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STATE OF CONNECTICUT *v.* SCOTT TORELL
(AC 45444)

Bright, C. J., and Cradle and Harper, Js.

Syllabus

The defendant acquittee, who previously had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the trial court's judgment granting the state's petition to extend his commitment to the Psychiatric Security Review Board pursuant to statute (§ 17a-593). The court relied on reports prepared by the board, as required by § 17a-593 (d), in determining, by clear and convincing evidence, that reasonable cause existed to believe that the acquittee remained mentally ill and that his discharge from the board's jurisdiction would constitute a danger to others. The court referred to the reasons set forth in the board's reports that the acquittee, who had been diagnosed with autism spectrum disorder, had not made progress in his treatment due to his refusal to cooperate with his treatment providers and did not consider his multiple sexual assaults of children to have been wrong. The court rejected as excessive the state's request that the acquittee's commitment be extended for a period not to exceed ten years and, instead, extended his commitment for a period not to exceed five years. On appeal, the acquittee claimed that the trial court improperly denied his motions to dismiss the state's petition on the grounds that his continued commitment to the jurisdiction of the board violated his rights to substantive and procedural due process. He further claimed that the court improperly denied his motion to strike those portions of the board's reports that recommended his continued commitment for a period not to exceed ten years. *Held*:

1. The trial court properly denied the acquittee's motion to dismiss the state's petition to extend his commitment to the board that alleged a violation of substantive due process under the federal constitution; given the court's determinations that the state satisfied its burden of proving by clear and convincing evidence that the acquittee suffered from a mental illness and would pose a danger to others if he were released from the board's jurisdiction, the court properly extended the acquittee's commitment and declined to address his claims that the care and medical treatment he had received were so deficient as to shock the conscience and thus were violative of his right to substantive due process, as those issues and the remedy the acquittee sought were beyond the scope of the hearing on the state's petition and could be raised in other proceedings that were available to him.

2. The acquittee could not prevail on his claim that the trial court improperly denied his motion to dismiss that alleged a violation of his right to procedural due process under article first, § 8, of the state constitution because the lack of mandatory, biennial judicial review during the five year period of his extended commitment posed an unreasonable risk of an erroneous deprivation of his liberty: the acquittee was not entitled, as he claimed, to mandatory, biennial judicial review, as is required for civilly committed individuals, our Supreme Court in *State* v. *Long* (268 Conn. 508) having determined that such review is not constitutionally required; moreover, the acquittee's contention that § 17a-593, as applied to him, failed to provide certain protections guaranteed by the state constitution was unavailing, as the existing procedures under § 17a-593 did not expose him to an unreasonable risk of an erroneous deprivation of his liberty, he received the procedural protections identified in *Long*, including adequate notice and a hearing, and there would be little value in the imposition of mandatory judicial review without a petition being filed during his continued commitment as a procedural safeguard.

3. This court declined to address the acquittee's claim that the trial court improperly denied his motion to strike the board's recommendation that his commitment be extended for not more than ten years; the acquittee in his principal brief to this court did not analyze how he was harmed by the board's recommendation but mentioned harm only in his reply brief, which constituted an abandonment of that claim.

Argued September 29—officially released December 19, 2023

Procedural History

Petition for an order extending the defendant's commitment to the jurisdiction of the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Jon C. Blue*, judge trial referee; thereafter, the court denied the defendant's motions to strike and to dismiss and rendered judgment granting the petition, from which the defendant appealed to this court. *Affirmed.*

Kevin Semataska, deputy assistant public defender, with whom, on the brief, was *Richard E. Condon, Jr.*, senior assistant public defender, for the appellant (defendant).

Meryl Gersz, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Michele C. Lukban* and *Maxine V. Wilensky*, former senior assistant state's attorneys, for the appellee (state).

Susan Castonguay, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (Psychiatric Security Review Board).

Opinion

HARPER, J. The defendant, Scott Torell (acquittee),[1] appeals from the judgment of the trial court granting the state's petition seeking his continued commitment to the jurisdiction of the Psychiatric Review Board (board) pursuant to General Statutes § 17a-593 (c). The acquittee claims that the court improperly denied (1) his motion to dismiss alleging a violation of substantive due process, (2) his motion to dismiss alleging a violation of procedural due process, and (3) his motion to strike a portion of the board's report to the court recommending a period of continued commitment not to exceed ten years. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On May 11, 2005, the acquittee was found not guilty by reason of mental disease or defect under General Statutes § 53a-13[2] of criminal charges alleged in two separate dockets. In Docket No. CR-03-021704, the acquittee was charged with attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), five counts of sexual assault in the third degree in violation of General Statutes § 53a-72a (a), and three counts of risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2).[3] In Docket No. CR-04-0223362, the acquittee was charged with sexual assault in the third degree in violation of General Statutes § 53a-72a, two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a, and two counts of risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21.[4] On July 18, 2005, the court committed[5] the acquittee to the jurisdiction of the board for a period of time not to exceed fourteen years.[6] At this time, the acquittee was diagnosed with, inter alia, pedophilia, sexual attraction to both genders, nonexclusive type.

