicks* v. *State*, 287 Conn. 421, 440, 948 A.2d 982 (2008) ("[T]he rule barring evidence of subsequent repairs in negligence actions is based on narrow public policy grounds, not on an evidentiary infirmity. . . . This policy fosters the public good by allowing tortfeasors to repair hazards without fear of having the repair used as proof of negligence . . . ."

[3] Under our state law, a nolo plea and an *Alford* plea are " 'functional equivalent[s] . . . .' " *State* v. *Faraday*, supra, 268 Conn. 205 n.17. "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial." *Commissioner of Correction* v. *Gordon*, 228 Conn. 384, 385 n.1, 636 A.2d 799 (1994).

Although a plea of nolo contendere and an *Alford* plea are functionally equivalent, I recognize that the precise language of the pleas may differ, and, thus, to the extent the plea is admissible and offered as an opposing party's statement, the content of the statement may differ. See footnote 6 of this opinion.

(Internal quotation marks omitted.)); *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992) ("[t]he general rule that evidence of settlement negotiations is not admissible at trial is based [on] the public policy of promoting the settlement of disputes" (internal quotation marks omitted)).

The inadmissibility of a plea of nolo contendere under certain circumstances is one example. See Conn. Code Evid. § 4-8A (a) (plea of nolo contendere "shall not be admissible in a civil or criminal case against a person who has entered a plea of . . . nolo contendere in a criminal case"). The majority accurately describes the limited "pragmatic and practical considerations" underlying the criminal justice system's permitting of a nolo plea at all. The majority states: "A plea of nolo contendere allows a defendant to accept a punishment, often lighter, as if he or she were guilty, and yet still maintain his or her innocence." The nolo plea may afford the accused the psychological advantage of not having to admit guilt—to himself or to others—or the very real fiscal advantage of resolving a criminal charge while still denying civil liability. A victim must still prove his civil case in court against a defendant who has pleaded nolo contendere and, as the majority puts it, has preserved or "consolidate[d]" his resources in defense of his property. Certain goals of the criminal justice system—including restitution to victims or the admission of guilt as a step toward rehabilitation—are thereby compromised to some extent in each case in which a nolo plea is accepted. See *State* v. *Fowlkes*, 283 Conn. 735, 744, 930 A.2d 644 (2007) (restitution serves state's rehabilitative interest in having defendant take responsibility for his conduct by making victim whole);[4] see

[4] The majority notes that a trial court, in accepting a nolo plea, is not prevented from ordering restitution to the victim. The accuracy of this point is obvious, but its materiality to the majority's logic is not. General Statutes § 53a-28 (c) limits the scope of financial restitution to victims of criminal conduct. The court may decline to award financial restitution if the defendant is unable to pay. Additionally, the court may order financial restitution

also *State* v. *McCleese*, 333 Conn. 378, 408, 215 A.3d 1154 (2019) (acknowledging that legitimate penal goals include deterrence, retribution, incapacitation, and rehabilitation). These goals are sacrificed for the salutary purpose of the "efficient disposition of criminal cases by encouraging plea bargaining." The majority tells us that "[a]llowing the use of nolo contendere pleas as proof of underlying criminal conduct in subsequent civil litigation *would*, *thus*, *undermine the very essence of the nolo contendere plea itself*." (Emphasis added.), citing J. Kuss, Comment, "Endangered Species: A Plea for the Preservation of *Nolo Contendere* in Alaska," 41 Gonz. L. Rev. 539, 562 (2006).[5] Thus has developed the evidentiary rule that now has been codified at § 4-8A (a) of the Connecticut Code of Evidence.

I have no quarrel with the policy of permitting defendants who plead nolo contendere to prevent the admission of that plea from being used to establish civil liability against them in subsequent litigation brought by their alleged victims. This case, certified to us from the United States District Court, requires us to deter-

only for "easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses . . . ." General Statutes § 53a-28 (c). As a result, even if the court orders financial restitution, the victim may still bring a civil suit for these excluded damages.

[5] As I note subsequently in this opinion, I believe that the majority's admonition, quoted in the text, is an overstatement. Even the authority it relies on is overstated. See footnote 10 of this opinion. In particular, the footnotes associated with the particular pages of the law review article the majority cites make clear that the main purpose of the rule prohibiting the admission of a plea of nolo contendere in later proceedings is to permit the defendant to avoid making an admission of guilt and to retain the ability to present evidence of his innocence in subsequent litigation. See J. Kuss, supra, 41 Gonz. L. Rev. 561–62 and nn.181–82. As I discuss in this opinion, admission of a defendant's plea of nolo contendere under the present circumstances would not undermine this purpose because the plea would not be dispositive evidence of liability, and the defendant would retain the ability to offer competing evidence of his or her innocence.

mine how far this policy extends, namely, to what lengths must the judiciary, through its rules of evidence, go to encourage plea bargaining and thereby deprive one or more forums of relevant evidence to resolve a subsequent controversy? Is it always true that admitting a nolo plea in any subsequent civil litigation as proof of criminal conduct will "undermine the very essence" of the nolo plea? I am skeptical.

