McLACHLAN, J., dissenting. Termination of parental rights has been called the civil equivalent of the death penalty. See *Matter of Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759 (2006). "The termination of parental rights is defined as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . . It is a most serious and sensitive judicial action. *Anonymous* v. *Norton*, 168 Conn. 421, 430, 362 A.2d 532, cert. denied, 423 U.S. 935, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975). Although that ultimate interference by the state in the parent-child relationship may be required under certain circumstances, the natural rights of parents in their children undeniably warrants deference and, absent a powerful countervailing interest, protection." (Citation omitted; internal quotation marks omitted.) *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 640, 436 A.2d 290 (1980).

The Supreme Court of the United States has long recognized this fundamental right of parents. Writing for the majority in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), Justice O'Connor stated: "The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. . . . The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (Citation omitted; internal quotation marks omitted.) Id., 65. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." Id. Thus, any statute which interferes with the parent's right to raise a child free from interference of the state as well as any procedure implementing it will be subject to strict scrutiny.[1] Id., 80 (Thomas, J., concurring).

I agree with the trial court and the majority that the department of children and families (department) made reasonable efforts to reunify the minor child, E, with the respondent father and that he was unwilling or unable to benefit from such efforts, and I agree that a termination of the respondent's parental rights is in the child's best interest. I regrettably cannot agree, however, with the conclusion that the respondent's parental rights appropriately were terminated on the stated statutory ground of failure to achieve personal rehabilitation.[2] If the state is going to intervene and terminate an individual's parental rights, it is paramount that the

state allege and prove the appropriate statutory ground.

"Compliance with the statutory criteria for termination cannot be dismissed by an all-encompassing best interests standard. *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 672, 420 A.2d 875 (1979). Insistence upon strict compliance with the statutory criteria before termination of parental rights and subsequent adoption proceedings can occur is not inconsistent with concern for the best interests of the child. Rather, it enhances the child's best interests by promoting autonomous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusion disguised under the rubric of the child's best interests. Id. [*T*]*he risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on such comparisons rather than on the statutory criteria requires the court, in considering a petition to terminate parental rights, to sever completely the issue of whether termination is statutorily warranted and whether a proposed adoption is desirable . . . .*" (Citation omitted; emphasis added; internal quotation marks omitted.) *In re Juvenile Appeal*, 1 Conn. App. 463, 467, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984). While it may have been in the best interest of E that the court terminated the respondent's parental rights, it is in the best interest of the public that the petitioner, the commissioner of children and families, select the appropriate statutory ground. Here, the court applied an improper statutory ground, which was alleged by the petitioner, in order to do what was in the best interest of E.

The respondent argues that the termination of his parental rights on the sole basis that he failed to achieve a sufficient degree of personal rehabilitation as would encourage a belief that within a reasonable time, considering the age and needs of the child, he could assume a responsible position in the life of the child, denied him due process.[3] That claim is supported by the following facts in the record. At the time the respondent was identified as E's father, he had a clean record. He had no history of substance abuse, no criminal history, no history of domestic violence, no history with the department, and he was gainfully employed and had housing during most of the time in question. In fact, E's social worker testified that the respondent had a "clean record" and that she did not make referrals for a substance abuse evaluation previous to returning E to the him because she was not concerned about substance abuse.[4]

The petitioner sought to terminate the respondent's parental rights on the basis of a failure to achieve a sufficient degree of rehabilitation pursuant to General

Statutes § 17a-112 (j) (3) (B) (ii). "Rehabilitate" means to restore a handicapped or delinquent person to a useful and constructive place in society through social rehabilitation. *In re Heather L.*, 49 Conn. Sup. 287, 308, 877 A.2d 27 (2004), aff'd, 274 Conn. 174, 874 A.2d 796 (2005). Webster's defines "rehabilitate" as "to restore to a former capacity . . . to restore to good repute . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Numerous Connecticut decisions have used the language that "[p]ersonal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent." (Internal quotation marks omitted.) *In re Alejandro L.*, 91 Conn. App. 248, 259, 881 A.2d 450 (2005).[5] Moreover, courts in other states have determined that rehabilitation is "remov[ing] the circumstances, conditions, or conduct that caused the parent's inability or unwillingness to properly care for the child." *M.E.* v. *Shelby County Dept. of Human Resources*, 972 So. 2d 89, 102 (Ala. Civ. App. 2007).