On November 21, 2012, the acquittee filed an application for discharge, arguing that he no longer suffered from a psychiatric disability to the extent that his discharge from the jurisdiction of the board would constitute a danger to himself or others.[7] After an extended delay, the court, *Hon. Jon C. Blue*, judge trial referee, held a hearing on the acquittee's application on January 23, 2018. On February 21, 2018, the court issued a memorandum of decision dismissing the acquittee's application for discharge. The court found that the acquittee had failed to establish, by a preponderance of the evidence, that he would not be a danger to himself or to others if his application was granted and he was discharged from the jurisdiction of the board.[8] In support of this finding, the court referenced the acquittee's past volatile behavior, poor self-control, and refusals to discuss the offenses leading to his arrests, to take responsibility for his behavior, to participate in most

recommended treatment, to consider recommendations that he take psychotropic medications, and to take part in group therapy. Additionally, the court noted that, in its December 5, 2017 report, the board indicated that the acquittee had made no progress since the prior report dated December 22, 2015, and continued to find that he required "care, custody and treatment for his mental illness and without such, would pose a danger to himself or others."

Prior to the expiration of the term of commitment, on January 25, 2019, the state filed a petition for continued commitment pursuant to § 17a-593 (c).[9] Therein, it alleged that "reasonable cause exists to believe the acquittee remains mentally ill to the extent that this discharge at the expiration of his maximum term of commitment (7/17/2019) would constitute a danger to [himself] or other[s]."[10] The court referred the petition to the board[11] for an evaluation and report pursuant to § 17a-593 (d).[12]

The board set forth the following findings of fact in its report: "[The acquittee] is an individual with psychiatric disabilities diagnosed as Unspecified Paraphilic Disorder;[13] Cannabis Use Disorder In Sustained Remission in a Controlled Environment, Unspecified Personality Disorder with Borderline and Schizotypal Traits, and Rule Out Autism Spectrum Disorder. . . . During the first several years of [his] hospitalization . . . [h]e demonstrated minimal involvement in treatment activities and denied responsibility for his sexual offenses against children. Between October, 2010, and March, 2012, [the acquittee] demonstrated adequate progress such that he was transferred to a less restrictive hospital setting. Since then, [the acquittee] has not made any appreciable progress but instead has had several instances of sexually inappropriate and aggressive behaviors. On two separate occasions, he fractured his hand punching a window and a door. Continuing to exhibit poor insight regarding his psychiatric illness and its relationship to his criminal offenses, he has failed to accept responsibility for his criminal actions, remaining adamant that he was not responsible for his sexual abuse of children. He has also been unable or unwilling to address the index offense in individual therapy, and attempts to encourage him to do so have been met with excessive defensiveness. He has additionally refused to participate in other therapeutic treatment activities, and remains opposed to his treatment team's recommendation that he consider psychotropic medications to help manage his mood lability and impulsivity. [The acquittee] has, in short, failed to appreciate that his psychiatric illness and the resultant sexual offenses brought him under the [b]oard's jurisdiction. The [b]oard, therefore, finds that [the acquittee] remains at risk for reengaging in sexually offending behavior and that he requires care, custody and treatment for his mental illness and that without such treat-

ment he would pose a danger to himself or others. The [b]oard further finds that [the acquittee] continues to require the [b]oard's oversight and that he cannot be safely discharged from its jurisdiction." (Footnote added.) In conclusion, the board requested that the court grant the petition for continued commitment for a period not to exceed ten years.

On September 11, 2020, the acquittee requested that the court refer the matter back to the board for the purpose of preparing an updated report. The court granted this request. The board subsequently submitted its updated report to the court on January 28, 2021. The updated report noted that the acquittee's diagnosis had been changed from unspecified paraphilic disorder to autism spectrum disorder. The board found that the diagnosis change "has not resulted in any clinical progress. In fact, his limited engagement in treatment declined further and he exhibited threatening behaviors toward other patients. Concerned about his risk, the hospital recommended to [the acquittee] that he consider medication to address the possibility of psychotic symptoms. [The acquittee] refused to comply with this recommendation. He remains resistant to attempts by his hospital treaters to individualize treatment modalities to accommodate his autism disorder." The board iterated its view that the acquittee could not be safely discharged from its jurisdiction and again recommended that the court grant the state's petition for continued commitment for a period not to exceed ten years.

On January 29, 2021, the acquittee filed a motion to strike the ten year recommendation contained in the board's reports submitted to the court. On February 16, 2021, the acquittee filed motions to dismiss the state's petition for continued commitment based on violations of his rights to substantive and procedural due process. With respect to the former, the acquittee argued that § 17a-593 (c), as applied to him, violated his substantive due process rights as guaranteed by the fifth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution; specifically, his rights to freedom from detention of infinite duration and to treatment as an involuntarily confined individual. As to the latter, the acquittee contended that § 17a-593 (c), as applied to him, violated article first, § 8, of the Connecticut constitution because it failed to provide him with certain procedural protections otherwise provided by the civil commitment process, including the right to periodic judicial review.

On October 28, 2021, the board submitted another report, dated October 26, 2021, to the court regarding the petition for continued commitment.[14] After reviewing numerous reports from the hospital and considering the testimony from various medical providers, the board noted that the acquittee "exhibits a complex psy-

chological profile that includes autism, personality disorder, and a primary psychotic disorder." The board specifically iterated that the acquittee's primary diagnosis was changed from unspecified paraphilic disorder to autism spectrum disorder in 2019, but that this change "has not resulted in any clinical progress, despite the hospital's continuous attempts to engage [the acquittee] in treatment and implement strategies specifically designed for persons with [autism spectrum disorder] which have been suggested by third-party consultation. In fact, his limited engagement in treatment declined further and he exhibited threatening behaviors toward other patients and staff." The board further found that the acquittee refused to comply with the treatment recommendation of medication to address the possibility of other psychotic symptoms and remained resistant to all attempts at individualized treatment modalities to accommodate his autism spectrum disorder. The board again opined that the acquittee required its oversight and that he could not safely be discharged from its jurisdiction. It repeated the recommendation that the court grant the state's petition for continued commitment for a period not to exceed ten years.