In my view, by holding that the defendant's plea of nolo contendere[6] is not admissible in the present controversy, today's decision unnecessarily extends the rule of inadmissibility beyond the scope of its intended purpose—to encourage plea bargaining—to ensure victim compensation, which, although laudable, is not the purpose of this rule.[7] Despite its protestation to the con-

[6] I note that, to plead nolo contendere, a defendant must submit a standard form, available on the Judicial Branch website, which provides in relevant part: "I do not want to contest the claims of the [s]tate of Connecticut that are in the complaint; and, I will not contend with the [s]tate of Connecticut about the complaint." Additionally, at the defendant's underlying plea proceedings, when asked how he plead to "the charge of assault in the first degree, on or about October [10] . . . 2016, in violation of General Statutes § 53a-59," the defendant responded, "[n]o contest." See footnote 8 of this opinion.

[7] It is not debatable that today's decision, rather than applying or interpreting existing law, extends the scope of this evidentiary rule at issue. The majority candidly admits as much in footnote 12 of its opinion when it acknowledges that "we have not yet addressed" the issue at hand. The majority resolves a split of authority among our trial courts and finds itself compelled to overrule the older of the two trial court precedents making up that split of authority. Compare *Allstate Ins. Co.* v. *Simansky*, 45 Conn. Supp. 623, 630, 738 A.2d 231 (1998), with *Allstate Ins. Co.* v. *Linarte*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005150-S (May 24, 2007) (43 Conn. L. Rptr. 664, 669). Nor is this a situation in which we are construing the terms of our Code of Evidence to apply to the issue presented. We are not bound by the wording of the rule, as contained either in our Code of Evidence or in our prior case law. As this court has explained, the Code of Evidence "was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community." *State* v. *DeJesus*, 288 Conn. 418, 455, 953 A.2d 45 (2008). This court retains "the authority to modify the common-law rules of evidence codified in the code . . . ." Id., 462.

trary, the majority treats the rule codified at § 4-8A (a) (2) as akin to an absolute privilege that cannot be pierced. I do not believe that "the very essence" of the nolo plea itself will be undermined if the defendant's plea is admitted into evidence in the insurance coverage dispute pending in District Court. Nor do I believe that our case law supports the majority's holding.

Like many rules of evidence, the rule that evidence of a conviction based on a plea of nolo contendere is inadmissible is far from absolute. Connecticut courts, courts in other jurisdictions, and our legislature have recognized or created exceptions to § 4-8A (a) (2), or its equivalent, beyond those found in § 4-8A (b) of the Connecticut Code of Evidence.[8] In each of these con-

[8] I note that the rule barring the admission of pleas of nolo contendere has been inconsistently phrased, adding to the confusion regarding its scope. For example, under the current state of our law, it is unclear whether this rule applies only when a party seeks to admit a nolo plea "against a person who has entered" into the plea agreement, in this case, the defendant. Conn. Code Evid. § 4-8A (a). By its very terms, § 4-8A (a) bars admission only under those circumstances. See *State* v. *Martin*, 197 Conn. 17, 21 n.7, 495 A.2d 1028 (1985) ("the plea of nolo contendere may not be used *against the defendant* as an admission in a subsequent criminal or civil case" (emphasis added)), overruled in part on other grounds by *State* v. *Das*, 291 Conn. 356, 968 A.2d 367 (2009). This strongly suggests that the plea would be admissible if the individual who entered into the plea agreement was not a party to the subsequent litigation. By contrast, our courts at times have stated the rule more broadly: "[A] prior plea of nolo contendere and a conviction based thereon may not be admitted into evidence in a subsequent civil action or administrative proceeding to establish either an admission of guilt or the fact of criminal conduct." *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 51, 757 A.2d 501 (2000); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.13.5 (c) (2), p. 532 ("A plea of nolo contendere is not a confession of guilt, but just a plea that the accused will not contest the issue of guilt and will be sentenced as a guilty person. . . . [It] is not an admission of guilt and cannot be used as an admission in a later proceeding." (Internal quotation marks omitted.)).

It is also unclear whether this rule applies only when the opposing party seeks to establish the defendant's civil liability, which is not the case here. See *Elevators Mutual Ins. Co.* v. *J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010) ("[t]he prohibition against admitting evidence of [no] contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea"), citing *Allstate Ins. Co.* v.

texts, it has been determined that the policy of encouraging plea bargaining should yield to a competing public policy, presumably either because the interest in encouraging plea bargaining has become more attenuated in a particular context or because the competing policy is more powerful.