Whatever definition is used, all have in common the concept of restoration from something. Here, the respondent poses the question: from what was he to be rehabilitated? The record in this case does not support the fact that the respondent suffered from some condition or disability from which he needed to be restored or rehabilitated. Admittedly, he had limited parenting skills, but this is not a condition from which he had to be rehabilitated. In order to prove a failure to achieve rehabilitation as a ground for termination of parental rights, a two-pronged test for rehabilitation must be satisfied: The state must prove by clear and convincing evidence that the parent has failed to achieve rehabilitation and that there is no reason to believe that a parent could assume a responsible position in the life of a child within a reasonable time, considering the child's age and needs. See General Statutes § 17a-112 (j) (3) (B); *In re Danuael D.*, 51 Conn. App. 829, 843, 724 A.2d 546 (1999); see generally *In re Migdalia M.*, 6 Conn. App. 194, 203, 504 A.2d 533, cert. denied, 199 Conn. 809, 508 A.2d 770 (1986); *In re Heather L.*, supra, 49 Conn. Sup. 308.[6]

The majority relies on *In re Alejandro L.* and particularly language in which the court stated: "[I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue."[7] (Internal quotation marks omitted.) *In re Alejandro L.*, supra, 91 Conn. App. 260. The majority's use of this language changes the meaning of the termination ground from "failure to rehabilitate" to "[gaining] the ability to care for the particular needs of the child at issue." (Internal quotation marks omitted.) Id.

The actual petition for termination of parental rights

is a preprinted form on which the jurisdictional facts and grounds are set forth with a number of boxes to be checked when applicable. In the space reserved for grounds of termination, the form has the seven grounds set forth in § 17a-112 (j). For each of the seven subcategories there is box. The only box checked in this case was that next to the language for ground (B), the so-called failure to rehabilitate ground. No other box was checked. Evidence in the record may have supported several other grounds, such as ground (D), which is that there is no ongoing parent-child relationship. The procedure to prepare a termination of parental rights petition is simple, but the parent-child relationship is so important that great care and attention should be taken to ensure that viable grounds of termination, if they exist, are alleged. Unfortunately, the effort was not made to match the facts and evidence of this case to the statutory grounds, nor was any motion ever made to amend the petition to allege viable grounds.

"Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted at trial . . . ." (Citations omitted; internal quotation marks omitted.) *Birchard* v. *New Britain*, 103 Conn. App. 79, 83, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007). Practice Book § 33a-1 (a), concerning the initiation of judicial proceedings for the termination of parental rights, provides in relevant part: "The petitioner shall set forth with reasonable particularity, *including statutory references*, the specific conditions which have resulted in the situation which is the subject of the petition." (Emphasis added.) The facts adduced at this trial do not support, in my opinion, a finding by clear and convincing evidence that the respondent has failed to rehabilitate. A reasonable person in the respondent's position when presented with this petition would not have the belief that he would have his relationship with his child completely severed. In this case, it is not the finding of facts that is clearly erroneous but the application of the law. The improper statutory ground was alleged.

The department checked the wrong box.

I respectfully dissent.

