BEACH, J., dissenting. I respectfully dissent. I believe that the totality of the facts found by the trial court justified a warrantless entry under the emergency doctrine exception to the warrant requirement.

The trial court found the following facts. "Officer Tilford Cobb has been an animal control officer with the Stamford police department for the past ten years. In said capacity, he has had many contacts with the defendant [Michael Angelo DeMarco] as a result of neighbor complaints relating to the defendant's keeping of animals at his Wendell Place residence.

"On October 11, 2007, Officer Cobb, as a follow-up to prior complaints, left a notice on the defendant's front door and on the windshield of an automobile parked on the premises, directing the defendant to contact the animal shelter. At the time, a neighbor indicated [that] he had not seen the defendant in several days. Further, the defendant did not respond to his cell phone. Prior history indicated that he had generally responded to such notices.

"On Sunday, October 21, 2007, [Cobb], as further follow-up, paid a home visit to the defendant's residence. When approaching the house, he saw the October 11 notice on the floor of the front porch and the second notice left on the car still in place. [Cobb] observed that mail, current and dated, had piled up in an overflowing mailbox, and the same neighbor he had spoken to before once again said that he had not seen the defendant in several days. Dogs were heard barking inside the house. As he approached the front door, a strong, 'horrible odor,' which he described as a 'feces smell,' emanated from the premises. He knocked on the door, which became ajar, with no response. At the time, he did not have the defendant's cell phone number with him.

"Feeling something was wrong in the house and out of concern for the defendant's welfare and any animals in the house, [Cobb] called headquarters, resulting in a response by Sergeant Thomas Barcello, who, shortly thereafter, arrived with backup officers. Barcello, after initial discussion with [Cobb] confirmed his observations by finding the house to be in disarray, two or three vehicles on the property and overflowing and dated mail together with the previously left notices by animal control. He and his men did a perimeter check of the house and attempted to look through the windows, which were so filthy that visual observation of the interior was not possible. Patrol Officer Will Mercado confirmed the observations made by [Cobb] and Barcello. Out of [Cobb's] express concerns and his own findings and after consultation with [Cobb] and his officers, he,

too, concluded that the defendant and possibly others, together with the animals in the house, might be in danger and need of assistance. The aforesaid observations, check of the premises and consultations all took place within a very brief period of time. Barcello concluded that a 'welfare check' was necessary. As a result of the putrid smell[1] emanating from the house and fear for the safety of his men, Barcello enlisted the aid of the Stamford fire department, which he felt had the proper breathing equipment to enter. Inspection by fire personnel disclosed no humans present but that the dogs in the house were in bad shape. It is uncontroverted that the house was in such deplorable condition at the time of the incident that shortly thereafter it was condemned by the city of Stamford." The trial court then stated that "[w]hile the defendant argues that telephone contact could have been made prior to entry, the evidence indicated otherwise, given the immediacy of the situation. [Cobb] had specifically indicated that he did not have the defendant's cell phone number with him when he made the check. Although telephone contact was made with the defendant later in the day, the evidence and the reasonable inferences therefrom indicate that this information was not available to Barcello at the time of the perceived emergency. The court specifically credits Barcello's testimony in this regard."

These were the only facts explicitly found by the trial court in this matter.[2] The defendant did not challenge any facts found by the trial court other than the partially erroneous finding regarding the cell phone number. On the basis of these facts, I conclude that the court properly found that the entry into the defendant's home was permissible under the emergency doctrine exception to the warrant requirement.

"[I]n reviewing a trial court's ruling on the emergency doctrine, subordinate factual findings will not be disturbed unless clearly erroneous and the trial court's legal conclusion regarding the applicability of the emergency doctrine in light of these facts will be reviewed de novo. . . . Conclusions drawn from [the] underlying facts must be legal and logical. . . . We must determine, therefore, whether, *on the basis of the facts found by the trial court*, the court properly concluded that it was objectively reasonable for the police to believe that an emergency situation existed when they entered the [dwelling] . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Fausel*, 295 Conn. 785, 793, 993 A.2d 455 (2010).

"The emergency exception to the warrant requirement allows police to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. . . . The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an

exigency or emergency. . . . As a result, the use of the emergency doctrine evolves outside the context of a criminal investigation and does not involve probable cause as a prerequisite for the making of an arrest or the search for and seizure of evidence. . . . Nevertheless, the emergency doctrine does not give the state an unrestricted invitation to enter the home. [G]iven the rationale for this very limited exception, the state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat. . . . The police, in order to avail themselves of this exception, must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings . . . . It is an objective and not a subjective test. The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed. . . . The state bears the burden of demonstrating that a warrantless entry falls within the emergency exception." (Citations omitted; internal quotation marks omitted.) Id., 794–95.