For example, in *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 757 A.2d 501 (2000), an arbitrator reinstated the employment of "an employee who [had] been terminated following his conviction [of larceny by embezzlement, on] the basis of . . . a plea [of nolo contendere], of embezzling the employer's funds . . . ." Id., 48. Notwithstanding this court's recognition that it had "stated in the context of litigation and administrative rulings that a prior conviction based [on] a nolo contendere plea may have no currency beyond the case in which it was rendered," we held that the arbitration award violated public policy; id., 49; and therefore upheld the trial court's vacatur of the award because "the parties cannot expect an arbitration award approving conduct [that] is illegal or contrary to public policy to receive judicial endorsement . . . ." (Internal quotation marks omitted.) Id., 45, quoting *Watertown Police Union Local 541* v. *Watertown*, 210 Conn. 333, 339, 555 A.2d 406 (1989). We thereby recognized that the policy favoring nolo pleas as a means of encouraging plea bargaining may give way in some instances when another "strong public policy" is at issue, such as the public policy against embezzlement. (Internal quotation marks omitted.) *Groton* v. *United Steelworkers of America*, supra, 45. This included "the policy that an employer should not be compelled to reinstate an

Simansky, 45 Conn. Supp. 623, 628, 738 A.2d 231 (1998); see also J. Kuss, supra, 41 Gonz. L. Rev. 565 (prospect of civil liability does not control course of related criminal proceedings).

employee who has been convicted of embezzling the employer's funds . . . ." Id., 48.

Additionally, in *State* v. *Daniels*, 248 Conn. 64, 726 A.2d 520 (1999), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005), the defendant appealed from the trial court's revocation of his probation pursuant to General Statutes (Rev. to 1995) § 53a-32, based on his arrest for burglary for breaking into an automobile. *State* v. *Daniels*, supra, 65, 67–68. The state claimed that the defendant's appeal was moot because, after the revocation of his probation, he entered a plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to the underlying charge. *State* v. *Daniels*, supra, 69. According to the state, "the trial court [could] grant the defendant no practical relief . . . [because, even] if the court were to agree with the defendant's claims on appeal, [and thus] the defendant [was] granted a new probation revocation hearing . . . the defendant's plea of guilty under the *Alford* doctrine would estop him from asserting his innocence at the new hearing." Id., 70. This court held that the appeal was not moot because, if it reversed the judgment, it could afford the defendant practical relief. See id., 73. Specifically, we concluded that, although the *Alford* plea would be admissible as evidence at a new probation hearing, the trial court would have broad discretion to determine whether to revoke probation, perhaps arriving at a different disposition. See id. ("the defendant's conviction based on his *Alford* plea would establish a violation of the conditions of the defendant's probation"). The trial court's broad discretion necessarily would include consideration of the defendant's *Alford* plea, which meant both that the defendant had been convicted and that he might be innocent of the charged crimes. Thus, although admissible, the defendant's *Alford* plea was not dispositive evidence. This procedure balances two competing pub-

lic policies—encouraging plea bargaining and providing the court with the discretion necessary to ensure that individuals on probation abide by the terms of their release into the community.[9]

Similarly, in *Godin* v. *Godin*, Docket No. FA-93-53345-S, 1995 WL 491420 (Conn. Super. August 8, 1995), aff'd, 43 Conn. App. 918, 684 A.2d 1225 (1996), the trial court prioritized the best interest of the children in a postdissolution matter over the public policy underlying pleas under the *Alford* doctrine. Specifically, after the trial court granted the parties shared custody of their children, the plaintiff entered an *Alford* plea to two counts of sexual assault based on his having had contact with the intimate areas of his two older children. Id., *1–2. The defendant then moved for sole custody premised on this change of circumstances. Id., *2. The trial court granted the motion based on the children's best interest, notwithstanding the nature of the pleas: "The fact that [the plaintiff] entered '[*A*]*lford*' pleas to these charges does not alter the fact of conviction. The conviction is a material change in circumstances since the divorce was granted and this [c]ourt cannot conclude that the best interest[s] of these children would be facilitated by their [abuser's] being in a custodial position. It is acknowledged that the youngest child was not abused by the husband, but it is logical to assume she could be at risk." Id.

