No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN STANLEY,

Petitioner,

v.

STATE OF CONNECTICUT, *Respondent.*

On Petition for a Writ of Certiorari
to the Connecticut Appellate Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the intentional use of the *67 feature to obfuscate one's phone number create a justifiable, reasonable, or a legitimate expectation of privacy which mandates suppression under a Fourth Amendment analysis?
2. Is it improper for a prosecutor to knowingly illicit testimony from a witness in a manner to circumvent well established rules of search and seizure?
3. Was there sufficient evidence to convict the petitioner?
4. Did the Connecticut Habeas Court improperly apply the doctrine of *res judicata*?

RELATED PROCEEDINGS

Stanley v. Commissioner of Correction, PSC-200261, Supreme Court of Connecticut (December 22, 2020).

Stanley v. Commissioner of Correction, AC-40557, Appellate Court of Connecticut (November 26, 2019).

Stanley v. Warden, State Prison, TSR-CV-154007330-S, Superior Court of Connecticut (May 18, 2017).

Stanley v. Commissioner of Correction, AC-35600, Appellate Court of Connecticut (November 3, 2015).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Stanley, by and through undersigned counsel, respectfully requests that the Court grant a writ of certiorari to review the decision of the Connecticut Supreme Court affirming his convictions.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the State of Connecticut, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The denial of Mr. Stanley's petition for certification to the Connecticut Supreme Court is at *Stanley v. Commissioner of Correction*, 336 Conn. 901, 242 A.3d 712 (2020) and is reprinted in the Appendix at App. A.

The decision affirming the Habeas Court's denial of his petition for writ of habeas corpus by the Connecticut Appellate Court is at *Stanley v. Commissioner of Correction*, 194 Conn. App. 903, 220 A.3d 244 (2019) and is reprinted in the Appendix at App. B.

The memorandum of decision of the Connecticut Habeas Court's denial of his petition for writ of habeas corpus at *Stanley v. Warden, State Prison*, Docket No. CV154007330S, 2017 Conn. Super. LEXIS 978, (Super. May 18, 2017) and is reprinted in the Appendix at App. C.

The decision affirming Mr. Stanley's criminal convictions by the Connecticut Appellate Court is at *State v. Stanley*, 161 Conn. App. 10, 125 A.3d 1078 (2015) and is reprinted in the Appendix at App. D.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Supreme Court on the basis of 28 U.S.C. § 1257. The Connecticut Supreme Court denied Petitioner's certification to appeal on December 22, 2020. This petition follows in a timely manner pursuant to Supreme Court Rule 13.1 and the Court's March 19, 2020 order extending the deadline to file petitions for writs of certiorari in all cases to 150 days from the date of the lower court judgment.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 7, 2015, the petitioner filed a petition for a writ of habeas corpus, wherein he alleged, inter alia, that his right to the effective assistance of appellate counsel was violated. On September 11, 2016, the petition was amended. On September 7, 2016, the respondent filed a return and motion to dismiss certain claims as barred by *res judicata*. On November 1, 2016, a hearing was held. On November 4, 2016 the Habeas Court, *Sferrazza, J.*, issued a memorandum of decision dismissing, in part, the amended petition. Thereafter, on April 27 and May 12, 2017, the surviving claims were tried to the Court. On May 18, 2017, the Court issued a memorandum of decision denying the petition. App. C. On June 1, 2017, the Court granted certification to appeal. On June 20, 2017, the petitioner appealed. On November 26, 2019, the Appellate Court affirmed, per curiam, the judgment of the Habeas Court. App. B. On December 22, 2020 the Connecticut Supreme Court denied the petition for certification to appeal. App. A. This petition follows.

REASONS FOR GRANTING THE PETITION

The Habeas Court improperly held the petitioner to the "preponderance of the evidence" standard to prove prejudice. App. C, 7-8. Rather, a petitioner "satisfy[ies] the prejudice prong of *Strickland* by establish[ing] ... there is a reasonable probability that the [outcome] would have been different." *Farnum v. Comm'r of Corr.*, 118 Conn. App. 670, 678 n.3, 984 A.2d 1126 (2009). "[A] [petitioner] need not show that counsel's deficient conduct more likely than not altered the outcome ...." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This analysis is contrary to federal law. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O'Connor, concurring). In addition to the errors described, infra, the Habeas Court's entire review of these claims is thus fatally flawed. Additionally, the Habeas Court erroneously dismissed claims raised by the petitioner as barred as *res judicata*. The Appellate Court erred in affirming said judgment.

Accordingly, this petition must be granted to address whether the courts below decided the issues incorrectly.

Facts Relevant to Questions Presented

On February 14, 2012, the trial court issued a protective order that required the petitioner "not [to] contact [the victim] in any manner." The complainant, J.T., later called police alleging the petitioner repeatedly called her. Officer Robert Vanacore obtained an ex parte warrant for the petitioner's cell phone records, which revealed numerous phone calls from the petitioner to J.T. The petitioner was charged with "100 counts of criminal violation of a protective order, one count of stalking in the first degree, and one count of threatening in the second degree." Following a jury trial, the pro se petitioner was convicted of all counts. Prior to trial, the state had obtained the petitioner's phone records by way of an ex parte warrant but failed to comply with C.G.S. § 54-47aa(d) (2012), in that notice was not sent to the petitioner. Judge Stanley T. Fuger had ruled that these records would not be permitted into evidence unless first provided to the petitioner. The state failed to disclose the records. Instead, the state submitted J.T.'s purported records. Yet, the state did use the petitioner's records, through Vanacore's testimony and in summations to argue that the calls were prefixed by "*67" to block the petitioner's number. J.T.'s records reveal no such information. The state argued this evidence to demonstrate consciousness of guilt. Appellate counsel argued only "that because the state was not sanctioned for discovery violations, the state violated his rights to due process and a fair trial." Yet, no request for sanctions was made at trial. Appellate counsel altogether failed to raise a Fourth Amendment claim concerning this evidence.

In its prejudice analysis, the Habeas Court faulted the petitioner for failing to introduce the full trial transcript. App. C, 8-9. The Court ignored that he had subpoenaed appellate counsel's entire file, which she failed to comply with. The court refused the pro se petitioner's request to

"bring [counsel] back". Rather, the court released her. Thus, the court erroneously found the petitioner "chose" to offer fragments of the transcript. App. C, 9. Then, the court did not take judicial notice of the prior proceedings. *Id*. Under these circumstances the Court's failure to, sua sponte, consider the expanded record was egregious. The Appellate Court erred in affirming this injustice.

Argument – Question 1

"The application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The petitioner argues that the intentional use of the *67 feature to obfuscate one's phone number creates a justifiable, reasonable, or a legitimate expectation of privacy which mandates suppression under a Fourth Amendment analysis. The respondent concedes that C.G.S. § 54-47aa was not complied with, yet mistakenly relies on *Smith* to argue there is no expectation of privacy to one's phone records and thus no constitutional violation. This argument is predicated on an incorrect application of *Smith*. *Smith* involved the use of a "pen register"' by officers to "tap" incoming numbers made from a home landline. In its reasoning the Court doubted "people in general entertain any actual expectation of privacy in the numbers they dial," as "they must 'convey' phone numbers to the telephone company" *Id*. at 742-43. This is not *Smith* and the Appellate Court's repeated reference to *Smith* controlling during oral argument evidences the import of this case. Both Judges Flynn and Prescott below focused on whether *Smith* controlled this outcome. Moreover, the petitioner had a reasonable expectation of privacy, as the number dialed was blocked. The privacy rights of this state's citizens are in jeopardy.