The court heard evidence on the state's petition for continued commitment over four days in December, 2021, and argument from the parties on February 28, 2022.[15] On March 2, 2022, Judge Blue issued a memorandum of decision granting the state's petition for continued commitment for a period of time but limited commitment to a period of time not to exceed five years. At the outset, the court observed that the acquittee "presented a challenging case to psychiatrists" and that his diagnosis had changed over the years due to an evolving understanding of the acquittee's mental status. After identifying the appropriate legal standard,[16] the court explained that the issue had been narrowed during the hearing to whether the state had demonstrated, by clear and convincing evidence, that the acquittee, if released, would be a danger to others.[17] The court then addressed the acquittee's argument that, had he been diagnosed properly with autism spectrum disorder from the start of his confinement, he would have received appropriate treatment so that he would not constitute a danger to others. Acknowledging this as a possibility, the court explained that the evidence established that the acquittee had been diagnosed with autism spectrum disorder for four years and that he had not made progress due to his refusal to cooperate with his treatment providers. Ultimately, the court reasoned that the present matter was not a medical malpractice action but, rather, a proceeding limited to the determination of whether the acquittee would present a danger to others if released. The court then considered all of the evidence, including the testimony of the acquittee's expert witness, Catherine F. Lewis, a psychiatrist, and deter-

mined that the state had met its burden of showing, by clear and convincing evidence, that the acquittee would be dangerous to others if released from the jurisdiction of the board. Although the court "unhesitatingly [paid] tribute to [Lewis'] expertise, her intellect, and her passion," it ultimately found that her opinion on the issue of the acquittee's danger to others was not supported by credible evidence. Specifically, the court referred to the reasons set forth by the board in its reports, as well as "the overwhelming evidence in the record that [the acquittee], even today, does not consider his multiple sexual assaults of minor children to have been wrong."[18]

The court then turned to the acquittee's constitutional arguments. It first observed that a motion to dismiss, by its nature, alleges a lack of jurisdiction, and that the court had both subject matter and personal jurisdiction to hear and decide the state's petition for continued commitment. Turning to the merits of the motion to dismiss alleging a substantive due process violation, the court stated: "If [the acquittee] feels that his treatment, or lack thereof, has denied him his constitutional rights, he is free to pursue an action under 42 U.S.C. § 1983, but the parameters of the present proceeding are determined by statute. That statute, [§ 17a-593 (c)], requires the court not to judge the adequacy of the treatment [the acquittee] received in the past but to determine whether the state has established by clear and convincing evidence that [the acquittee] is mentally ill and, if released, would be a danger to himself or others." If the state satisfies that standard, then the commitment of the acquittee does not "shock the conscience," which is the test for whether an Executive Branch action constitutes a violation of substantive due process.

Next, the court addressed the acquittee's procedural due process claim. "Procedural due process requires adequate notice and hearing. [The acquittee] has had plenty of both. He has been represented by counsel throughout both the administrative and judicial processes. In the proceedings before this court, he has had ample opportunity to confront and cross-examine the witnesses against him and to submit whatever evidence he wished in his favor. . . . The hearing has been fair throughout. There has been no violation of procedural due process."

After determining that it would grant the state's petition for continued commitment, the court turned to the length of time that the acquittee would remain under the jurisdiction of the board. The court first denied the acquittee's motion to strike, concluding that the board's recommendation was not binding, and "[t]he authority to decide the actual length of any continued commitment lies in the court alone."[19] The court then determined that the ten year recommendation by the board and the seven year recommendation by the state, were

excessive. The court committed the acquittee to the jurisdiction of the board for a period of time not to exceed five years. This appeal followed. Additional facts will be set forth as necessary.

I

The acquittee first claims that the court improperly denied his motion to dismiss alleging a violation of substantive due process under the federal constitution. Specifically, he argues that the medical treatment he received was substantially below the standard of care so as to shock the conscience and that his commitment is not rationally related to the requisite therapeutic purpose.[20] The state counters, inter alia, that the court properly concluded that "the acquittee's complaints as to the quality of his treatment are not directly germane to the trial court's assessment of whether the acquittee is a person who should be discharged, and any treatment failures should more appropriately be raised in a different procedural context." We agree that the court properly limited the issue to whether to grant or deny the state's petition for continued commitment and that the acquittee's arguments regarding the quality of medical care and treatment he received should be adjudicated in another proceeding.

Before addressing the specifics of the acquittee's claim, we briefly review the relevant legal principles pertaining to the substantive due process doctrine and the recommitment procedure for individuals found not guilty of a criminal offense pursuant to § 53a-13 and who have reached the end of the term of maximum commitment. "Freedom from unjustified governmental intrusions into personal security and bodily freedom are basic, historically recognized liberty interests that are protected by the federal constitution. . . . As a matter of federal law, [i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection; that is, the nature of commitment [must] bear some reasonable relation to the purpose for which the individual is committed. . . . The United States Supreme Court has recognized involuntary commitment to a mental institution, in particular, as involving more than a loss of freedom from confinement . . . due to its stigmatizing consequences, and the potential exposure to invasive, compulsory medical and psychiatric treatment. . . .

"The law of federal due process accordingly imposes significant constitutional constraints on involuntary commitments. Even for the purpose of psychiatric treatment, a state may not confine an individual, unless the individual is both mentally ill and dangerous. . . . Federal law has, however, recognized that insanity acquittees are a special class that should be treated differently from other candidates for commitment . . . . Thus, when a criminal defendant establishes by a preponderance of the evidence that he is not guilty

of a crime by reason of insanity, the [c]onstitution permits the [g]overnment, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Metz*, 230 Conn. 400, 412–14, 645 A.2d 965 (1994).