Connecticut is not unique in balancing competing policy considerations in determining the admissibility of a plea of nolo contendere. Other jurisdictions like-

[9] Although the majority is correct that the rules of evidence do not apply in revocation of probation proceedings, the court in *Daniels* nonetheless had to consider the policy implications of admitting pleas of nolo contendere under those circumstances. See *State* v. *Daniels*, supra, 248 Conn. 64. Moreover, the majority fails to acknowledge, let alone respond to, this court's application of a policy balancing test in other circumstances in which the Code of Evidence undoubtedly does apply.

wise have held such pleas admissible when balanced against competing public policies, noting that the policy in favor of pleas of nolo contendere remains intact because the defendant still may assert his or her innocence, as the plea is not dispositive evidence of criminal conduct. See, e.g., *State* v. *Ruby*, 650 P.2d 412, 414 (Alaska App. 1982) (plea of nolo contendere was admissible in revocation of probation proceedings but, consistent with purpose of pleading nolo, admission does not collaterally estop defendant from asserting his innocence); *State ex rel. Oklahoma Bar Assn.* v. *Bradley*, 746 P.2d 1130, 1134 (Okla. 1987) (because of important purpose of regulating attorneys, "the fact that the plea entered was nolo contendere, and not admissible in a civil action would not preclude it from being admitted as evidence in a proceeding in a disciplinary matter against a member of the bar"); *Turton* v. *State Bar*, 775 S.W.2d 712, 715 (Tex. App. 1989, writ denied) (despite rule prohibiting admission of plea of nolo contendere in civil cases against individual who entered plea, rule requiring suspension of attorney's law license for committing serious crime applied regardless of type of plea).

In these cases, our courts and other courts have balanced the competing public policies to determine the admissibility of a plea of nolo contendere. Once admitted, the nolo plea constituted evidence of a conviction, although not an admission to the underlying facts. See, e.g., *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 52 (in holding that nolo plea was admissible, this court concluded that nolo plea "may be viewed, as in the present case, as a conviction for embezzlement of the employer's funds"); *State* v. *Daniels*, supra, 248 Conn. 73 ("the defendant's conviction based on his *Alford* plea would establish a violation of the conditions of [his] probation, thereby significantly lightening the state's burden under the first component, the evidentiary phase, of a new probation revocation hearing"); see

also *Sokoloff* v. *Saxbe*, 501 F.2d 571, 574–75 (2d Cir. 1974) (plea used as admission of guilt); *State* v. *Ruby*, supra, 650 P.2d 414 ("allowing use of a no contest plea to establish a violation of law").

Such evidence, however, was not necessarily dispositive of whether the insured committed an intentional or criminal act; rather, the insured had the opportunity to rebut this evidence with competing evidence. See *State* v. *Daniels*, supra, 248 Conn. 73; see also *State* v. *Ruby*, supra, 650 P.2d 414. But if the insured offered no competing evidence, the plea of nolo contendere was sufficient to establish the insured's commission of the crime. See, e.g., *State* v. *Daniels*, supra, 73; see also *State* v. *Ruby*, supra, 414. As a result, courts have applied a burden shifting approach when determining what weight to afford admissible pleas of nolo contendere.

Our legislature has enacted other exceptions to the general rule barring the admission of pleas of nolo contendere. See, e.g., General Statutes § 1-110a (a) (permitting attorney general to apply to Superior Court to revoke or reduce pension of public officials or state or municipal employees who plead nolo contendere to any crime related to state office); General Statutes § 38a-720m (b) (5) (D) (allowing for suspension or revocation of license of third-party administrator after hearing when its agent has plead nolo contendere); General Statutes § 54-1q ("[t]he court shall not accept a plea of guilty or nolo contendere from a person in a proceeding with respect to a violation of section 14-110, subsection (b) or (c) of section 14-147, section 14-215, subsection (a) of section 14-222, subsection (a) or (b) of section 14-224 or section 53a-119b unless the court advises such person that conviction of the offense for which such person has been charged may have the consequence of the Commissioner of Motor Vehicles suspending such person's motor vehicle operator's license"); see also

Sokoloff v. *Saxbe*, supra, 501 F.2d 574–75. The majority lumps many of these legislative exceptions together into a category that it labels "collateral consequences" of a criminal conviction based on a nolo plea. The majority assures us it recognizes that a criminal defendant cannot fully be protected against every such eventuality. And that is my point. Whether called "collateral" or by some other descriptor, these evidentiary consequences are permitted only because it has been determined in that particular circumstance—by a court, legislature or other body—that a more compelling policy outweighs the judicial policy favoring nolo pleas as a way to encourage plea bargaining.

The case before the United States District Court involves an insurer's duty to defend the defendant pursuant to an insurance policy with a criminal acts exclusion; see footnote 2 of this opinion; when the defendant was sued civilly for the same conduct that led to his plea of nolo contendere to an assault charge. Under these circumstances, I find the link between the present dispute in the District Court and the judicial policy of encouraging plea bargaining significantly weaker than the direct link between the criminal forum, in which the defendant pleaded nolo, and the civil forum in which Tailan Moscaritolo, the alleged victim in the underlying incident, sued the defendant. At the same time, recognizing an exception to the general rule of inadmissibility of nolo pleas under the circumstances of this case ensures the vindication of a public policy that competes with—and, in my view, overtakes—the policy of encouraging plea bargaining, namely, the policy of not indemnifying insureds for criminal acts.