The majority concludes that the court's findings, as corrected, are not sufficient to support the conclusion that the police reasonably believed that a warrantless entry was necessary to help someone in immediate need of assistance. I respectfully disagree.

The trial court found that the officers involved were motivated by a perceived need to render assistance to anyone, including the defendant, who might be located within the home.[3] It also found that the defendant had not responded to notices left previously by animal control officers, which behavior was out of character, mail was overflowing from the mailbox, the distressed sound of dogs could be heard, neighbors had not seen the defendant in several days and an extraordinarily foul smell was emanating from the residence. The police officers determined that the fire department, which had special breathing equipment, was better suited to investigate what condition actually existed within the house. It was thus objectively reasonable, in my opinion, for the police officers to believe, based on the facts known at the time, that an individual may well be within the home and in need of emergency assistance.[4] The majority, however, concludes that on these facts no reasonable police officer would believe that a dangerous situation existed, such that emergency entry was justified.

A review of the facts in a recently decided case, *State* v. *Fausel*, supra, 295 Conn. 785, is instructive in this matter. In *Fausel*, a police operator alerted other police of an individual, James Wayne, who was in the process of evading arrest and might be found in the area. Id., 788–89. Two detectives then noticed a vehicle of the

same description backed into the driveway of a house. Id., 789. The detectives went to the front and side doors of the house and knocked but received no response. Id. The detectives then checked the mailbox, which indicated that there was mail addressed to three individuals, including the defendant, Kenneth E. Fausel, but no mail was addressed to Wayne. Id. After receiving no response from the house, the police officers then announced that a dog would be released into the house. Id. Wayne then appeared and surrendered. He refused to provide any information about whose house it was. Id. After securing Wayne, the police then did a sweep of the house to determine if anyone else was present and, in the course of such sweep, found blue bags used in the packaging of crack cocaine belonging to the defendant. Id.

In that case, the police did not immediately rush into the house to apprehend Wayne. Obviously, the search around the perimeter of the house and the repeated knocking at the door took some time. In addition, the police did not enter the house until Wayne was already secured. Only after Wayne was no longer in the house did the police enter and perform a sweep. The police could have obtained a warrant for a search of the house after Wayne was secured but were not required to do so because of the potential for individuals in need of assistance in the house.[5] Apparently, the police were concerned that Wayne may have injured others in the house. Similarly, in this case, the police were not required immediately to enter the house at a risk to themselves: the facts found strongly suggest that it was reasonable to wait for the firefighters, who possessed breathing apparatus.

Under the traditional standard of review for constitutional issues—a mixed question of fact and law—the difference of opinion between the majority and me is quite straightforward. On the same set of facts, the majority holds that, viewing the situation objectively, the officers did not have reason to believe that life or limb was in danger. I believe, however, that the officers' belief was objectively reasonable.[6] The majority seeks to bolster its holding by adding a number of facts through the use of the "scrupulous review" standard of review. A brief excursion into the history and use of this standard of review may be useful.

The doctrine of scrupulous review in this jurisdiction appears to have its genesis in *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). At issue was the voluntariness of a confession, made while the defendant had been in police custody for five days. Id., 625. The Connecticut trial court had made a factual finding that the confession had been voluntary, and the conviction was upheld by the Connecticut Supreme Court of Errors. See *State* v. *Taborsky*, 147 Conn. 194, 158 A.2d 239 (1960), rev'd sub nom. *Culombe* v. *Connect-*

icut, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961).[7] The defendant Arthur Culombe petitioned the United States Supreme Court for certiorari, which was granted. *Culombe* v. *Connecticut*, 363 U.S. 826, 80 S. Ct. 1604, 4 L. Ed. 2d 1522 (1960). In the course of its majority opinion, written by Justice Frankfurter, the court discussed the appropriate standard of review. See *Culombe* v. *Connecticut*, supra, 367 U.S. 603–606. Justice Frankfurter wrote that the ascertainment of historical fact rests appropriately with the trier of fact, "subject to whatever corrective powers a State's appellate processes afford." Id., 603. All testimonial conflict, then, is decided by the state courts. If factual findings are "wholly lacking support in [the] evidence," the Supreme Court does not consider itself bound by those findings. Id. If there are no explicit factual findings, the rejection of a federal constitutional claim by a trial court applying the proper constitutional standards resolves all factual conflicts in testimony against the criminal defendant. Id., 603–604. Justice Frankfurter then stated, however, that in such a case the Supreme Court would consider "only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." Id., 604.