As previously noted, the acquittee filed a motion to dismiss,[21] alleging that his commitment to the jurisdiction of the board constituted a violation of substantive due process in that continued commitment would violate his right to freedom from detention of indefinite duration and his right to treatment as an involuntarily confined individual. "Substantive due process is the embodiment of society's desire to prevent government from abusing [its] power, or employing it as an instrument of oppression. . . . To that end, a claim of a violation of substantive due process must allege a level of executive abuse of power . . . which shocks the conscience. . . . A salient example of such abuse of power may be found in the very case in which the standard was first enunciated. In *Rochin* v. *California*, [342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)] the United States Supreme Court held that the forced pumping of a suspect's stomach to retrieve evidence shocked the conscience. As the court described it, [i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." (Citations omitted; internal quotation marks omitted.) *ATC Partnership* v. *Windham*, 251 Conn. 597, 608, 741 A.2d 305 (1999), cert. denied, 530 U.S. 1214, 120 S. Ct. 2217, 147 L. Ed. 2d 249 (2000); see also *D'Amico* v. *Johnson*, 53 Conn. App. 855, 864, 733 A.2d 869 (1999).

Additionally, we note that, "[a]lthough no objective measure has been developed to identify such a violation with scientific precision, it is understood that malicious and sadistic abuses of power by government officials, intended to oppress or to cause injury, and designed for no legitimate government purpose, unquestionably shock the conscience. . . . The doctrine is designed to protect the individual against . . . the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ." (Citations omitted; internal quotation marks omitted.) *Gawlik* v. *Semple*, judicial district of New Haven, Docket No. CV-16-5036776-S (September 4, 2018) (reprinted at 197 Conn. App. 86, 112, 231 A.3d 347), aff'd, 197 Conn. App. 83, 231 A.3d 326 (2020), cert. denied, 335 Conn. 953, 238 A.3d 730, cert. denied, U.S. , 141 S. Ct. 1713, 209 L. Ed. 2d 479 (2021); see generally *Bolmer* v. *Oliveira*, 594 F.3d 134, 143 (2d

Cir. 2010) (physician's decision to involuntarily commit mentally ill person shocks conscience and violates substantive due process when based on substantive and procedural criteria that are substantially below standards generally accepted in medical community).

Our legislature has set forth the procedures for continuing the commitment of an acquittee to the jurisdiction of the board when he or she approaches the maximum term of commitment.[22] See *State* v. *Dyous*, 307 Conn. 299, 307, 53 A.3d 153 (2012). "Section 17a-593 (c) authorizes a state's attorney to seek a court order for the continued commitment of an acquittee [i]f reasonable cause exists to believe that the acquittee remains mentally ill or [a person with intellectual disability] to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others . . . ." (Internal quotation marks omitted.) *State* v. *Metz*, supra, 230 Conn. 408. "The court shall forward . . . any [such] petition . . . to the board. The board shall . . . file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report. General Statutes § 17a-593 (d). Within ten days of receipt . . . of the board's report . . . either the state's attorney or counsel for the acquittee may file notice of intent to perform a separate examination of the acquittee. An examination conducted on behalf of the acquittee may be performed by a psychiatrist or psychologist of the acquittee's own choice . . . . General Statutes § 17a-593 (e). After receipt of the board's report and any separate examination reports, the court shall . . . commence a hearing on the . . . petition for continued commitment. General Statutes § 17a-593 (f). At that hearing, the state bears the burden of proving by clear and convincing evidence that the acquittee is currently mentally ill and dangerous to himself or herself or others or gravely disabled . . . a burden identical to that borne by an applicant for an order of civil commitment. Unlike the finder of fact at a civil commitment hearing, however, the court at a continued commitment hearing must [consider] that its primary concern is the protection of society . . . . General Statutes § 17a-593 (g)." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Dyous*, supra, 307–309.

At the conclusion of a hearing for the continued commitment of an acquittee beyond his or her maximum term of confinement, the trial court, by statute, must issue one of two possible orders—the acquittee is or is not a person who should be discharged from the jurisdiction of the board. See General Statutes § 17a-593 (g); *State* v. *Jacob*, 69 Conn. App. 666, 672, 798 A.2d 974 (2002); see also *State* v. *Lindo*, 110 Conn. App. 418,

424, 955 A.2d 576, cert. denied, 289 Conn. 948, 960 A.2d 1038 (2008). The trial court in the present matter, on several occasions, described its task as a "binary" choice and indicated that the determination of whether the medical treatment provided to the acquittee shocked the conscience, constituting a violation of substantive due process, was outside of the scope of the hearing on the state's petition.[23]

We agree that, following a § 17a-593 proceeding to determine whether to continue the commitment of an acquittee beyond the maximum term of his or her commitment, the question before the trial court is whether the acquittee is or is not a person who should be discharged from the jurisdiction of the board. The resolution of that inquiry is based on whether the state has demonstrated, by clear and convincing evidence, that reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities, which includes any mental illness or mental disease as defined by the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatry Association, to the extent that his discharge would constitute a danger to himself or herself or to others. See, e.g., *State* v. *Dyous*, supra, 307 Conn. 308; *State* v. *Metz*, supra, 230 Conn. 408; see also General Statutes § 17a-593 (c). In this appeal, the acquittee does not claim that the procedures set forth in § 17a-593 (c) violate his substantive rights to due process under the federal constitution. The acquittee also has not challenged the trial court's conclusions that he suffered from a mental illness and that he would pose a danger to others if released from the board's jurisdiction. Instead, the acquittee advances only his argument that the medical treatment he has received has been deficient or inadequate so as to shock the conscience, constituting a violation of substantive due process.