In this case, cell phone account records containing network data obtained by ex parte warrant were used at the defendant's trial, as opposed to a pen register of mere numbers dialed from a landline. *Smith* is thus distinguishable. Moreover, the data obtained went beyond only the number called. A prefix of "*67" indicates an intent of a dialer not to disclose dialing information to recipients, further removing this matter from *Smith* and bolstering the argument of counsel below: *Smith* was decided "in the technological dark ages" and does not apply here. Indeed, five Justices questioned whether *Smith* applies in the modern era because it is "ill suited to the digital age." *U.S. v. Jones*, 565 U.S. 400, 417 (2012). Not a landline pen register, but the petitioner's personal cell phone account records are at issue. The record evidences this matter is more akin to *Carpenter v. U.S.*, 138 S.Ct. 2206 (2018) than *Smith*. *See also State v. Brown*, 331 Conn. 258, 272, 202 A.3d 1003, 1011 (2019) (ex parte warrant based on reasonable suspicion for cell site location records violated the Fourth Amendment). The petitioner had a reasonable expectation and right that his account information would be shielded from the intrusive eyes of the state, which would not otherwise be available to the state, but for the warrant issued in violation of statutory law.

This evidence was necessary to secure an arrest warrant, as the state admittedly could not otherwise identify the caller. The warrant is thus predicated on illegally obtained evidence. This "anonymous caller" information should have been excluded as fruit of the poisonous tree. Yet, inexplicably, in her petition for certification to appeal from the Appellate Court, counsel for the first time attacked the arrest warrant and use of the petitioner's phone records. In response, the state successfully argued that counsel failed to properly raise these claims below and cannot belatedly do so. That the state violated a statutory notice provision does not excuse the state from also conforming its conduct to the pertinent constitutional restraints. Indeed, the Supreme Court has excluded evidence arising "directly out of statutory violations that implicated important Fourth

and Fifth Amendment interests." *See McNabb v. United States*, 318 U.S. 332 (1943) (incriminating statements obtained during detention in violation of federal statutory law); *Nardone v. United States*, 308 U.S. 338 (1939) (evidence procured by wiretap in violation of Communications Act). Permitting evidence obtained in violation of C.G.S. § 54-47aa will encourage violations. This simply cannot stand.

The admission of this evidence was harmful, as it was not available by an alternative source. *See State v. Joyce*, 243 Conn. 282, 289-90, 705 A.2d 181, 185 (1988). No other evidence corroborated J.T.'s claim that the petitioner called her from a blocked number. Moreover, J.T.'s credibility was certainly suspect by virtue of her recantation. The state used the petitioner's phone records to rehabilitate J.T. and to establish a basis independent of her that the petitioner's measures to block his number was in consciousness of his guilt. This was relied heavily upon by the state in summations. The state made repeated comments about calls originating from a "blocked" number. The illegally obtained evidence established a basis for the state to gain a consciousness of guilt instruction. The evidence of the petitioner's guilt was not overwhelming in the absence of the evidence, comments, and jury instruction all gleaned from his cell phone records. Thus, the Habeas Court erred in determining that counsel's failure to raise this claim did not prejudice the petitioner. Critically, this conclusion was predicated on an error the Court induced, that is, the completeness of the record before it.

Argument – Question 2

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . .. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). *See also State v. Salamon*, 287 Conn. 509, 556, 949 A.2d 1092, 1125 (2008) (It is well established a prosecutor cannot create an impression upon a jury by innuendos in questions not supported by evidence). The record reveals that the Habeas Court erred in determining the petitioner was not prejudiced by appellate counsel's failure to raise an issue of prosecutorial impropriety regarding the state's use of petitioner's illegally obtained cell phone records. App. C, 5-13. The state's improprieties in eliciting testimony from Vanacore and its reference to this evidence in summations concerning his phone records violated the petitioner's right to due process and a fair trial and counsel's failure thus prejudiced him.

That the improprieties were harmful is patent. The state lacked even probable cause to arrest the petitioner without his phone records according to the warrant. On August 17, 2012, the state claimed it did not have his records, but would disclose them if it did. Judge Fuger ruled that if the state attempted to introduce these undisclosed records, they would not be permitted. The state then represented the records would not be used, yet circumvented the order by introducing the "fruits" of the records. The state elicited testimony from Vanacore that the records establish these calls contained a prefix code of "*67." "[T]hat's an indication of someone trying to block their phone number [to the recipient]."

J.T's records do not reveal efforts to block the caller information, yet she testified the calls were blocked. As the complainant's credibility was in doubt, it was critical for the state to corroborate her testimony and establish consciousness of guilt. The state argued in summations that the petitioner had blocked his number. The only source of that information was his phone records. The state used this evidence to inform the jury it could infer he blocked the number with a guilty conscience. Aside from the complainant's dubious testimony, the record is bereft of

evidence the petitioner called J.T. using a blocked number. Thus, the Habeas Court's conclusion that the petitioner was not prejudiced by appellate counsel's failure to raise this claim was both erroneous and belied by the record. The Appellate Court's per curiam affirmance of the Habeas Court's erroneous prejudice determination was likewise error.

Argument - Question 3

Appellate counsel failed to raise a claim on appeal that there was insufficient evidence to sustain 97 of the 100 counts of violating a protective order. There was no evidence to support that the protected party answered any of these alleged calls. Therefore, there was not sufficient evidence to establish J.T. was threatened, harassed, or frightened. Courts will look at the conduct as a whole supporting each individual charge of violation of a protective order. For example, in *State v. Binnette*, 86 Conn. App. 491, 61 A.2d 1197 (2004), the Court decided whether conduct was sufficient to sustain a conviction for violation of a protective order. Defendant Binnette called the protected party, told her he was coming to her house, went to her house and threw a beer bottle. The *Binnette* court decided that the aforementioned conduct, in conjunction with the fact that the protected party saw Binnette outside of her home and was frightened, was sufficient. In that and other cases such as *State v. Charles*, 78 Conn. App. 131, 826 A.2d 1172 (2003) and *State v. Hassel*, 94 Conn. App. 741, 894 A.2d 372 (2006) the focus has been not only on the conduct of a defendant but on whether or not the protected party was scared and harassed. There was no evidence that J.T. was scared and harassed by some 97 of the 100 calls that were made to the phone.

The conduct used as a basis to convict the petitioner of the vast majority of counts was that outgoing calls were merely made. It is debatable whether such conduct is sufficient to sustain convictions for an attempt to violate a protective order, but he was not so charged. Moreover, the petitioner's expert testified that this is a question not clearly addressed by our courts. Critically,

there was evidence that the receiving phone did not even belong to J.T., but rather Paul Spring. The petitioner's expert testified that such a claim should have been raised in this case. Thus, it is clear that the Habeas Court erred in determining that the petitioner was not prejudiced by this failure and the Appellate Court erred in affirming said judgment.

Argument – Question 4

The doctrine of *res judicata* bars a litigant from raising the same claim following a final judgment rendered upon the merits in a subsequent action. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). As noted above, the Habeas Court dismissed several claims reasoning that these claims were previously litigated and decided in the preceding writ, CV13-14005408-S or on appeal. However, the record reveals that the claims were not raised, litigated, and/or decided previously. In a memorandum of decision dated March 11, 2014, the prior court, Cobb, J., in CV13-14005408-S ruled on claims pertaining to: 1) the state's intimidation of witnesses at the criminal trial; and 2) constitutional violations based on the use of the protected party's phone record. However, in the underlying petition, the petitioner claimed: 1) that the state intimidated witnesses at the prior habeas trial; 2) constitutional violations based on the illegal seizure and subsequent use of his phone records; and 3) the true source of the calls was the petitioner's son. As none of the claims were raised and litigated in a prior habeas petition, or on appeal, the Habeas Court erred in dismissing these claims and this matter must be remanded for a determination of the issue on the merit. The Appellate Court thus erred in affirming the judgment of the Habeas Court.

CONCLUSION

For the foregoing reasons, Mr. Stanley respectfully requests this Court to consider the questions presented and redress the many constitutional violations that took place at his trial and during his appeals.

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APPENDIX A

SUPREME COURT

STATE OF CONNECTICUT

PSC-200261

STEVEN K. STANLEY

v.