To my first point, it is not at all evident that, in an insurance coverage dispute, admitting a defendant's plea of nolo contendere as evidence that he committed a criminal act would necessarily "undermine the very essence of the nolo contendere plea itself" and result

in less plea bargaining. To just say it would does not make it so. The principal advantage to a defendant of being allowed to plead nolo contendere is that his conviction may not be used as evidence against him in his alleged victim's civil lawsuit for damages. That benefit of his plea bargain would not be upset in the present case by entering the defendant's conviction into the record in the District Court controversy. To prove his case against the defendant in Superior Court, Moscaritolo will still have to prove that the defendant's actions—negligent or intentional—were both actionable and caused his injury and damages.

It is only by chance that the crime the defendant was convicted of committing took place under circumstances that even arguably could be covered by insurance, in this case, under his mother's homeowners insurance policy. Innumerable criminal defendants plead nolo contendere without any hope of insurance coverage. I am not convinced that admitting a defendant's conviction into evidence in a coverage dispute will result in so many fewer plea bargains that it merits excluding relevant evidence from this collateral controversy.

Balanced against what, under these circumstances, is a more attenuated interest in encouraging plea bargains is the shared interest of the public, insurers, and policyholders who pay premiums in not permitting those who commit criminal acts to be indemnified against liability for damages caused by those acts. See, e.g., *Auto Club Group Ins. Co.* v. *Daniel*, 254 Mich. App. 1, 5, 658 N.W.2d 193 (2002) ("as a matter of public policy, an insurance policy that excludes coverage for a person's criminal acts serves to deter crime, while a policy that provides benefits to those who commit crimes would encourage it" (emphasis omitted)); *State Farm Fire & Casualty Co.* v. *Schwich*, 749 N.W.2d 108, 114 (Minn. App. 2008) ("[I]t is against public policy to

licens[e] intentional and unlawful harmful act[s]. . . . Minnesota courts have repeatedly declined to find liability coverage for unlawful conduct and serious criminal acts." (Citation omitted; internal quotation marks omitted.)); *Litrenta* v. *Republic Ins.*, 245 App. Div. 2d 344, 345, 665 N.Y.S.2d 679 (1997) ("it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute"); *State Farm Mutual Automobile Ins. Co.* v. *Martin*, 442 Pa. Super. 442, 445, 660 A.2d 66 (1995) ("a person should not be indemnified by insurance against the consequences of his [wilful], criminal assault" (internal quotation marks omitted)), appeal denied, 544 Pa. 676, 678 A.2d 366 (1996). A minority of jurisdictions have not followed the general rule barring coverage for criminal or intentional acts. "The more lenient view . . . finds that the public interest in having victims recover for their injuries outweighs the public interest in forcing the [wilful] wrongdoer to pay the consequences of the wrongdoing." (Internal quotation marks omitted.) *Grinnell Mutual Reinsurance Co.* v. *Jungling*, 654 N.W.2d 530, 538–39 (Iowa 2002); see id. (discussing minority approach). Other jurisdictions have adopted a multifactor balancing test to determine which of the competing public policies should prevail. See, e.g., id., 539 ("[c]ourts in Florida, Pennsylvania, and Oregon engage in a specific analysis to determine whether coverage of a particular act is against public policy [when] the policy has no intentional-acts exclusion"). Although this court has not expressly adopted either the majority or minority rule, the analysis evident in our case law, at the very least, would prefer a balancing approach. See *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 51–52 (acknowledging general rule at issue but holding that public policy concerns unique to case justified admission of plea of nolo contendere).

In my view, a proper balance of competing public policies supports the admissibility of an insured's con-

viction based on a plea of nolo contendere in a case such as the one certified to us—a declaratory judgment action brought by an insurer to determine the applicability of a criminal acts exclusion in an insurance policy.[10] That is not to say, however, that evidence of the conviction is dispositive of the question of whether the criminal acts exclusion prevails in the case before the District Court. See, e.g., *State* v. *Daniels*, supra, 248 Conn. 73 and n.11 (recognizing admissibility of *Alford* plea in violation of probation proceeding but not determining whether plea constituted conclusive proof of violation of probation); id., 84–86 (*McDonald*, *J.*, concurring) (agreeing that *Alford* plea, which is equivalent to nolo plea, is admissible in violation of probation proceeding but not conclusive of guilt given public policy underlying plea). In other words, the insured could seek to present admissible evidence to contest his or her guilt and, thus, may raise the possibility of coverage, which, in a dispute over the duty to defend, might arguably trigger an insurer's broad duty. See *Nash Street, LLC* v. *Main Street America Assurance Co.*, 337 Conn. 1, 9–10, 251 A.3d 600 (2020).[11] In this way, the rule I suggest would vindi-