As a remedy for this alleged constitutional violation, the acquittee argues that the state's motion for continued confinement should have been dismissed and that he should have been released to the community despite his continued mental illness and dangerousness to others. The petitioner cites no authority for this proposition, and we are aware of none. Instead, the law provides other remedies for such a constitutional violation. For example, a detained person who claims that the medical care he has received is so inadequate or inappropriate as to shock the conscience may bring an action alleging a violation of his substantive due process rights pursuant to 42 U.S.C. § 1983.[24] See, e.g., *Charles* v. *Orange County*, 925 F.3d 73, 85 (2d Cir. 2019). Such a claim may also be raised in a petition for habeas corpus alleging deliberate indifference in violation of the eighth amendment's prohibition on cruel and unusual punishment. See, e.g., *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338–39, 925 A.2d 764 (2008). These methods of raising a constitutional

violation related to the provision of medical care to detained persons provide remedies that directly address the constitutional violation—either injunctive relief requiring the provision of the medical treatment requested or damages for the failure to do so. By contrast, the relief the acquittee seeks in the present case would not address the alleged constitutional violation. In particular, his release would not result in his receiving the treatment to which he claims he is entitled. Instead, the result would be that he would be released into the community while still suffering from a mental illness and still posing a danger to others. Given the availability of other remedies, substantive due process does not require the result the acquittee seeks.

In the present case, the court determined that the state had satisfied its burden of establishing that the acquittee suffered from a mental illness and that, if released from the jurisdiction of the board, he would pose a danger to others. Given those determinations, the court properly extended his commitment to the jurisdiction of the board and declined to address the other issues raised that are beyond the scope of the present proceeding. We conclude, therefore, that the court properly denied the motion to dismiss filed by the acquittee alleging a violation of substantive due process.

II

The acquittee next claims that that the court improperly denied his motion to dismiss alleging a violation of procedural due process. Specifically, he argues that the court's imposition of an additional term of commitment to the jurisdiction of the board not to exceed five years improperly denied him mandatory biennial judicial review in violation of his right to due process pursuant to article first, § 8, of the Connecticut constitution. The state counters that, pursuant to our Supreme Court's decision in *State* v. *Long*, 268 Conn. 508, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004), the acquittee's procedural due process claim must fail. We agree with the state.

The following additional facts are relevant to this claim. On February 16, 2021, the acquittee filed a motion to dismiss, alleging a violation of procedural due process on the ground that § 17a-593 (c), as applied to him, failed to provide certain protections guaranteed by our state constitution. Specifically, he argued, inter alia, that he was entitled to "[p]eriodic judicial review, which includes the basic procedural safeguards of an initial civil commitment hearing as articulated in *Fasulo* v. *Arafeh*, [173 Conn. 473, 378 A.2d 553 (1977)]." The state filed an objection to this motion on May 4, 2021.

In its memorandum of decision, the court described the acquittee's procedural due process claim as "particularly weak" and rejected it, stating: "Procedural due

process requires adequate notice and hearing. [The acquittee] has had plenty of both. He has been represented by counsel throughout both the administrative and judicial processes. In the proceedings before this court, he has had ample opportunity to confront and cross-examine the witnesses against him and to submit whatever evidence he wished in his favor. In view of the stakes, the court made every effort to bend over backward and allowed him to introduce contested evidence. The hearing has been fair throughout. There has been no violation of procedural due process."

On appeal, the acquittee contends that his state constitutional right to due process has been violated because the lack of mandatory biennial judicial review poses an unreasonable risk of an erroneous deprivation of his liberty during his five year period of continued commitment to the jurisdiction of the board. He further claims entitlement, as an acquittee, to mandatory biennial judicial review as required for civilly committed individuals by *Fasulo* v. *Arafeh*, supra, 173 Conn. 473, and General Statutes § 17a-498.[25] We conclude that the resolution of this claim is controlled by our Supreme Court's decision in *State* v. *Long*, supra, 268 Conn. 508.

In *Long*, the acquittee initially was committed to the jurisdiction of the board for five years, the maximum time allowable after he was found not guilty of assault in the second degree by reason of mental disease or defect pursuant to § 53a-13. Id., 511–12. The state petitioned the court to extend the acquittee's commitment, and he was recommitted for a period of time not to exceed three years. Id., 513. Multiple additional recommitments ensued, resulting in his commitment to the jurisdiction of the board for more than sixteen years.[26] Id. In March, 2001, the state filed another petition to continue the acquittee's commitment. Id. He moved to strike the board's report recommending continued commitment and to dismiss the state's petition, inter alia, on the basis of his claim that § 17a-593 violated his state constitutional right to procedural due process. Id. Although the trial court initially denied the acquittee's motions and granted the state's petition for recommitment, it sua sponte reconsidered its ruling and granted the motion to dismiss on the ground that § 17a-593 (c) was unconstitutional. Id., 513–14. "Specifically, the [trial] court concluded that § 17a-593 (c) violated the [acquittee's] due process rights under article first, § 8, of the Connecticut constitution because the statute failed to provide an acquittee with mandatory periodic judicial review of confinement as required by *Fasulo* v. *Arafeh*, supra, 173 Conn. 479. The court also determined that § 17a-593 (c) violated the [acquittee's] equal protection rights under the fourteenth amendment to the United States constitution because it treats acquittees . . . differently from convicted prisoners who subsequently are civilly committed to a mental hospital at some point after they have been incarcerated . . . ."