COMMISSIONER OF CORRECTION

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

The petitioner Steven Stanley's petition for certification to appeal from the Appellate Court, 194 Conn. App. 903 (AC 40557), is denied.

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

James E. Mortimer, assigned counsel, in support of the petition.
Nancy L. Walker, assistant state's attorney, in opposition.

Decided December 22, 2020

By the Court,

/s/
Cory M. Daige
Assistant Clerk - Appellate

Notice Sent: December 22, 2020
Petition Filed: November 18, 2020
Hon. Samuel J. Sferrazza
Clerk, Superior Court, TSR-CV15-4007330-S
Clerk, Appellate Court
Reporter of Judicial Decisions
Staff Attorneys' Office
Counsel of Record

APPENDIX B

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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

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JAMES D. SULLIVAN *v.* ASSOCIATED INSURANCE AGENCY, LLC, ET AL.
(AC 41757)

Lavine, Prescott and Sheldon, Js.

Argued November 12—officially released November 26, 2019

Defendants' appeal from the Superior Court in the judicial district of Waterbury, *Agati*, *J.*

Per Curiam. The judgment is affirmed.

SEAPORT CAPITAL PARTNERS, LLC *v.* SHERI SPEAR
(AC 41879)

DiPentima, C. J., and Elgo and Sullivan, Js.

Argued November 12—officially released November 26, 2019

Defendant's appeal from the Superior Court in the judicial district of New London, *Hon. Joseph Q. Koletsky*, judge trial referee.

Per Curiam. The judgment is affirmed.

NATALIE VILLAR ET AL. *v.* A BETTER WAY WHOLESALE AUTOS, INC.
(AC 41881)

Keller, Bright and Sheldon, Js.

Argued November 13—officially released November 26, 2019

Defendant's appeal from the Superior Court in the judicial district of Waterbury, *Brazzel-Massaro*, *J.*

Per Curiam. The judgment is affirmed.

STEVEN K. STANLEY *v.* COMMISSIONER OF CORRECTION
(AC 40557)

Prescott, Moll and Flynn, Js.

Argued November 14—officially released November 26, 2019

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

Per Curiam. The judgment is affirmed.

BRIAN E. LAMBECK *v.* SILVER HILL HOSPITAL, INC., ET AL.
(AC 42315)

Bright, Moll and Bear, Js.

Argued November 18—officially released November 26, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Jacobs*, *J.*

Per Curiam. The judgment is affirmed.

APPENDIX C

DOCKET NO.: CV 15-4007330-S	:	SUPERIOR COURT
STEVEN STANLEY	:	J. D. OF TOLLAND
V.	:	AT ROCKVILLE
WARDEN, STATE PRISON	:	MAY 18, 2017

MEMORANDUM OF DECISION

The petitioner, Steven Stanley, represented himself in a jury trial that resulted in a judgment of conviction for 100 counts of violating a criminal protective order; stalking first degree; and threatening second degree, for which crimes he serves a total, effective sentence of eighteen years imprisonment, followed by twelve years special parole and a standing protective order. The Appellate Court affirmed the judgment of conviction on direct appeal, *State* v. *Stanley,* 161 Conn. App. 10 (2015); cert. denied, 320 Conn. 918 (2016). Attorney Deborah Stevenson represented the petitioner for his direct appeal.

The petitioner, again appearing pro se, had filed an earlier habeas corpus action that was denied, *Stanley* v. *Warden,* Superior Court, Tolland Judicial District, d.n. CV 13-4005408 (March 11, 2014), and the Appellate Court dismissed his appeal from that adverse decision, *Stanley* v. *Commissioner,* 156 Conn. 903 (2015).

In the present habeas case, the petitioner alleged sundry grounds for relief, and the court previously dismissed all but one ground, *Stanley* v. *Warden,* Superior Court, Tolland Judicial District, d.n. CV 15-4007330 (November 4, 2016). The sole remaining claim asserts that the petitioner's appellate lawyer, Attorney Stevenson, provided ineffective assistance. The court tried this matter on April 27 and May 12, 2017, and makes the following findings of fact and rulings of law.

Our Appellate Court concisely summarized the evidence that supported the jury's verdicts:

"On March 18, 2012, the victim called the police to report that the defendant was violating the protective order by telephoning her constantly. East Hartford Police Officer Robert A. Vanacore responded by going to her residence and taking her statement. Later that day, the victim called the police a second time; she then reported that the defendant had appeared in front of her house, and, "burn[ing] rubber," drove his motorcycle away at a high rate of speed. The victim's roommate, Gene Lavigne, also gave a statement to the police, confirming that the defendant had driven his motorcycle by the house. While police were interviewing the victim, the defendant called and spoke to her three times. The victim put the cell phone on speaker so that East Hartford Police Officer Daniel Zaleski and Vanacore were able to overhear the calls.

Vanacore sought and obtained the defendant's phone records. After reviewing the records and discovering that approximately 1750 phone calls from the defendant's cell phone to the victim's cell phone had been made between February 14, 2012, and March 24, 2012, Vanacore requested an arrest warrant for the defendant." *State* v. *Stanley,* supra, 13-14.

"In support of the charges, the state presented the testimony of the victim, who received the calls, police officers who overheard one of the threatening phone calls, and the victim's phone records. The jury had before it evidence of more than 1750 calls made from the defendant's cell phone to the victim's cell phone. The jury also heard evidence regarding the failed relationship between the victim and the defendant, and his previously

threatening behavior. The victim identified his voice on three phone calls made on March 18, 2012. The defendant also wrote letters to family members advising them to testify that they had made phone calls to the victim. The jury reasonably could have inferred from this evidence that it was the defendant himself who made all of the phone calls reflected in the victim's phone records. None of the defendant's witnesses testified that they made many of the calls from the defendant's cell phone, as he contended," Id., 16-17.

The court recognizes that pro se litigants often draft pleadings with imprecision, redundancy, and rambling prolixity, and this petitioner follows suit. After examining the amended petitions, the motions to amend the petition, the memoranda submitted therewith, and the petitioner's final argument, the court discerns the following specific allegations of substandard performance by Attorney Stevenson. That she failed to raise as appellate grounds:

1. that the petitioner's phone records were illegally seized, in violation of his constitutional rights;

2. that his arrest warrant lacked probable cause, thereby tainting the seizure of evidence obtained thereafter;

3. that the use of that evidence by the prosecution at trial violated his due process rights;

4. that the victim's phone records were really those of her former boyfriend, Paul Springs;

5. that Judge Carl Taylor ought to have recused himself from ruling on any motions because Judge Taylor issued the flawed arrest warrant;

6. that the trial judge erroneously excluded Paul Spring's testimony;

7. that the trial judge erroneously excluded a written recantation authored by the victim;

8. that the prosecutorial team engaged in witness intimidation;

9. that Judge Taylor denied the petitioner's request to disqualify and replace a biased juror; and

10. whether telephone calls that the victim did not answer violated the criminal protective order.