[1] Generally, when a statutory classification affects a fundamental liberty interest, that statute is subject to strict scrutiny. See *Keogh* v. *Bridgeport*, 187 Conn. 53, 66, 444 A.2d 225 (1982). In the present case, the parties do not assert, nor do I, that the statute in this case should be examined or challenged. I simply emphasize the fundamental nature and importance of a parent's right to raise his or her children, which, because of the statutory scheme, must be properly applied. I agree with the majority that in the present case, the court's decision is governed by the clearly erroneous standard of review. I am of the opinion, however, that a mistake was committed. See *Shapero* v. *Mercede*, 66 Conn. App. 343, 346, 784 A.2d 435 (2001) ("A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed. . . . A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . The conclusions drawn by the trial court will be upheld unless they are legally and logically inconsistent with the evidence." [Citation omitted; internal quotation marks omitted.]), rev'd on other grounds, 262 Conn. 1, 808 A.2d 666 (2002). Here, the evidence does not support a finding of failure to rehabilitate.

[2] A reversal of the judgment here would not automatically reunify E with the respondent; rather, she would remain committed to the custody of the petitioner until the petitioner petitioned the court for termination of the respondent's parental rights on the proper statutory ground or made an appropriate permanency plan.

[3] The respondent's first issue on appeal was that "[t]he trial court erred in finding that the respondent father had failed to rehabilitate. . . . The respondent father was not accorded his due process rights as provided by the due process clause of the fourteenth amendment to the United States Constitution." The respondent further enunciated his due process argument in his brief before this court.

Although the majority has determined that the respondent's due process claim is not preserved, I believe that the claim is preserved and should be addressed due to the fundamental right involved in the present case.

Practice Book § 5-2 provides: "Any party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief under Section 5-1 or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question. If the party fails to do this, the judicial authority will be under no obligation to decide the question." The respondent satisfied Practice Book § 5-2.

In his closing argument at trial, the respondent asserted "his position that his rights, as guaranteed by the fourteenth amendment to the United States constitution, have been violated." He made this argument by stating that the department conducted a background check, in which it found that he did not have a criminal history and did not have a history with the department.

The following language excerpted from the respondent's closing argument expands on his due process claim: "[A] police report of a single incident of domestic violence. That is not a failure to rehabilitate. Rehabilitate means to restore to a prior level. [The respondent] doesn't have any history of domestic violence. . . . [The department social worker] said there was no concern about substance abuse. She never made a referral for an evaluation in the two years that they were working on sending [E] home. No evidence of alcohol abuse at all. . . . In any event, he submitted to the substance abuse [testing], and it was negative. Both urine screens and the hair test were negative. So, he's not rehabilitating from substance abuse. . . . *This is a violation of our laws*. There's one ground for termination, and that's failure to rehabilitate. When asked from what [the respondent] was rehabilitating, [another social worker from the department] had trouble identifying it. I believe she said, well, ah—I guess severe domestic violence or maybe substance abuse. But it can't be either one of those." (Emphasis added.)

Furthermore, Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." The predecessor to Practice Book § 60-5, before it was amended in 1979, provided: "The supreme court shall not be bound to consider any errors on an appeal unless they are specifically assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial *and was ruled upon and decided by the court* adversely to the appellant's claim, or that it arose subsequent to the trial." (Emphasis added.) Therefore, even though the majority claims that unless the issue is distinctly raised and *decided* by the court, it is not preserved and review is precluded absent review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or plain error review, I believe it was sufficiently raised. Furthermore, Practice Book § 60-5 does not preclude a claim that was raised imperfectly from being reviewed; it merely states that the court is not bound to afford it review.

Moreover, the state did not object to the respondent's due process argument by claiming that it was not preserved; rather, the state asserted only that the claim was briefed inadequately. The respondent's due process claim, however, is ten pages long, and the respondent has analyzed his claim and provided case law in support of such claim. See generally *State* v. *Linarte*,

107 Conn. App. 93, 118, 944 A.2d 369 (2008).

[4] During the reunification process, however, the respondent, when he had custody of E, was involved in a domestic violence altercation with E's mother in which he reportedly consumed alcohol to the point of inebriation and was stabbed. While I make no excuses for such reckless behavior, it nevertheless does not indicate a pattern of substance abuse or domestic violence from which the respondent needed to be rehabilitated.