(Footnotes omitted.) *State* v. *Long*, supra, 268 Conn. 514. Finally, it concluded that § 17a-593 (c) violated the acquittee's equal protection rights under article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments. Id., 514–15. Although it determined that § 17a-593 (c) was unconstitutional, the trial court expressly found that the state had proved, by clear and convincing evidence, that the acquittee has a mental illness and would be a danger to others if discharged from the board's jurisdiction. Id., 515.

On appeal, our Supreme Court considered and rejected all the bases on which the trial court had determined that the statute was unconstitutional. In conducting its procedural due process analysis, the court first identified the issue as whether mandatory judicial review was necessary before extending an acquittee's commitment beyond the initial period authorized by General Statutes § 17a-582 (e) (1) (A). Id., 520–21. It then noted that a validly enacted statute carries a strong presumption of constitutionality, and a challenger must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. Id., 521. Next, it observed that "[a] procedural due process challenge to the validity of [a statute] cannot proceed in the abstract. . . . Due process is inherently fact-bound because due process is flexible and calls for such procedural protections as the particular situation demands. . . . The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum." (Citations omitted; internal quotation marks omitted.) Id., 522–23.

The court then identified the applicable analytical framework, namely, the factors identified in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *State* v. *Long*, supra, 268 Conn. 523–24. "The United States Supreme Court [has] set forth three factors [which this court has followed] to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Citation omitted; internal quotation marks omitted.) Id. The court recognized that it was "undisputed" that § 17a-593 (c) implicated the acquittee's liberty interest and that the state had an interest in confining individuals who posed

a danger to themselves or others as a result of mental illness. Id., 524. "Thus, the only factor that we must address is whether, based upon the judicial review that the [acquittee] did in fact receive, the [acquittee's] liberty interest was subject to an unreasonable risk of erroneous deprivation, and the probable value of any additional procedural safeguards." Id., 524–25.

At the outset of its analysis, the court explained that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . [which] must be at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have timely and adequate notice detailing the reasons for [the proposed action], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Internal quotation marks omitted.) Id., 525. Next, it noted that there had been five petitions for continued commitment, and, in each instance, the acquittee "(1) was given a copy of the petition . . . (2) was afforded the right to be present at the hearing and the right to be represented by counsel . . . (3) had the right to a separate and independent review of his mental health by an independent psychiatrist or psychologist of his choice . . . and (4) had the right to examine all documents and reports considered by the court in preparation of his defense. . . . [See General Statutes § 17a-593.] In each instance, the [acquittee] was in fact represented by counsel, supplied by the state. Furthermore, prior to each hearing, the board filed a report with the court, and gave copies to the [acquittee] and the state, as to whether the [acquittee] should be discharged. . . . In each instance, the trial court ordered the [acquittee] recommitted for periods ranging from eighteen months to three years during the term of recommitment, the [acquittee] had the right to apply directly to the court for his discharge every six months . . . however, he never exercised that right. Had the [acquittee] submitted such an application at any point during his commitment, the court would have been required to hold a judicial hearing on whether the [acquittee] should be discharged. . . . During his term of recommitment, the board received a report every six months from the hospital where he was confined. . . . Furthermore, the board was required to hold a hearing on the [acquittee's] mental health status once every two years . . . and the board had the option to recommend to the court that the [acquittee] be discharged . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 525–27. The court concluded that these existing statutory procedures, as applied, did not expose the acquittee to an unreasonable risk of erroneous deprivation of his liberty. Id., 527. "*We further conclude that there would be little value in the imposition of additional procedural safeguards, such as mandatory judicial review without a petition being filed dur-*

ing the term of recommitment." (Emphasis added.) Id.

In the present case, the acquittee, who received the procedural protections identified in *State* v. *Long*, supra, 268 Conn. 508, contends that due process requires mandatory biennial judicial review, which our Supreme Court specifically concluded was not constitutionally required. He therefore attempts to distinguish his case from *Long*. Specifically, he argues that, in *Long*, "the acquittee was subject to five recommitments over ten years, effectively entitling him to mandatory biennial judicial review. Moreover, the trial court granted the [acquittee's] motion to dismiss and thus did not impose any term of commitment." We are not persuaded by the latter argument, as our Supreme Court reversed the decision of the trial court granting the motion to dismiss and concluded that the protections set forth in § 17a-593 provided sufficient due process protection. As to the former, the acquittee presents a creative mathematical argument vis-à-vis the facts of *Long* to support his claim of a constitutionally required biennial judicial review for acquittees subjected to continued commitment following the expiration of their initial maximum confinement. This approach, however, fails to account for the fact that the acquittee in *Long* was subjected to a continued commitment for a three year period without a mandatory judicial review during that specific time frame, and our Supreme Court determined that this did not constitute a procedural due process violation.

Simply stated, we are not persuaded by the acquittee's effort to distinguish the present case from *State* v. *Long*, supra, 268 Conn. 508, and, on the basis of that case, we conclude that the existing statutory procedures, as applied to the acquittee, do not expose him to an unreasonable risk of erroneous deprivation of his liberty and that there would be little value in the imposition of mandatory judicial review without a petition being filed during his continued commitment as a procedural safeguard. We further conclude, therefore, that § 17a-593 (c), as applied to the acquittee, does not violate his procedural due process rights under article first, § 8, of our state constitution.[27]

III

The acquittee's final claim is that the court improperly denied his motion to strike the portion of the board's report to the court recommending his continued commitment for a period not to exceed ten years. Specifically, he argues that the board lacks authority under the relevant statutory scheme to recommend a time frame for continued commitment. The board counters, inter alia, that this claim fails because the acquittee failed to argue in his principal appellate brief that he was prejudiced as a result of the court's denial of the motion to strike the challenged section of the board's report. We agree with the board.