Our Supreme Court has adopted the two-pronged *Strickland* test for evaluating ineffective assistance claims. *Johnson* v. *Commissioner,* 218 Conn. 403, 425 (1991); *Ostolaza* v. *Warden,* 26 Conn. App. 758, 761 (1992). The *Strickland* criteria requires that the petitioner demonstrate, by a preponderance of the evidence, both that his attorney's performance was substandard and that the outcome of the proceedings would have been different. *Id.*

As to the performance prong of *Strickland,* the petitioner must establish that habeas counsel's representation fell below an objective standard of reasonableness. *Johnson* v. *Commissioner, supra.*

This standard of reasonableness is measured by prevailing, professional practices. *Id.* The habeas court must make every effort to eliminate the distorting effects of

hindsight and to reconstruct the circumstances surrounding counsel's conduct from that attorney's perspective at the time of the representation. *Id.*

If it is easier to dispose of a claim of ineffective assistance on the ground of insufficient proof of prejudice, the habeas court may address that issue directly without reaching the question of counsel's competence. *Pelletier* v. *Warden,* 32 Conn. App. 38, 46 (1993). In order to satisfy the prejudice prong of the *Strickland* test, the petitioner must prove, by a preponderance of the evidence, that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Levine* v. *Manson,* 195 Conn. 636, 640 (1985). Reasonable probability means a probability sufficient to undermine confidence in the outcome. *Daeira* v. *Commissioner,* 107 Conn. App. 539, 542-43 (2008), cert. denied, 289 Conn. 911 (2008); that is, the petitioner must show that there is a reasonable probability that he remains burdened by an unreliable determination of guilt. *Id.*

Also, as to appellate representation, the prejudice component of the *Strickland* standard refers to the outcome of the appeal, rather than that of the criminal trial, *Small* v. *Commissioner,* 286 Conn. 707, 723-724 (2008). Therefore, the petitioner bears the burden of demonstrating, by a preponderance of the evidence, that, but for Attorney Stevenson's purported deficiencies, there exists a reasonable probability that the result of the petitioner's direct appeal would have been more favorable, *Iovieno* v. *Commissioner,* 242 Conn. 689, 694 (1997); apparently overruling, sub silentio, *Fisher* v. *Commissioner* 45 Conn. App. 362, 367 (1997); a case that had, two months earlier, incorrectly ruled that the preponderance of the evidence level of proof was inapplicable to

the prejudice prong of *Strickland.* This court, of course, is bound to follow Supreme Court precedent rather than conflicting Appellate Court caselaw.

Analysis of the prejudice component in this case has been significantly circumscribed because the petitioner's own legal expert, Attorney Jeffrey Kestenband, testified that he could only identify three potential inadequacies by Attorney Stevenson that gave rise to a reasonable probability of a different outcome for the petitioner's direct appeal; namely, 1. the refusal to admit the victim's written recantation into evidence; 2. the denial of disqualification of a juror for bias; and 3. whether a defendant can be found guilty of violating a criminal protective order like the petitioner's where the protected person does not answer the putative telephone calls. Because no other credible testimony bore on the satisfaction of the prejudice aspect of the *Strickland* test, the court need only address that issue directly as to these three specifications of ineffective assistance.

Attorney Kestenband stressed that his first and second opinions regarding a more favorable outcome were entirely premised on the existence of the factual hypotheticals described to him by the petitioner. Attorney Kestenband acknowledged that he never read the complete transcripts of the petitioner's criminal trial nor did he ascertain whether the hypotheticals so described matched the trial records.

Therefore, the first order of business for this court is to determine whether the scenarios assumed by Attorney Kerstenband comport with the actual events that occurred at that criminal trial and related proceedings. Unfortunately, the petitioner never offered into evidence the full transcripts of that trial. Of particular importance, is that he failed to

produce the trial transcripts pertaining to the portions of those proceedings which were relevant to his claim regarding the failure to admit into evidence the victim's written recantation or of the trial judge's refusal to replace the purportedly biased juror. These evidentiary gaps undermine the petitioner's contentions.

The court is aware that Practice Book 23-36 allows a party to request that the habeas court take judicial notice of the transcripts of the criminal proceedings and the appellate and trial records. However, the petitioner chose to offer into evidence only selected portions of the transcripts bearing on other issues but declined to offer or request that this court take judicial notice of the appropriate transcripts pertaining to his claims regarding the exclusion of the copy of the written recantation and the denial of his request to replace a juror. Under these circumstances, the court will eschew considering, sua sponte, unavailable court transcripts that the parties chose not to offer or produce.

Attorney Stevenson never raised such claims on appeal. The petitioner called Attorney Stevenson as a witness in this habeas case, but he never inquired of her regarding why she decided to pursue other grounds instead. In the absence of credible evidence, the court finds no support to believe that the events unfolded in precisely the manner hypothesized by the petitioner. The court decides that the petitioner has failed to meet his burden of proving, by a preponderance of the evidence, that there exists a reasonable likelihood of a better outcome of his appeal had Attorney Stevenson pressed these claims.

As to the exclusion of the victim's written recantation by the trial judge, the hypothetical presented to Attorney Kerstenband suffers from the same evidentiary

malady. This court has no way of knowing how the trial judge ruled nor on what basis. The petitioner avows that the trial judge disallowed the document because the copy had the *petitioner's* markings on it. Did the petitioner have the opportunity to offer a clean copy? No one can tell without a review of the record, which the petitioner chose not to offer at this habeas trial.

More importantly, the trial court allowed the petitioner to cross-examine the victim about her recantation. Apparently, she agreed she authored such a retraction of her allegations against the petitioner, but she explained that she did so because the petitioner pressured her to do so and not because those allegations were false. The trial judge instructed the jury as to the proper use of the victim's prior, inconsistent statement as bearing on her credibility or lack thereof.

Clearly, the trial court permitted the petitioner to put before the jury, the fact of the victim's retraction. The victim conceded that recantation, but the jury obviously believed her explanation for producing it. That concession, therefore, belies the petitioner's assertion that, the trial court's ruling harmed him. The court determines that the petitioner has also failed to satisfy his burden of establishing, by a preponderance of the evidence, the prejudice component of the *Strickland* test as to the outcome of his appeal but for the failure of Attorney Stevenson to raise this issue.

The final issue pertaining to prejudice arises from the petitioner's contention that the crime of violation of a criminal protective order, as set forth in General Statutes § 53a-223, that also prohibits telephone contact, is completed only when and if the protected person answers the call. The petitioner's expert, Attorney Kerstenband,

expressed concern that unanswered telephone calls to the protected person initiated by the person restrained by the order might only constitute an attempt to violate the order. The victim in the petitioner's case answered two or three of the petitioner's hundreds of calls to her. Understandably, she avoided answering calls she suspected were made by him.

The court holds, as a matter of law, that, where a court has issued a criminal protective order, under General Statutes § 46b-38c(e), that specifically enjoins a defendant from contacting another by telephone and that defendant defies the order by intentionally initiating a telephone call to the protected person, the defendant has committed a violation of that protective order whether or not the protected person answers. Section 46b-38c(e) mandates that a defendant refrain from harassment or intimidation of the protected person, and the protective order may include those provisions necessary to protect the victim of a family violence crime.

The protective order placed upon the petitioner specified, inter alia, that he must not abuse, harass, or interfere with the victim nor may he contact her "in any manner, including by . . . telephone contact." As the Appellate Court noted, the "jury had before it evidence of more than 1750 calls made from the [petitioner's] cell phone to the victim's cell phone," *State* v. *Stanley,* supra 16.

One can suffer abuse, harassment, and be interfered with by the actions of another simply through knowledge that the miscreant is persistent in his unlawful pursuit of the victim, even though the victim is able to elude the pursuer's efforts. The dread and consternation induced by the unrepentant caller's usurpation of the victim's telephone line, despite imposition of legal restraint by the judicial authority, and the willingness of

the caller blithely to breach the court's orders, certainly can be regarded as abuse, harassment, and interference. The *effort* to call, in itself, is intimidating, provocative, and potentially mortifying.

Whether the protected person recognizes the source of the call or refuses to accept the call, lest the caller be the defendant, is immaterial. The primary purpose of the protective order, to insulate the victim from the caller's reach, would be thwarted under the petitioner's interpretation.

Violation of a protective order under § 53a-223 is a general intent crime, *State* v. *Fagan,* 280 Conn. 69, 76-78 (2006). In that case, the defendant broke that law by intentionally driving by, and within 100 yards, of the victim's residence, even though the state presented no evidence that the perpetrator knew whether the victim was home or not.