[5] See *In re Nasia B.*, 98 Conn. App. 319, 908 A.2d 1090 (2006) (court affirmed termination of mother's parental rights on several grounds, including failure to rehabilitate because mother had history of substance abuse and mental health issues, and chose to attend sporadically various programs and take advantage of opportunities to address both of those issues as well as her parenting skills); see also *In re Shaun B.*, 97 Conn. App. 203, 903 A.2d 246 (2006) (court affirmed termination of mother's parental rights on basis of failure to rehabilitate when mother had anger management and mental health issues, and did not take advantage of specific steps and programs offered that would have addressed issues); *In re Vanna A.*, 83 Conn. App. 17, 847 A.2d 1073 (2004) (court affirmed termination of mother's parental rights on ground of failure to rehabilitate because mother had been arrested several times, incarcerated, there were abuse allegations, and court found mother's continued involvement in criminal justice system and lack of progress in therapy demonstrated inability to reunify with child).

[6] The majority states that the respondent should have filed a motion for articulation if he was unclear as to the grounds for his failure to rehabilitate. In its opinion, however, the majority appears to conclude that the respondent's failure to rehabilitate was supported by the court's finding that he had abandoned his two daughters in Ghana when he first came to the United States and his involvement in a domestic violence incident in which he had been stabbed. The respondent testified that he was trying to work with immigration authorities to bring his daughters to the United States. He also informed the court that he spoke with his daughters on a regular basis. While the court found it "remarkable" that the respondent had been so inattentive to his daughters in Ghana, the facts and circumstances surrounding his departure from Ghana, leaving his daughters behind, are unclear. Moreover, neither the petitioner nor the court claimed that the respondent, in order to reunify with E, should have taken measures to bring his other daughters to the United States. I am not attacking the finding of the court that the respondent abandoned his daughters in Ghana. I raise this issue because the record does not provide us with enough information about the circumstances of the respondent and his family in Ghana for us to determine whether leaving his children in another country, more than six years earlier, is relevant to his ability to raise E.

[7] *In re Alejandro L.* is but one example of a litany of cases in which the facts clearly demonstrate the conditions from which the parent failed to rehabilitate. There, the respondent was discharged repeatedly from substance abuse, mental health and domestic violence counseling. *In re Alejandro L.*, supra, 91 Conn. App. 250–53. For example, the respondent was admitted to Manchester Memorial Hospital for attempted suicide and was admitted to River East, the intensive outpatient treatment program at Natchaug Hospital, but was discharged for not attending her therapy sessions. Id., 252. She was then referred to an outpatient program with Hockanum Community Valley counseling outpatient mental health and substance abuse treatment center (Hockanum Valley), but was once again discharged because of her failure to attend programs. Id.

After the court adjudicated all of her four children neglected, she began receiving counseling from Hockanum Valley but once again was discharged for failure to attend programs. Id. Additionally, she failed to report for drug testing and, when she was tested, the test indicated that she had recently used drugs. Id., 252–53. She was arrested for burglary and was admitted to River East again but was subsequently discharged for failure to comply with recommended treatment for cocaine addiction. Id., 253. She also refused to attend recommended intensive treatment at the Teamworks partial hospitalization program, saying instead that she intended to enroll in a New Direction program but failed to enroll. Id. She was then referred for the third time to another intake appointment at Hockanum Valley and, for the third time, was discharged for failure to comply with the program. Id., 253. The department referred her to Stafford Family Services for counseling and provided transportation, but she failed to attend. Id., 254. There was a domestic violence protective order entered in her favor against L, the children's father, but she chose to live with him. Id. Last, her burglary charge resulted in a criminal conviction with probation requiring her to attend substance abuse counseling with which she failed to comply. Id. The facts of all of the cases used as precedent support the position of this dissent that "failure

to rehabilitate" is not appropriate in this case.