As previously noted, the board submitted its report on the state's petition for an order of continued commitment on April 22, 2019. At the conclusion of this report, the board "respectfully recommends to the [c]ourt that it grant [the petition for an order of continued commitment of the acquittee] for a period not to exceed ten years." The board's ten year recommendation was repeated in its updated reports dated January 19, 2021, and October 26, 2021. On February 16, 2021, the acquittee filed an amended motion to strike the board's recommendations that the court grant the petition for continued commitment for a period not to exceed ten years. On February 28, 2022, the court orally denied the acquittee's motion to strike, stating that, in its view, the board was permitted to make a recommendation and that the ultimate decision with respect to the length of a continued commitment rested with the court. The court iterated these points in its memorandum of decision and ultimately ordered a period of continued commitment for a period of time not to exceed five years.

In his principal appellate brief, the acquittee argues that his evidentiary claim is based on a statutory interpretation of § 17a-593 and therefore is subject to plenary review. He then contends that, although it is a common practice for the board to issue a recommended time frame for continued commitment, this practice is not permitted under the relevant statutory framework. Absent from the acquittee's brief, however, is any analysis of how he was harmed by this recommendation. In its brief, the board identified the acquittee's failure to brief the issue of harm. In his reply brief, the acquittee speculated that the court used the board's ten year recommendation and his zero year recommendation to arrive at a period of continued commitment not to exceed five years.

In *State* v. *Myers*, 178 Conn. App. 102, 174 A.3d 197 (2017), this court stated: "It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him. . . . It is also a well established principle that arguments cannot be raised for the first time in a reply brief. . . . [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . In the present case, the defendant appeals from an evidentiary ruling of a nonconstitutional nature. As such, it is the defendant's responsibility to analyze, in his principal brief, the harm that flows from an evidentiary ruling. The defendant did not do this but, instead, referenced harm only in his reply brief. Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but

one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer. . . . Specifically with regard to evidentiary rulings, this court, on multiple occasions, has declined to review claims where the appellant fails to analyze harmful error in his or her principal brief." (Citations omitted; internal quotation marks omitted.) Id., 106–107; see also *State* v. *Tomlinson*, 340 Conn. 533, 548, 264 A.3d 950 (2021) (it is defendant's burden to establish harm from any evidentiary error and, because he failed to brief issue of harm, claim was deemed abandoned and reviewing court declined to address it); *State* v. *Gonzalez*, 106 Conn. App. 238, 249, 941 A.2d 989 (same), cert. denied, 287 Conn. 903, 947 A.2d 343 (2008).

In the present case, the acquittee did not address the issue of harm in his principal brief, mentioning it only in his reply brief. Pursuant to our jurisprudence, such an approach constitutes an abandonment of his claim, and we therefore decline to address it.[28] We conclude, therefore, that the acquittee's arguments with respect to his motion to strike the board's recommendation of continued commitment not to exceed ten years fail.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 17a-580 (1) provides: " 'Acquittee' means any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." See also *State* v. *Guild*, 214 Conn. App. 121, 122 n.1, 279 A.3d 222 (2022).

[2] General Statutes § 53a-13 (a) provides that, "[i]n any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." See also *State* v. *Long*, 268 Conn. 508, 540, 847 A.2d 862 (verdict of not guilty by reason of mental disease or defect establishes that person committed act that constitutes criminal offense because of mental illness), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

Although § 53a-13 has been amended since the events giving rise to the acquittee's prosecution; see Public Acts 2023, No. 23-19, § 16; that amendment has no bearing on this appeal. Accordingly, we refer to the current revision of the statute.

[3] These charges arose from an alleged sexual assault of a fifteen year old victim between 2001 and 2002, when the acquittee was approximately eighteen or nineteen years old. "According to police reports, [the acquittee] befriended a . . . child with [whom] he began viewing pornographic images and engaging in mutual masturbation and fellatio at his home."

[4] These charges arose from an alleged sexual assault of an eleven year old victim that occurred on June 5, 2004. "[The acquittee] exposed himself to [the victim], rubbed the [victim's] penis and forced the [victim] to touch and stroke his own penis in a van in which he had driven the [victim] and the [victim's] nine year-old [sibling] to a . . . park, stopping only when the [victim's sibling], who had been away from the van, returned."

[5] "When an individual is found not guilty by reason of mental disease or defect, the individual—the acquittee—is committed to the custody of the Commissioner of Mental Health and Addiction Services for examination of the acquittee's mental condition. General Statutes § 17a-582 (a). Once the examination is complete, a hearing is held, and the court determines whether the examinee should be confined, conditionally released, or discharged. General Statutes § 17a-582 (e) (1) and (2)." (Footnotes omitted.) *State* v. *Vasquez*, 194 Conn. App. 831, 835–36, 222 A.3d 1018 (2019), cert. denied, 334 Conn. 922, 223 A.3d 61 (2020).

[6] See General Statutes § 17a-582; *State* v. *Harris*, 277 Conn. 378, 382–83,

890 A.2d 559 (2006) (after acquittee has proven defense of mental disease or defect, he or she may be committed to jurisdiction of board for maximum term of commitment not to exceed maximum sentence that could have been imposed had that individual been convicted); *State* v. *Foster*, 217 Conn. App. 476, 506 n.1, 289 A.3d 191 (*Seeley*, *J.*, concurring) (same), cert. granted, 346 Conn. 920, 291 A.3d 1041 (2023); see generally *State* v. *Long*, 268 Conn. 508, 519–20, 847 A.2d 862 (review of statutory commitment scheme for acquittees as set forth in General Statutes §§ 17a-580 through 17a-603), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

Our Supreme Court has observed that, "[a]lthough the purpose of an order of commitment issued as a result of an insanity acquittal is significantly different from that of a prison sentence imposed as a result of a criminal conviction . . . the effect of such a commitment on the acquittee is no less a deprivation of liberty than that of a prison sentence." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Imperiale*, 337 Conn. 694, 712, 255 A.3d 825 (2021).