[10] Although the majority is correct that courts in some jurisdictions have held that pleas of nolo contendere are not admissible in insurance policy disputes; see *Safeco Ins. Co. of Illinois* v. *Gasiorowski*, Docket No. 20-3877, 2021 WL 2853255, *3 (E.D. Pa. July 7, 2021); *Elevators Mutual Ins. Co.* v. *J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010); *Korsak* v. *Prudential Property & Casualty Ins. Co.*, 441 A.2d 832, 834 (R.I. 1982); some of the cases the majority cites did not involve the issue presented here—the admissibility of the nolo plea in the subsequent action—but, instead, concerned whether the nolo plea estopped individuals who entered the pleas from challenging their liability in a subsequent civil action. See *Lichon* v. *American Universal Ins. Co.*, 435 Mich. 408, 431, 459 N.W.2d 288 (1990); *Safeco Ins. Co. of America* v. *Liss*, 303 Mont. 519, 533, 16 P.3d 399 (2000); *Hopps* v. *Utica Mutual Ins. Co.*, 127 N.H. 508, 511, 506 A.2d 294 (1985).

[11] "[T]he duty to defend is triggered whenever a complaint alleges facts that potentially could fall within the scope of coverage, whereas the duty to indemnify arises only if the evidence adduced at trial establishes that the conduct actually was covered by the policy. Because the duty to defend is significantly broader than the duty to indemnify, [when] there is no duty to defend, there is no duty to indemnify . . . ." (Emphasis omitted; internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268

cate the public policy that disfavors insuring against criminal conduct by requiring the insured to establish at least a possibility of coverage; see *St. Paul Fire & Marine Ins. Co.* v. *Shernow*, 222 Conn. 823, 832, 610 A.2d 1281 (1992) ("[w]here [as here] no finding of an intent to injure has been made, nothing in the public policy of this [s]tate precludes indemnity for compensatory damages flowing from [the] defendant's volitional act" (emphasis omitted; internal quotation marks omitted)); while preserving the defendant's ability to maintain his innocence. See *State* v. *Bridgett*, 3 Conn. Cir. 206, 208–209, 210 A.2d 182 (1965) ("[t]he only basic characteristic of the plea of nolo contendere [that] differentiates it from a guilty plea is that the defendant is not estopped from denying the facts to which he pleaded nolo contendere in a subsequent judicial civil proceeding").

For at least two reasons, this rule would not undermine the "very essence" of the public policy underpinning pleas of nolo contendere: encouraging plea bargaining. First, Moscaritolo still cannot use the defendant's nolo plea in the lawsuit he has brought against him, alleging civil liability premised on the same facts as those underlying the defendant's conviction. See, e.g.,

Conn. 675, 688, 846 A.2d 849 (2004). I note that, although the certified question involves only the duty to defend, my same reasoning would apply in the duty to indemnify context. The plea of nolo contendere would be admissible but not dispositive. Notably, the rule I suggest would not depart from authority presently available on this question. In fact, the last time a federal court certified this question to this court; see *Northfield Ins. Co.* v. *Derma Clinic, Inc.*, 440 F.3d 86, 93 (2d Cir. 2006); the only Connecticut case to address the question held that a conviction based on a plea of nolo contendere is admissible to "trigger" a similar policy exclusion and defeat a duty to indemnify the insured. See *Allstate Ins. Co.* v. *Simansky*, 45 Conn. Supp. 623, 629, 738 A.2d 231 (1998) ("For purposes of the exclusion, the conviction cannot be disregarded as if it did not happen. It did happen, and in so happening triggered the exclusion."). But see *Allstate Ins. Co.* v. *Linarte*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005150-S (May 24, 2007) (43 Conn. L. Rptr. 664, 669).

Elevators Mutual Ins. Co. v. *J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010) ("[t]he prohibition against admitting evidence of [no] contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea").

Second, I do not believe that the District Court, by entering the plea of nolo contendere into evidence in a declaratory judgment action, would be admitting the plea "against" the defendant in the way § 4-8A (a) (2) contemplates. The majority does not appreciate how the "mere procedural device" of a declaratory judgment action has skewed its reasoning. (Internal quotation marks omitted.) *Wilson* v. *Kelley*, 224 Conn. 110, 115–16, 617 A.2d 433 (1992); see id. ("[d]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated" (internal quotation marks omitted)).

