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SCHALLER, J., concurring. While I agree that the defendant's conviction should be affirmed, I write separately because I do not agree with the majority's analysis of the waiver rule as it pertains to the defendant's claim that the court improperly denied his motion for a judgment of acquittal.

The defendant in this case moved for a judgment of acquittal after the state had closed its case. Following the court's denial of that motion, the defendant set forth evidence of his own. In this situation, the waiver rule provides that "if a defendant elects to introduce evidence after the trial court denies his or her motion for judgment of acquittal at the end of the state's case, appellate review encompasses the evidence in toto, including evidence introduced by the defendant." *State v. Calonico*, 256 Conn. 135, 139, 770 A.2d 454 (2001). In accordance with this rule, appellate review examines "the evidence in toto in order to review the trial court's ruling on the motion for judgment of acquittal after all of the evidence [has] been presented." (Internal quotation marks omitted.) *Id.*

While the majority recognizes the principles embodied in the waiver rule, I believe that it has not applied the rule to the defendant's second claim. The majority declines to review the defendant's second claim on the basis of its conclusion that it already has reviewed the sufficiency of all the evidence in its resolution of the defendant's first claim, in which he challenged the sufficiency of the evidence to support his conviction of manslaughter in the first degree with a firearm and assault in the first degree. The majority's resolution of the first claim, however, does not review the sufficiency of *all the evidence*.

While the majority initially casts the first claim as a general challenge to the sufficiency of the evidence, it clearly states later that the defendant's *specific claim* is that the eyewitness identifications of him were unreliable. The majority then goes on to analyze the credibility of the eyewitnesses. The analysis is limited to this one aspect of the evidence and goes no further. On the basis of the defendant's specific claim and the majority's subsequent analysis, it is clear to me that the defendant's claim, properly stated, is that there was insufficient evidence to convict him because the eyewitness identifications were unreliable. This does not challenge the sufficiency of the evidence generally nor does it require, or indeed even allow, the majority to review all the evidence presented in the case.

The defendant cannot be deprived of appellate review of his second claim based on the resolution of the first claim because the second claim, according to the waiver

rule, requires an examination of *all the evidence in toto*. Since the defendant's first claim challenged only one limited aspect of the evidence, namely, the eyewitness identifications, the majority did not review all the evidence in its resolution of the claim, but rather examined only these identifications. I conclude that the majority's review of the evidence in claim one is not adequate to meet the waiver rule's requirement that we examine *all the evidence in toto*.

In addition, I note that the waiver rule cannot be used to decline review. While I understand the majority's use of the phrase in this particular case, where it perceives the first and second claims to be essentially the same, I believe it is incorrect to state that we decline review under the waiver rule. The waiver rule requires a complete evidentiary review; it provides no authority to decline review. In the present case, therefore, if the majority had in fact reviewed all the evidence in claim one, it should have concluded that review of the second claim was unwarranted because the issue already had been fully addressed in claim one and that further review in this particular case would be merely duplicative.

My differences with the majority's application of the waiver rule notwithstanding, however, I also conclude that the defendant's conviction should be affirmed. After a review of the defendant's second claim under the waiver rule, in which I examined all the evidence presented at trial, it is my opinion that the court properly denied the motion for a judgment of acquittal and that there was sufficient evidence for the jury to find the defendant guilty of the crimes charged. I therefore agree with the majority's conclusion.