The inferences from the historical facts and the legal conclusions drawn from them require a more plenary standard of review. Id., 605. "[I]t cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel." Id. Even so, great weight is to be accorded to the inferences drawn by the state courts, and, in a case which is not entirely clear, the state court's determination should control. Id. The standard established by *Culombe* for the review of state court decisions on federal constitutional issues, then, is strikingly similar to our standard of mixed question of law and fact,[8] with the additional proviso that the federal authority may consider "facts," which, if not explicitly found by the trial court, are manifestly and uncontrovertibly correct. Otherwise, facts not explicitly found will be deemed to support the trier's decision, where the trier applied the appropriate standards.

For the twenty years following *Culombe*, our courts do not appear to have referred to a more exacting or "scrupulous" standard of review for constitutional claims, perhaps because the *Culombe* standard was stated as a principle to be applied to the federal review of state court decisions rather than as a standard that state courts are mandated to use in their own appellate process. My research reveals that the first meaningful mention of scrupulous review in a Connecticut case occurs in *State* v. *Frazier*, 185 Conn. 211, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S. Ct. 3496, 73 L. Ed. 2d 1375 (1982), in which Justice Shea wrote in

the context of the waiver of *Miranda*[9] rights: "The issue is factual, but our usual deference to the finding of the trial court on questions of this nature is qualified by the necessity for a scrupulous examination of the record to ascertain whether such a finding is supported by substantial evidence." Id., 219, citing *Culombe* v. *Connecticut*, supra, 367 U.S. 605. This standard has been cited, with occasional variations, to the present day. See, e.g., *State* v. *Boyd*, 295 Conn. 707, 717, 992 A.2d 1071 (2010); *State* v. *Lawrence*, 282 Conn. 141, 154, 920 A.2d 236 (2007).[10]

Though language requiring a scrupulous examination of the record appears frequently, its functional meaning is not altogether clear. In many cases, scrupulous review seems to result simply in a somewhat more searching examination than might be required under the clearly erroneous standard: if the trial court's findings are supported by "substantial evidence," they will stand. See, e.g., *State* v. *Lawrence*, supra, 282 Conn. 154–58 (not appellate court's role to retry case; here, facts supported by ample evidence in record not clearly erroneous); *State* v. *Jones*, 281 Conn. 613, 654–55, 916 A.2d 17 (even if scrupulous examination undertaken, not appellate court's role to determine credibility or retry facts but to see whether record supports finding), cert. denied, 552 U.S. 868, 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007); *State* v. *Ellis*, 232 Conn. 691, 700–704, 657 A.2d 1099 (1995) (constitutional claims require scrupulous review; clearly erroneous standard apparently applied); *State* v. *Alexander*, 197 Conn. 180, 185, 496 A.2d 486 (1985) (reviewing court's customary deference to trial court fact-finding tempered by necessity for scrupulous examination of record to ascertain if finding of agency supported by substantial evidence).

At least once, our Supreme Court has undertaken a *Culombe*-like analysis and has relied on facts not explicitly found by the trial court in resolving constitutional claims. In *State* v. *Frazier*, supra, 185 Conn. 219, the issue was whether the defendant had effectively waived his constitutional rights prior to police questioning. Although the trial court did not make several findings that the Supreme Court found to be important, the Supreme Court nonetheless believed that it justifiably could resort to the police tape recording of the defendant's confession, apparently an exhibit at trial, as a source of uncontrovertible fact as to what was said during the interview; other facts that the Supreme Court held were entirely uncontradicted were relied on.[11] Id., 219–20.

The *Culombe* analysis may be summarized, then, as follows. The usual standard by which constitutional claims are reviewed is to apply the clearly erroneous standard to the historical facts, and a plenary standard to the inferences and conclusions that must be objectively reasonable. In an appropriate case, the clearly

erroneous standard is tempered by an ability to consider facts not explicitly found by the trial court. The appellate court does not, however, retry the case in the sense that it does not make credibility determinations, nor does it choose between competing facts. In the absence of explicit findings, it will be assumed that the trial court believed facts supporting its conclusion, unless the uncontroverted and unassailable facts are to the contrary.