This failure is revealed most prominently in the majority's statement that it sees "no principled reason to rigorously enforce the restrictions imposed by § 4-8A (a) of the Connecticut Code of Evidence on the victim of a crime in a tort case [i.e., Moscaritolo] while simultaneously ignoring that rule for a corporation [i.e., an insurance company] in a declaratory judgment action arising out of the very same set of facts." The principled reason for the distinction, of course, lies in the admitted purpose of the rule itself: to encourage plea bargaining. Not surprisingly, this goal is impacted differently by the two different litigation postures the majority compares. The purpose of the rule is not implicated directly (or by its terms, at all) in a declaratory judgment action to resolve an insurance coverage dispute in the same way as in an action by the victim against the defendant. Unlike the victim of the crime, who seeks to establish the defendant's liability in tort, an insurance company

in a declaratory judgment action seeks a very different remedy: an adjudication of the parties' contractual rights. See, e.g., *Walker* v. *Schaeffer*, 854 F.2d 138, 143 (6th Cir. 1988) ("We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission [that] would preclude liability. Rule 410 [of the Federal Rules of Evidence] was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts [that] would indicate no civil liability . . . ." (Emphasis omitted.)).

To illustrate this point, consider the sequence of events that would lead to a subrogation action by Moscaritolo against the plaintiff insurer under these facts. When the defendant agreed to plead nolo contendere to a charge of assault in the first degree, Moscaritolo already had sued him in Superior Court. Assume that, after the defendant's plea, Moscaritolo pursued and obtained a judgment against him. If the plaintiff refused to indemnify the defendant for the judgment rendered against him, Moscaritolo would have the right to bring a subrogation action against the plaintiff insurer under General Statutes § 38a-321, standing in the shoes of the insured, the defendant, who would not be a party to that action. Section 4-8A (a) (2) of the Connecticut Code of Evidence prohibits the admission of a plea of nolo contendere only if it is sought to be used "against a person who has entered" the plea. By its terms, the rule would therefore not be implicated in Moscaritolo's subrogation action, and there would be no obstacle to admitting the defendant's nolo plea as evidence in support of the

plaintiff insurer's defense that the criminal acts exclusion of the insurance policy applies.

The fact that, in the subrogation action, Moscaritolo would stand in the defendant's shoes does not alter the outcome because § 38a-321 grants only a subrogation plaintiff the same rights as the insured under the policy—that is, the right to assert "any claim or defense that [the insured] himself could have raised had [the insured] brought suit against [the insurer]." *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 198, 663 A.2d 1001 (1995). A subrogation plaintiff steps into the insured's shoes as to any right of the insured that arises out of the insurance policy but not as to any right that arises *outside of* the insurance policy. See, e.g., id. ("Because [the insured's] right to maintain the confidentiality of communications with his psychiatrist arises under [General Statutes] § 52-146e and not under his contract of insurance with [the defendant], § 38a-321 does not empower [the plaintiff] to waive [the insured's] privilege").

In the present controversy, the defendant's "right" not to have a nolo plea admitted "against" him is not a right contained in the insurance policy at issue in the declaratory judgment action but is a common-law evidentiary rule that is codified in our Code of Evidence. As a result, in a subrogation action under § 38a-321 brought by Moscaritolo against the plaintiff insurer, Moscaritolo could not object to the admission of the defendant's plea of nolo contendere. It is plainly relevant to whether the criminal acts exclusion applies in this case.

The insurer, however, has cut to the chase—responsibly and reasonably—by filing a declaratory judgment action to resolve all parties' rights and obligations, which remain the same regardless of the procedural posture. See *Wilson* v. *Kelley*, supra, 224 Conn. 115–16

("[d]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated" (internal quotation marks omitted)). If we prohibit insurers from admitting nolo pleas in declaratory judgment actions such as this case, insurers may decide to deny coverage and to wait for any potential subrogation action under § 38a-321, in which the insured's plea of nolo contendere would, in my view, clearly be admissible. This would defeat the purpose of a declaratory judgment action.

Further, under the regime the majority prescribes, without the benefit of the nolo plea to prove the defendant's criminal actions and the application of the exclusion, the insurance company will be left to parse police reports and to seek cooperation from witnesses to an incident to which it was not a party and that it did not investigate in the first instance.[12] Police officers and

[12] The majority states that the language of the policy—that the exclusion "applies regardless of whether or not such insured person is actually charged with, or convicted of a crime"—makes "either the existence or absence of a criminal conviction contractually irrelevant." (Emphasis omitted.) Text accompanying footnote 11 of the majority opinion. Contractually irrelevant, maybe. But it does not make the existence of the criminal conviction irrelevant *as an evidentiary matter*. Surely, the defendant's conviction of first degree assault makes it "more probable" that he in fact committed a criminal assault, which is clearly "material to the determination of the proceeding": whether the criminal acts exclusion applies. Conn. Code Evid. § 4-1 (defining "relevant evidence"). If the majority means to suggest that insurance companies can solve the admissibility question by using different contract language, such as a criminal acts exclusion that turns explicitly on the existence of a criminal conviction, regardless of how that conviction was obtained, I am not convinced. As long as the majority is sticking to an interpretation of § 4-8A of the Connecticut Code of Evidence that strictly prohibits the admissibility of nolo pleas in subsequent civil proceedings, I do not see how different contract language affects the admissibility of the defendant's plea. Rather, such a change in the policy language might affect whether the plea of nolo contendere was dispositive, even if it were ruled admissible. The defendant conceded as much at oral argument before this court when his counsel agreed that the nolo plea still would be inadmissible even if the policy language were more specific about the criminal acts exclusion applying when there has been a conviction, including a conviction pursuant to a nolo plea.