Although the use of the word "harass" in § 46b-38c(e) arguably covers a broader range of conduct than *telephone* harassment, as that crime is defined in General Statutes § 53a-183(a)(3), that term surely embraces the criminal activity proscribed by telephone harassment. Subsection 53a-183(a)(3) criminalizes telephone calls made with the intent to harass, annoy, or alarm "whether or not a conversation ensues . . . ." The Appellate Court has instructed that "it is the physical act of placing the call and causing a ringing at the receiving end that constitutes the actus reus of the crime, "*State* v *Moulton,* 120 Conn. App. 330, 337 (2010); reversed on other grounds, 310 Conn. 337 (2013).

Also, Attorney Stevenson *did* raise on direct appeal the sufficiency of the evidence to convict the petitioner of 100 counts of violation of a criminal protective

order. The Appellate Court held the jury's guilty verdicts were supported by the evidence at the criminal trial, *State* v. *Stanley,* supra, 15-17. If the victim's answering of each one of the telephone calls was a necessary element of that crime, one would have expected the Appellate Court to have mentioned that deficiency.

It would be highly anomalous to determine that an unanswered telephone call is a choate crime under § 53a-183(a)(3), but, as to the crime of violating a court order, the identical conduct is inchoate. The impact on the victim is the same, as is the vexatious nature of the perpetrator's conduct.

Therefore, the court decides that the petitioner has failed to prove, by a preponderance of the evidence, that there exists a reasonable likelihood of success on appeal had this argument been made by Attorney Stevenson.

For these reasons, the court denies habeas corpus relief on the ground of ineffective assistance of appellate counsel.

Sferrazza, J.

APPENDIX D

STATE OF CONNECTICUT *v.* STEVEN K. STANLEY
(AC 35600)

Beach, Keller and Mihalakos, Js.

Argued May 18—officially released November 3, 2015

(Appeal from Superior Court, judicial district of Hartford, geographical area number twelve, Fuger, J.

[motion to disqualify]; C. Taylor, J. [motions to strike, dismiss, for mistrial].)

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony J. Spinella*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Steven K. Stanley, appeals from the judgment of conviction of 100 counts of criminal violation of a protective order in violation of General Statutes § 53a-223,[1] stalking in the first degree in violation of General Statutes § 53a-181c, and threatening in the second degree in violation of General Statutes § 53a-62. On appeal, he claims that (1) his conviction of violation of a protective order was based on insufficient evidence, (2) discovery violations regarding his and the victim's cell phone records deprived him of his constitutional rights, (3) the trial court erred in declining to suppress or to strike his and the victim's cell phone records, and (4) his constitutional rights were violated when the same judge who had signed the warrant for his arrest also denied his motion to suppress evidence that had formed, in part, the basis for the application in support of the arrest warrant. We are not persuaded and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant and the victim[2] had had a dating relationship. On February 10, 2012, the victim called the police from a bar and reported that she feared for her safety because the defendant was making threatening phone calls to her from the parking lot of the bar. After Officer Jason Guerrera of the East Hartford Police Department arrived, the defendant was detained in the vicinity of Guerrera's police cruiser, awaiting a ride from his son. He made threatening phone calls to the victim while so detained. Guerrera overheard the calls. The defendant was arrested and handcuffed.

Following this incident, on February 14, 2012, the court issued a protective order that required the defendant "not [to] contact [the victim] in any manner, including by written, electronic or telephone contact . . . ." Despite this order, the defendant phoned the victim between forty and ninety times a day for a period of time. On at least one occasion the defendant offered to buy the victim a drink at a bar that she frequented.

On March 18, 2012, the victim called the police to report that the defendant was violating the protective order by telephoning her constantly. East Hartford police Officer Robert A. Vanacore responded by going to her residence and taking her statement. Later that day, the victim called the police a second time; she then reported that the defendant had appeared in front of her house, and, "burn[ing] rubber," drove his motorcycle away at a high rate of speed. The victim's roommate, Gene Lavigne, also gave a statement to the police, confirming that the defendant had driven his motorcycle by the house. While police were interviewing the victim, the defendant called and spoke to her three times.[3] The victim put the cell phone on speaker so that East Hartford police Officer Daniel Zaleski and Vanacore[4]

were able to overhear the calls.

Vanacore sought and obtained the defendant's phone records. After reviewing the records and discovering that approximately 1750 phone calls from the defendant's cell phone to the victim's cell phone had been made between February 14, 2012, and March 24, 2012, Vanacore requested an arrest warrant for the defendant. The state originally charged the defendant with 372 counts, but later filed an amended information that included 102 counts, specifically, 100 counts of criminal violation of a protective order, one count of stalking in the first degree, and one count of threatening in the second degree.

The defendant chose to represent himself, and following a trial, the jury found the defendant guilty of all 102 counts. The court sentenced the defendant to eighteen years imprisonment with twelve years special parole and imposed a standing criminal protective order. This appeal followed.

I

The defendant claims that his conviction of 100 counts of violation of a protective order was not supported by sufficient evidence. The defendant admitted that the calls were made from his cell phone, but he argues that the state failed to prove that he personally made the phone calls to the victim. He argues that the number on her caller identification function was blocked. The victim testified that she recognized the defendant's voice on two occasions only. The state argues that there was sufficient evidence to sustain the defendant's conviction in that (1) the victim's phone records listed the calls as having been made from the defendant's cell phone number; (2) the victim identified the defendant's voice on several occasions; (3) the defendant showed consciousness of guilt by writing to his sons to ask them to testify that they made the phone calls; and (4) the defendant demonstrated other intimidating and harassing behavior that was consistent with the repeated phone calls. We agree with the state that there was sufficient evidence to sustain the defendant's conviction of violation of a protective order. Although there was direct evidence that the defendant made only a limited number of the calls, there was circumstantial evidence to support the conclusion that the defendant made the calls as charged in the amended information.[5]

"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 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. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Our review is a fact based inquiry limited to determining whether the inferences drawn by the jury are so unreasonable as to be unjustifiable." (Internal quotation marks omitted.) *State* v. *Binnette*, 86 Conn. App. 491, 496–97, 861 A.2d 1197 (2004), cert. denied, 273 Conn. 902, 868 A.2d 745 (2005).

In support of the charges, the state presented the testimony of the victim, who received the calls, police officers who overheard one of the threatening phone calls, and the victim's phone records. The jury had before it evidence of more than 1750 calls made from the defendant's cell phone to the victim's cell phone. The jury also heard evidence regarding the failed relationship between the victim and the defendant, and his previously threatening behavior. The victim identified his voice on three phone calls made on March 18, 2012.[6] The defendant also wrote letters to family members advising them to testify that they had made phone calls to the victim. The jury reasonably could have inferred from this evidence that it was the defendant himself who made all of the phone calls reflected in the victim's phone records. None of the defendant's witnesses[7] testified that they made many of the calls from the defendant's cell phone, as he contended.[8] We conclude that the defendant's conviction of violation of a protective order was based on sufficient evidence.

II

The defendant claims that the state failed to provide him with his phone records and the victim's phone records in a timely manner and that he therefore was deprived of (1) his right to confront the witnesses

against him and (2) his right to present a defense.[9]

Additional facts are helpful to the resolution of the defendant's claims. The police obtained the defendant's phone records at the outset of the investigation. The defendant moved for discovery, including requests for "all facts of [the] arrest" and "all evidence."[10] The court, *C. Taylor*, *J.*, granted the motions on February 21, 2012, and May 8, 2012. The defendant subsequently made several motions for the court to order the state to comply with the prior orders and turn over several items, including relevant phone records relating to both the defendant and the victim. On August 17, 2012, at a hearing before Judge Fuger, the state said that it did not have either the defendant's phone records or the victim's phone records, but that if it did obtain them, it would disclose them to the defendant. Judge Fuger said that if the state attempted to introduce the records without having first provided them to the defendant, he would not allow them into evidence. The defendant eventually obtained at least a substantial part, if not all, of his phone records. The state reported that it did not receive the victim's phone records until the first day of the defendant's trial.