I respectfully believe that the majority in this case exceeded the permissible scope of "scrupulous review." There indeed was evidence to support many of the "facts" mentioned by the majority, but there was also evidence to support "facts," not explicitly found, which support the conclusion that an emergency existed. The hazard in performing scrupulous review, in my view, is not in rigorously testing facts found by the trial court but rather in selecting "new" facts from many, which, on the cold record, may be more or less equally credible. For example, the majority states that neighbors had complained of odors in the past but does not state that police and fire personnel perceived an odor unlike any they had perceived before. See footnote 1 of this dissenting opinion. The majority states that there frequently were a number of cars on the premises but does not stress that notices that had been placed about one week before were still there.[12] The majority does not stress the accumulation of mail. The majority concludes that the whole sequence of events at the scene played out over nearly one hour, enough to dispel any notion of an emergency. The trial court, on the other hand, found that the "observations, check of the premises and consultations all took place within a very brief period of time." There was evidence from which the court could have concluded that approximately fifty minutes elapsed between Cobb's arrival and the firefighters' entry, and also there was evidence that the responders' vehicles were advised to drive with emergency signals. Under the circumstances, the court thought the response was quite swift. Although scrupulous review may be appropriate to supply facts not found by the trial court if they are themselves uncontestable, an appellate court would engage in fact-finding if it were to emphasize some apparently uncontested[13] facts at the expense of others. Frequently, we are unable to discern with certainty whether the trier of fact did not believe, for some reason, facts not found, or whether they were deemed insignificant or simply not mentioned in the interest of time. If the evidence can support different conclusions and some facts are not explicitly found, *Culombe* specifically states that the facts consistent with the court's conclusions are to be used for the purpose of appellate review. *Culombe* v. *Connecticut*, supra, 367 U.S. 603–604.

The facts added by the majority pursuant to the doctrine of scrupulous review, even if appropriately added,

do not significantly alter the overall situation found by the trial court. The ultimate test is whether a reasonable police officer would have reason to believe that an emergency existed. This is not a criminal investigation; probable cause is not required. The safety of the community is implicated. On the facts found by the trial court, without the filtering of hindsight, it is most reasonable to believe that an emergency presented itself. Though the defendant perhaps could have been called prior to the entry, he was not called, and we ought not speculate about the result of a call not made. Further, the fact that he perhaps could have been reached does not have a substantial effect on the reasonableness of the finding of an emergency. Though multiple vehicles and unkempt premises may have been the norm, features such as accumulation of mail and a most perverse odor suggested something beyond the norm.

Finally, the majority suggests that the officers' "measured behavior" at the scene was "stark evidence" of their purported awareness that no emergency was presented. The facts found by the trial court show that the entire scenario took less than one hour on a Sunday. It presumably would have taken much longer to prepare a warrant and to have it issued. Cobb called for police help, which certainly is consistent with an emergency. It was then reasonably determined that for the safety of anyone entering the home assistance from the fire department was required, with its capacity safely to enter toxic and perhaps explosive areas. In the circumstances, "measured behavior" in coping with an emergency was not inappropriate and indeed was consistent with concern for the safety of the community and of the first responders.

This court's review of whether the facts found by the trial court, even subject to scrupulous review, support an objectively reasonable belief that an emergency existed is plenary. I would conclude that the trial court properly determined that the entry was based on an objectively reasonable belief that an emergency existed.[14]

I would affirm the judgment of the trial court.

[1] The majority reports the testimony of Cobb, who stated that he had never smelled such an odor before but that he thought the odor may have been feces. Other witnesses, however, testified that they could not identify the odor. Barcello testified that the odor was of such a nature that he did not know what it was or whether or not it was a chemical odor. He also stated that he thought the odor was too pungent and too strong to be only dog feces. Mercado, another officer with the Stamford police department dispatched to assist Barcello, similarly testified that he had never smelled such an odor before. Finally, Troy Jones, the safety officer for the Glenbrook fire department, testified that he also could not identify the smell at first, so he entered the house with protective gear and a Scott monitoring meter, which identifies natural gas, carbon monoxide, methane and certain other gases. I do note, however, that the court did not expressly find anything more specific about the smell than that stated in its memorandum of decision.

[2] The record shows that neither Cobb nor Barcello had the defendant's cell phone number with him. It was apparent, however, that Cobb likely could have found the number by calling his office.

[3] The subjective belief of the officers is not controlling in itself.