detectives will be subpoenaed, not to a criminal trial or even to the ensuing civil trial brought by the victim, but to an insurance coverage trial at which the insurer stands in the shoes of the prosecutor trying to prove a crime was committed. Even less than the defendant himself, the victim likely would no longer have any interest in proving a crime was committed, which would ensure the application of the exclusion. The truth seeking function will have been turned upside down.[13]

Finally, the majority's insistence on evidentiary equivalency between a tort action brought by a victim and a declaratory judgment action brought by an insurer reveals a determination to advance a very different policy (compensating victims of criminal activity) than that which the rule purports to advance (favoring plea bar-

To the extent the majority is suggesting that, by entering into an insurance policy agreement that explicitly excludes coverage when the insured pleads nolo contendere, the insured waives his or her evidentiary right to bar the admissibility of the nolo plea, I do not believe case law is clear on this issue. See C. Paulson, "Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure," 45 Ariz. St. L.J. 471, 515–22 (2013) (noting that some courts have been hesitant to uphold contractual provisions that waive evidentiary rules or alter evidentiary presumptions).

[13] Indeed, the majority candidly alludes to exactly such inverted motivations, with the state at least tacitly complicit: "During the [trial court's] canvass [of the defendant], the prosecutor informed the court that there was a pending civil case filed by the victim, Moscaritolo, against [the defendant] and his mother's insurance company. He further advised the court that [the defendant] was cooperating in that civil lawsuit, and, for that reason, the victim was 'not necessarily seeking much jail time' and that he may be monetarily indemnified for the injuries he suffered." The defendant received a sentence of twelve years of imprisonment, execution suspended after two years, and three years of probation. Inasmuch as the defendant lived with his mother, whose homeowners insurance policy is the policy implicated, it appears clear that it was not the defendant who was going to "monetarily indemnif[y]" Moscaritolo. Moreover, given that the trial court has granted the parties an indefinite continuance in Moscaritolo's civil action during the pendency of the federal declaratory judgment action, it appears clear that part of the resolution of the criminal case, and part of the defendant's cooperation, hinged on seeking restitution through insurance proceeds, thereby in fact costing the insurer and its policyholders, and thereby furthering what public policy disfavors: the indemnification of criminal acts.

gaining). A policy that favors compensating victims of crime may be a laudable one, and our state has enacted a number of provisions to advance this policy, including the victim's rights amendment to the state constitution and subsequent enforcement legislation. See Conn. Const., amend. XXIX (b) (9) ("the right to restitution"); General Statutes § 54-215 ("Office of Victim Services shall establish a Criminal Injuries Compensation Fund for the purpose of funding the compensation services provided for by sections 54-201 to 54-218, inclusive"). Annexing this policy to § 4-8A of the Connecticut Code of Evidence, which was intended to facilitate plea bargaining, and enforcing it in an insurance contract dispute, requires us to import far more in the way of policy into this rule than a mere evidentiary rule should—or in my view, was intended to—bear. "Connecticut law has long upheld policy exclusions that have the effect of depriving an innocent victim of the benefit of the tortfeasor's liability insurance." *Allstate Ins. Co.* v. *Simansky*, 45 Conn. Supp. 623, 627, 738 A.2d 231 (1998). I would leave the balancing of any further implications and impacts—to victims, insureds, insurers and policyholders whose premiums are affected—to the legislature.

As a result, I believe that, under our current case law, the defendant's plea of nolo contendere is admissible in the present case to prove his conviction and as an opposing party statement that he did not contest the criminal complaint charging him with first degree assault. See footnote 6 of this opinion. Although the policy exclusion at issue does not require that the defendant be "charged with, or convicted of a crime"; see footnote 2 of this opinion; the fact of the conviction and his admission that he did not contest the criminal charges against him are at least relevant to whether he committed an "intentional or criminal [act] . . . ." See id. It is for the fact finder to determine the weight of this

evidence. The defendant, however, may offer competing evidence to establish his innocence. Thus, in the present case, depending on that competing evidence, he may be able to establish that there is at least a material issue of fact as to whether he has established a possibility of coverage, thereby triggering the plaintiff's duty to defend.

Because I disagree with the majority's balancing of these competing public policy concerns, I therefore respectfully dissent from the majority's holding that the defendant's plea of nolo contendere is inadmissible but concur insofar as the majority concludes that his plea does not necessarily trigger the policy's criminal acts exclusion.