On the first day of trial, the state introduced only the victim's phone records. The court admitted the records as a full exhibit on the first day of trial, but the records were not published to the jury until the next day so that copies could be provided to the defendant for his review overnight. The defendant did not object to this arrangement, and did not ask for a continuance to allow for more time to review the victim's phone records. The defendant then used the victim's phone records in an attempt to impeach her on the third day of trial. The state did not seek to enter the defendant's phone records into evidence.

A

The defendant argues that the state's failure to disclose the victim's phone records resulted in a denial of his right to confrontation under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).[11]

The defendant raises this claim, for the first time, on appeal and requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[12] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of

any one of these conditions, the defendant's claim will fail. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label." (Citations omitted; emphasis in original; footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, A.3d (2015) (modifying *Golding*'s third prong).

The defendant argues that the phone records were testimonial in nature because they were compiled solely for use against him at trial, and that they were offered to prove the truth of the matter asserted. Because he was not able to cross-examine the maker of the phone records prior to or during trial in violation of his rights under the confrontation clause, he argues, the phone records should not have been admitted into evidence. We conclude that the admission of the victim's phone records into evidence did not implicate a sixth amendment right and, thus, the defendant's claim fails under *Golding*.

"Answering the threshold question in a *Crawford* analysis—whether the statements in question were testimonial in nature—also answers whether the defendant has met the burden presented under *Golding*'s second prong, which requires a claim of constitutional magnitude." *State* v. *Jones*, 140 Conn. App. 455, 469, 59 A.3d 320 (2013), aff'd, 314 Conn. 410, 102 A.3d 694 (2014). "In *Crawford* v. *Washington*, [supra, 541 U.S. 36], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. . . . In the wake of *Crawford*, therefore, the preliminary step in any confrontation clause analysis is the determination of whether the subject statements are testimonial hearsay. . . . Our Supreme Court has noted that, although there is no comprehensive definition of testimonial, it is clear that much of the [United States] Supreme Court's and our own jurisprudence applying *Crawford* largely has focused on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes." (Citation omitted; internal quotation marks omitted.) *State* v. *Young*, 157 Conn. App. 544, 565, 117 A.3d 944, cert. denied, 317 Conn. 922, 118 A.3d 549 (2015).

There was nothing to suggest at trial that the victim's phone records were other than business records of the telephone company. Section 8-4 of the Connecticut Code of Evidence provides in relevant part: "(a) . . . Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or

record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter. (b) . . . The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility." (Internal quotation marks omitted.) See also General Statutes § 52-180; *United States* v. *Yeley-Davis*, 632 F.3d 673, 679 (10th Cir.) (cell phone records not testimonial in nature; thus, no confrontation clause violation occurred), cert. denied, U.S. , 131 S. Ct. 2172, 179 L. Ed. 2d 951 (2011); *State* v. *Hood*, 135 Ohio St. 3d 137, 145, 984 N.E.2d 1057 (2012) ("[e]ven when cell-phone companies, in response to a subpoena, prepare types of records that are not normally prepared for their customers, those records still contain information that cell-phone companies keep in the ordinary course of their business"). Because there was nothing to suggest that the automated compilation of records of all customers' calls was other than standard business routine, the records were not testimonial in nature and *Crawford* did not apply. See *Crawford* v. *Washington*, supra, 541 U.S. 56. Accordingly, the claim fails under the second prong of *Golding*.

B

The defendant argues that his right to present a complete defense pursuant to the sixth amendment to the United States constitution,[13] as applied to the states through the fourteenth amendment, was violated by the prosecutor's failure to disclose the phone records to him in a timely fashion.[14] The defendant argues that he wanted "to compare the two sets of records, to determine if the days and times corresponded, to determine whether he had any alibi defense for any of the days and times,[15] and for impeachment of the state's witnesses."[16] (Footnote added.) We are not persuaded.

The record indicates that the state did not have the victim's phone records until the morning of the first day of trial. The defendant had the opportunity to review them overnight before they were published to the jury. At the time of the entry of the victim's phone records into evidence, the following colloquy took place:

"The Court: All right. Then, anything else on the issue of the phone records?

"[The Defendant]: I guess some of that file will be turned over to me.

"The Court: All right. Counselor, have you made a copy of it?

"[The Prosecutor]: I can have it done, Judge.

"The Court: All right. Then—I'm sorry?

"[The Defendant]: I would just like it so that I can check each and every number correspondence with mine to see who her phone went to.

"The Court: All right. What we will do—how many more questions do you have for this witness? . . . Then, what I will do, then, based on the arguments that were presented to me by the defense, I will—the records can be marked in this matter as full exhibits. The defendant has stated no grounds for them not to be. However, with that said, I will order that the state make copies of the records and give them to the gentleman so that he can take them back with him today, so he can review those records and then we will go from there."

The defendant did not object to this arrangement. The basis for the defendant's argument on appeal is that "[p]recluding the defendant from obtaining the complete phone records, in a timely fashion prior to court, severely prejudiced the defendant . . . ." He does not deny that he obtained the phone records; rather, he now argues on appeal that his defense was compromised by the timing. The defendant points to no concrete way in which his defense was compromised; his principal defense was a claim that, although the calls were made from his phone, the state had not proved that he had made the calls. As noted previously, the defendant used the victim's records to try to impeach her. Significantly, he could have requested a continuance, but he did not. See *State* v. *Lage*, 141 Conn. App. 510, 526–27, 61 A.3d 581 (2013) ("[o]ur Supreme Court expressly has declined to impose on the trial courts the duty to order a continuance sua sponte" [internal quotation marks omitted]); *Pasiakos* v. *BJ's Wholesale Club*, *Inc.*, 93 Conn. App. 641, 645, 889 A.2d 916, cert. denied, 277 Conn. 929, 896 A.2d 101 (2006). We conclude that the defendant's right to present a defense was not violated.

III

The defendant claims that the court abused its discretion by declining to suppress or, sua sponte, to strike (1) his phone records and (2) the victim's phone records. We are not persuaded.

In May, 2012, the defendant filed a motion to suppress his phone records and the victim's phone records pursuant to General Statutes § 54-41m,[17] which concerns wire-

tapping and electronic surveillance. The court did not rule on this motion. The state did not offer the defendant's phone records into evidence. The victim's phone records were admitted into evidence.

During trial, Vanacore, called by the state, testified that the victim consented to Vanacore's overhearing a cell phone call between the defendant and the victim. The victim activated the speakerphone option, and Vanacore heard the conversation. Vanacore testified that the code, *67, appeared on the screen, indicating that someone was "trying to block their phone number from the sender to the receiving phone calls." He further testified that the defendant's phone records reflected approximately 1750 phone calls from the defendant to the victim, that the *67 code preceded the defendant's phone number on the records of his calls to the victim, and that the code indicated that the defendant had tried to block his number.

In the course of his investigation, Vanacore obtained the defendant's phone records pursuant to the provisions of General Statutes § 54-47aa, which authorizes law enforcement officers to obtain records from telecommunication companies.[18] The defendant objected to the admission of the records into evidence because he had not been notified of the police access to his phone records within forty-eight hours of their disclosure to police in violation of § 54-47aa (d).[19] The state responded that it was not sure what the defendant was requesting in his objection and acknowledged that § 54-47aa had not been complied with. It further argued that a search warrant was not constitutionally required for the defendant's phone records because there is no reasonable expectation of privacy in one's phone records. The state questioned what the consequences might be if § 54-47aa (d) were not complied with, but concluded that the inquiry was not material because it was not offering the defendant's phone records into evidence in any event. The defendant then requested that "the phone records . . . be stricken from the record." The prosecutor stated that he was not offering the defendant's phone records into evidence. In response, the court stated, "Well, if he is not intending on offering them into evidence, then I don't see an issue here, presently." The defendant agreed: "I don't either, Your Honor." When the defendant raised the issue of the victim's phone records, the court stated that he had no standing to assert a claim as to another person's phone records.