[4] Other jurisdictions have held that similar circumstances indicated a possible emergency situation justifying a search without a warrant. See, e.g., *United States* v. *Presler*, 610 F.2d 1206, 1209 (4th Cir. 1979) (defendant's landlord had not seen him for some time, unusual odor emanating from his room); *People* v. *Molnar*, 98 N.Y.2d 328, 329, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002) (caller alerted police to " 'strange odor' " at defendant's apartment); *Rauscher* v. *State*, 129 S.W.3d 714, 717 (Tex. App. 2004) (neighbors reported not seeing defendant's wife for some time and foul, unidentified odor was emanating from home), review denied, 2004 Tex. Crim. App. LEXIS 1122 (Tex. Crim. App. July 28, 2004); *State* v. *York*, 159 Wis. 2d 215, 217, 464 N.W.2d 36 (Wis. App. 1990) (couple reported missing and foul odor, possibly decomposing body, detected), review denied, 465 N.W.2d 656 (Wis. 1991).

[5] See also *People* v. *Molnar*, 98 N.Y.2d 328, 335, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002) (emergency still existed notwithstanding passage of one hour between arrival of police and their entry into premises).

[6] The fact that, as it turned out, no one was in need of assistance does not detract from the responders' objectively reasonable belief. *State* v. *Ortiz*, 95 Conn. App. 69, 83, 895 A.2d 834, cert. denied, 280 Conn. 903, 907 A.2d 94 (2006). The emergency exception "must be applied by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences. As one court usefully put it, the question is whether the officers would have been derelict in their duty had they acted otherwise. This means, of course, that it is of no moment that it turns out there was in fact no emergency." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 800, quoting 3 W. LaFave, Search and Seizure (4th Ed. 2004) § 6.6 (a), pp. 452–53.

[7] The appeals of the defendants, Arthur Culombe and Joseph "Mad Dog" Taborsky, were consolidated and the results announced in one opinion.

[8] See *State* v. *Atkinson*, 235 Conn. 748, 759–60, 670 A.2d 276 (1996). Addressing the issue of whether a suspect was in custody, the court held that the standard to review historical facts was whether the facts were clearly erroneous, with the caveat that the reviewing court would undergo a "scrupulous examination of the record" to determine whether, in the totality of the circumstances, the trial court's finding was supported by "substantial evidence." Id., 759. The court's review of the conclusion reached was plenary; the court described the review as appropriate for a mixed question of law and fact. Id., 759 n.17.

[9] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[10] *State* v. *Fausel*, supra, 295 Conn. 793, referred only to the traditional clearly erroneous standard of review of historical fact and contains no mention of "scrupulous review." The omission may not be of significance, however, because the defendant in that case did not challenge the court's factual findings. Id., 793 n.5.

[11] *Frazier* was decided under the findings system since abandoned by our Supreme Court. Generally, the appellant was required to submit numbered requested draft findings of fact to the trial court, the appellee was required to submit counterfindings and the trial court would then prepare numbered factual findings. It was error for a trial court not to make a requested finding of fact if the requested fact was admitted or undisputed. See, e.g., *Saphir* v. *Neustadt*, 177 Conn. 191, 197, 413 A.2d 843 (1979). In *Frazier*, the court failed to find as facts several of the defendant's requested findings of fact, which were admitted or undisputed, and the defendant was given the benefit of the doubt. *State* v. *Frazier*, supra, 185 Conn. 219–20. The findings system, then, provided a framework in which the *Culombe* analysis could be readily applied, though it appears that the *Frazier* court did not rely on the findings system alone. Some of the same purpose is served today by requests for articulation.

There likely is little practical difference between the "clearly erroneous' standard and that of "scrupulous examination." A court's "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." (Internal quotation marks omitted.) *Sikorsky Aircraft Corp.* v. *Commissioner of Revenue Services*, 297 Conn. 540, 568, A.2d (2010). A firm conviction based on the entire evidence would seem not to be inconsistent with a conclusion reached after the exercise of scrupulous review.

[12] The majority does mention testimony about a cell phone call one day

after the notices were placed. Even so, the notices remained for about one week.

[13] A fact is not admitted or undisputed merely because there is no evidence to the contrary.

[14] The facts, even as set forth by the majority under its scrupulous review analysis, support, in my opinion, the conclusion that the entry was based on an objectively reasonable belief. A conclusion of reasonable belief does not require that every fact, sifted perhaps years later by a court, be consistent with that belief.