A

The defendant argues that the court abused its discretion in failing to "suppress and strike the defendant's phone records and testimony about them, in violation of the law of the case and his right to due process, a fair trial, and to present a defense." He argues that the phone records should have been suppressed because

the police violated § 54-47aa (d) by failing to notify him within forty-eight hours of the issuance of the ex parte order permitting the police to obtain the phone records. He also argues that the court erred in admitting Vanacore's testimony regarding facts contained in the phone records. We are not persuaded.

The defendant cannot prevail on his claim that the court erred in declining to grant his motion to suppress.[20] The court did not rule on the motion to suppress. The lack of a ruling on the motion to suppress has no bearing on this appeal because, first, the motion was made pursuant to the wiretapping statute and the defendant's claims on appeal pertain to notice under § 54-47aa. Second, the state chose not to offer the defendant's phone records into evidence. The claimed error did not occur.

The defendant also argues that the court erred in not striking sua sponte the portion of Vanacore's testimony that pertained to the defendant's phone records. This argument is slightly different from the claim regarding the motion to suppress. The claim was not preserved[21] and fails under the second prong of *Golding* because it is simply evidentiary in nature. "[T]he admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved." (Internal quotation marks omitted.) *State* v. *Dews*, 87 Conn. App. 63, 68, 864 A.2d 59, cert. denied, 274 Conn. 901, 876 A.2d 13 (2005).

B

The defendant also claims, with regard to the victim's phone records, that the court erred in not granting his motion to suppress and erred in not striking the victim's phone records from evidence. The defendant argues that the court, *C. Taylor*, *J.*, erred in admitting the victim's phone records into evidence because during a pretrial proceeding, the court, *Fuger*, *J.*, had stated, when discussing the defendant's discovery requests for the phone records, that "I will tell you that come trial, if this case goes to trial, that if any of these documents that fit within this description are attempted to be used and you have not . . . had them previously disclosed to you, then if you move to strike them from evidence, that will be granted." The defendant argues that the admission of the victim's phone records violates the law of the case doctrine, and his rights to due process, a fair trial and to present a defense. We are not persuaded.

The motion to suppress sought to suppress the victim's phone records on the basis of the wiretapping statute, and not the statute being argued on appeal, which is the notice provisions of § 54-47aa. Accordingly, the claim regarding § 54-47aa is unpreserved. The defendant requests review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, the plain error doctrine; Prac-

tice Book § 60-5; and review under the exercise of our supervisory powers over the administration of justice. He argues that his rights to due process, a fair trial, and to present a defense were violated. The defendant does not have standing to raise constitutional issues regarding the admission of the phone records of a third party.[22] "[A] party is precluded from asserting the constitutional rights of another." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 665, 881 A.2d 1005 (2005).

The defendant's claim as to the court's denial of his motion to strike the victim's phone records from evidence fails for similar reasons. The defendant cannot assert the constitutional rights of the victim. Additionally, there is nothing in § 54-47aa to suggest that the defendant is to receive notice regarding a third party's phone records. Rather, § 54-47aa (d) provides in relevant part: "Not later than forty-eight hours after the issuance of an order pursuant to subsection (b) of this section, the law enforcement official shall mail notice of the issuance of such order to the *subscriber or customer whose call-identifying information or basic subscriber information is the subject of such order* . . . ." (Emphasis added.) The fact that the victim's phone records show that she received calls from the defendant's cell phone does not, in itself, make the statute applicable. We once again stress that there never was a dispute at trial that the calls came from his cell phone.

Last, the defendant argues that in denying the motion to strike, Judge Taylor violated the law of the case doctrine because Judge Fuger commented that a motion to strike would be granted if the phone records were offered into evidence and the defendant had not had the records disclosed to him. "The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance." (Internal quotation marks omitted.) *Signore* v. *Signore*, 110 Conn. App. 126, 133, 954 A.2d 245 (2008). Under the law of the case doctrine, "it is well established that a trial judge need not follow the decisions of another judge made at an earlier stage of the proceedings. . . . A judge may find it appropriate to rely upon a previous ruling. But the law of the case is not an inflexible principle and in a proper situation a judge may modify or depart from an interlocutory ruling of another coordinate magistrate, in whole or in part." (Citations omitted.) *State* v. *Rogers*, 199 Conn. 453, 459, 508 A.2d 11 (1986). The law of the case doctrine is not implicated because, first, Judge Taylor's ruling was not necessarily inconsistent with Judge Fuger's comment: the victim's phone records were disclosed to the defendant and the defendant had time to review them. Second, even if the rulings were

inconsistent, "a trial judge need not follow the decisions of another judge made at an earlier stage of the proceedings." Id.

IV

The defendant claims that his rights were violated in a number of ways when the same judge who had signed his arrest warrant, which was based in part on the phone records at issue, also denied his motion to suppress the phone records. He claims that this circumstance violated Practice Book § 41-17, canon 3 of the Code of Judicial Conduct, and his rights under the federal constitution[23] to a fair trial and to due process. We disagree.

On May 15, 2012, the defendant filed a motion seeking to disqualify the court, *C. Taylor*, *J.*, pursuant to Practice Book § 41-17 from presiding over motions relating to the phone records because Judge Taylor had signed his arrest warrant. The court, *Fuger*, *J.*, denied the motion to disqualify Judge Taylor.

The defendant cannot prevail on his claim that Practice Book § 41-17 was violated because that rule of practice is inapplicable. Section 41-17 provides: "A judicial authority who signed any warrant or order for the seizure of property, testimony or evidence or for the interception of any communications shall not preside at any hearing on a motion made pertaining to such warrant or order." Judge Taylor did not sign a search warrant, nor did he rule on the validity of such a warrant. He did sign an arrest warrant, but no claim is made that Judge Taylor ruled on any motion or order directly attacking the arrest warrant. The policy behind § 41-17 also was not broached. See *State* v. *Canales*, 281 Conn. 572, 598–99, 916 A.2d 767 (2007).

The defendant's claims under the federal constitution are unpreserved. The defendant requests review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. The defendant's claim fails under the second prong of *Golding*, which requires that the claim be of constitutional magnitude. Id., 239. "The United States Supreme Court consistently has held that a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from actual bias on the part of that judge. . . . [It has stated that] the requirements of [federal] due process are less rigorous than those of the Code of Judicial Conduct, which mandates both impartiality and the appearance of impartiality. . . . [M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment establishes a constitutional floor, not a uniform standard. . . . Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. . . . But the floor established by the [d]ue [p]ro-

cess [c]lause clearly requires a fair trial in a fair tribunal . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case. . . . [C]ertainly only in the most extreme of cases would disqualification on [the basis of allegations of bias or prejudice] be constitutionally required . . . . [The] due process clause generally [is] interpreted to require only lack of actual bias, not lack of appearance of bias." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Canales*, supra, 281 Conn. 594–95. The defendant does not allege actual bias, nor is there any suggestion of actual bias in the record. His claim fails under the second prong of *Golding* because it is not of constitutional magnitude.[24]

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 53a-223 (a) provides in relevant part: "A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c . . . has been issued against such person, and such person violates such order."

We note that this subsection has been amended since the date of the offense. See, e.g., Public Acts 2014, No. 14-173, § 5. Because that amendment does not affect issues in this appeal, all references to § 53a-223 are to the current revision of the statute.

[2] In accordance with our policy of protecting the privacy interest of the victim of a criminal violation of a protective order, we decline to identify the victim or others through whom the victim's identity may be ascertained.

[3] The defendant entered into evidence a police report that documented the March 18, 2012 cell phone calls: "Phone call #1 [the defendant] said 'I'm done' and then hung up. Phone call #2 [the defendant] said 'You just signed your own death certificate' and then hung up. Phone call #3 [the defendant] said 'Bitch why did you call the cops on me' 'Bitch' 'You are a snitch' and then was hung up on by [the victim]." Another police report recounted the threat in the first phone call as, "you're going down."

[4] Vanacore overheard only the third cell phone call.

[5] In the context of his argument that introduction of phone records violated his sixth amendment right to confront witnesses; see part II A of this opinion; the defendant mentions that the state, in its closing argument, mentioned to the jury that there were many more phone calls in the victim's phone records than there were counts in the information. The defendant suggests that this incongruity underscored the need for a witness to supply more precision to the process of deciding who made the calls and that "the jury could pick which [calls violated the protective order] using [the victim's] phone records."

The defendant did not directly claim that the discretion of the jury to choose what calls to apply to specific counts constituted error. We note that the information charged that the defendant made a number of calls on several different days; the information did not allege specific times of day that the calls were made. The records, on the other hand, identified specific times that the calls were made. In the circumstances of this case, we find no harm in the manner in which the state chose to proceed.

[6] In the information, the defendant was charged with two violations of a protection order on March 18, 2012, as well as a stalking and threatening.

[7] When the defendant asked his mother whether she might have called the victim from the defendant's phone two or three times by accident, his mother responded that she might have, although she did not remember. The defendant's brother also testified that their mother might have used the defendant's phone to call the victim.

[8] The defendant also claims that the court erred in denying his posttrial motion to dismiss and motion for a mistrial. The motions were based, in part, on claims of insufficient evidence and failure to provide discovery. The defendant cannot prevail on his arguments for the same reasons that we conclude in part I of this opinion that there was sufficient evidence to support the defendant's conviction and in part II of this opinion that his claims of discovery violations lack merit. The defendant also appears to

argue that the court erred by providing a purely conclusory analysis in denying the motions, although he did not file a motion for articulation. See Practice Book § 66-5.

[9] The defendant also seems to argue that because the state was not sanctioned for discovery violations, the state violated his rights to due process and a fair trial. Whether the court imposes sanctions on the state does not implicate the defendant's constitutional rights. See, e.g., *State* v. *Colon*, 71 Conn. App. 217, 241, 800 A.2d 1268 ("[w]here discovery concerns inculpatory evidence, there exists no constitutional right to the disclosure of such evidence and, therefore, the rules of the court regulate any such disclosure"), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002).

The defendant did not request sanctions pursuant to Practice Book § 40-5, which provides in relevant part that "[i]f a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate . . . ." The court, however, stated that "if this case goes to trial [and] if any of these documents that fit within this description [of the defendant's and the victim's phone records] are attempted to be used and you have not . . . had them previously disclosed to you, then if you move to strike them from evidence, that will be granted."

Further, we do not conclude that, in the circumstances of this case, the more general due process right to a fair trial was violated. The defendant's own phone records, a copy of which was apparently disclosed to him prior to trial, were not introduced into evidence, and he had the opportunity to review the victim's records during trial. Critically, he did not dispute that a multitude of calls had been made from his phone to the victim's phone.

[10] The defendant filed a third motion for discovery, requesting the video footage and audio recordings from the police car at the time of his arrest. The request was granted by the court, *Fuger*, *J.*, on March 7, 2012. That motion does not specifically refer to the phone records.

[11] We note that the state did not offer the defendant's phone records into evidence and, thus, *Crawford* v. *Washington*, supra, 541 U.S. 36, does not apply to those records.

[12] The defendant also requests reversal under the plain error doctrine; Practice Book § 60-5; see *State* v. *Domian*, 235 Conn. 679, 692, 668 A.2d 1333 (1996) (plain error reserved for "truly extraordinary situations where 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]). Our conclusion that there was no error pursuant to *Crawford* precludes a conclusion of plain error.

The defendant further seeks review under our supervisory powers over the administration of justice; see *State* v. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009) (reviewing court's supervisory powers are an "extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole" [emphasis omitted; internal quotation marks omitted]). This is not the type of extraordinary situation that our supervisory powers may address.

[13] "The sixth amendment to the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. The sixth amendment is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . The sixth amendment right to present a defense is made applicable to the states through the due process clause of the fourteenth amendment." (Citation omitted; internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 794 n.2, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

The defendant also claims his rights under article first of the Connecticut constitution were violated. The defendant failed to provide a separate analysis of his claim under the Connecticut constitution, and, accordingly, we decline to afford it review. See *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992).

[14] There was evidence of more than 1750 phone calls from the defendant to the victim, but the state charged the defendant with only 100 counts of

violation of the protective order.

[15] To the extent that the defendant argues that he was denied his right to present a defense because the state did not identify the specific times of the phone calls in the information, his claim is unpreserved because he failed to file a motion for a bill of particulars. By failing to seek a bill of particulars, he waived his constitutional claim and is ineligible for *Golding* review. See *State* v. *Bazemore*, 107 Conn. App. 441, 455, 945 A.2d 987, cert. denied, 287 Conn. 923, 951 A.2d 573 (2008). In any event, specific times were referenced in records that he did review. There has been no showing that anything prevented his direct access to his own records at any time.

[16] It bears repeating that, contrary to his argument regarding a lack of ability to impeach the state's witnesses, the defendant actually used the victim's phone records to impeach her on the third day of trial.

[17] General Statutes § 54-41m provides: "Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state of Connecticut, or of a political subdivision thereof, may move to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted under the provisions of this chapter; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion, in which case such motion may be made at any time during the course of such trial, hearing or proceeding. If the motion is granted, the contents of the intercepted wire communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter and shall not be received in evidence in any such trial, hearing or proceeding. The panel, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection the intercepted communication and evidence derived therefrom."

The defendant does not argue on appeal that the records were admitted into evidence in violation of the wiretapping statute.

[18] Vanacore testified that he obtained from AT&T "an ex parte search warrant" for the defendant's records at the time of his investigation. It is not clear why the state's attorney's office did not later have those records. In the circumstances of this case, as related at length, there is no apparent prejudice caused by the lack of immediate notification.

[19] General Statutes § 54-47aa (d) provides in relevant part: "Not later than forty-eight hours after the issuance of an order pursuant to subsection (b) of this section, the law enforcement official shall mail notice of the issuance of such order to the subscriber or customer whose call-identifying information or basic subscriber information is the subject of such order, except that such notification may be delayed" in certain circumstances.

[20] We note that Vanacore testified that the victim consented to the police listening to the phone call between her and the defendant. "[I]f one of the parties to a telephone conversation consents to wiretapping, the provisions of the wiretap act . . . do not apply." *State* v. *Tomasko*, 238 Conn. 253, 272, 681 A.2d 922 (1996).

[21] "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *State* v. *Adams*, 117 Conn. App. 747, 755, 982 A.2d 187 (2009).

In this case, not only was the claim not preserved, but the defendant went further and agreed with the court that there was no "issue" if the records were not admitted into evidence; there was no objection at all to Vanacore's testimony about the records.

[22] We decline to review the claim pursuant to the plain error doctrine or the exercise of our supervisory powers over the administration of justice.

[23] The defendant also claims that his rights under the Connecticut constitution were violated. The defendant, however, does not provide a separate analysis of his claim under the Connecticut constitution, and accordingly, we decline to afford it review. See *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992).

[24] The defendant also requests reversal pursuant to the plain error doctrine and the exercise of our supervisory powers over the administration of justice.

The defendant has not demonstrated that there was any error; thus, the plain error doctrine; see *State* v. *Domian*, 235 Conn. 679, 692, 668 A.2d 1333 (19960; and the use of our supervisory powers; see *State* v. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009), are not available.

The defendant further argues that the procedure violated General Statutes § 51-183h and canon 3 of the Code of Judicial Conduct (now rule 2.11). Neither of these claims are preserved for our review. See also *Francis* v. *Commissioner of Correction*, 142 Conn. App. 530, 545, 66 A.3d 501, cert. denied, 310 Conn. 921, 77 A.3d 141 (2013).