[7] "[W]e note that the confinement of insanity acquittees, although resulting initially from an adjudication in the criminal justice system, is not punishment for a crime. The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness. . . . [A]s a matter of due process, an acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." (Citation omitted; internal quotation marks omitted.) *State* v. *Ardizzone*, 215 Conn. App. 854, 866, 283 A.3d 982 (2022), cert. denied, 346 Conn. 905, 287 A.3d 1089 (2023); see id. ("acquittee bears the burden of proving that he or she is a person who should be discharged" (internal quotation marks omitted)).

[8] See, e.g., *State* v. *Ardizzone*, 215 Conn. App. 854, 866–67, 283 A.3d 982 (2022), cert. denied, 346 Conn. 905, 287 A.3d 1089 (2023).

[9] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." See also *State* v. *Dyous*, 307 Conn. 299, 307, 53 A.3d 153 (2012); *State* v. *Warren*, 100 Conn. App. 407, 412–13, 919 A.2d 465 (2007).

[10] See generally *State* v. *March*, 265 Conn. 697, 704–707, 709, 830 A.2d 212 (2003) (Supreme Court interpreted terms "psychiatric disabilities" and "mental illness or mental disease" and discussed phrase "danger to self or others"); see also Regs., Conn. State Agencies § 17a-581-2 (a) (5) and (6).

[11] "The board is an administrative body consisting of a psychiatrist, a psychologist, a probation expert, a layperson, an attorney who is a member of the state bar, and a layperson with experience in victim advocacy. General Statutes § 17a-581 (b). The purpose of this administrative body is to manage, monitor and review the status of each acquittee to ensure the protection of the general public. . . . That being its purpose, the board has general and specific familiarity with all acquittees beginning with their initial commitment . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Dyous*, 307 Conn. 299, 324, 53 A.3d 153 (2012); see also *State* v. *Long*, 268 Conn. 508, 519–20, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

[12] General Statutes § 17a-593 (d) provides: "The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report." See also *State* v. *Dyous*, 198 Conn. App. 253, 263–64, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020).

[13] At some point in 2013, the pedophilia diagnosis was changed to paraphilia, not otherwise specified.

[14] During the pendency of the resolution of the state's petition, the court granted the parties' motions to extend his commitment.

[15] During her closing argument, the prosecutor offered a recommendation

to the court that the acquittee's commitment to the jurisdiction of the board be continued for a period of at least seven years.

[16] In *State* v. *Metz*, 230 Conn. 400, 425, 645 A.2d 965 (1994), our Supreme Court concluded that § 17a-593 (c) "imposes the same burden on the state at a hearing for the continued commitment of an acquittee beyond his current definite period of commitment as is imposed in a civil commitment hearing under [General Statutes] § 17a-498 (c); namely, to show by clear and convincing evidence that the acquittee is currently mentally ill and dangerous to himself or herself or others or gravely disabled." See also *State* v. *Dyous*, 307 Conn. 299, 308, 53 A.3d 153 (2012); *State* v. *Harris*, 277 Conn. 378, 386, 890 A.2d 559 (2006). "Unlike the finder of fact at a civil commitment hearing, however, the court at a continued commitment hearing must [consider] that its primary concern is the protection of society. . . . General Statutes § 17a-593 (g)." (Internal quotation marks omitted.) *State* v. *Dyous*, supra, 308–309. A member of this court, however, recently noted that, "in 2022, the legislature added the phrase 'and its secondary concern is the safety and well-being of the acquittee' to subsection (g) of § 17a-593. See Public Acts 2022, No. 22-45, § 5." *State* v. *Foster*, 217 Conn. App. 476, 517 n.10, 289 A.3d 191 (*Seeley*, *J.*, concurring), cert. granted, 346 Conn. 920, 291 A.3d 1041 (2023).

[17] Based on the evidence presented, there was no dispute that the acquittee suffered from a mental illness, and that the court determined that there was "scant evidence" that, if the acquittee was released, he would pose a danger to himself. See, e.g., *State* v. *Corr*, 87 Conn. App. 717, 721, 867 A.2d 124 (acquittee did not contest that he suffered from psychiatric disability), cert. denied, 273 Conn. 929, 873 A.2d 998 (2005).

[18] This court has recognized: "[T]he goals of a treating psychiatrist frequently conflict with the goals of the criminal justice system. . . . While the psychiatrist must be concerned primarily with therapeutic goals, the court must give priority to the public safety ramifications of releasing from confinement an individual who has already shown a propensity for violence. As a result, the determination of dangerousness in the context of a mental status hearing reflects a societal rather than a medical judgment, in which the rights and needs of the [acquittee] must be balanced against the security interests of society. . . . The awesome task of weighing these two interests and arriving at a decision concerning release rests finally with the trial court." (Internal quotation marks omitted.) *State* v. *Corr*, 87 Conn. App. 717, 725, 867 A.2d 124, cert. denied, 273 Conn. 929, 873 A.2d 998 (2005).

[19] See, e.g., *State* v. *Dyous*, 198 Conn. App. 253, 264, 233 A.3d 1138 (Superior Court not bound by board's recommendation but considers board's report in addition to other evidence presented by parties and makes its own findings as to mental health condition of acquittee), cert. denied, 335 Conn. 948, 238 A.3d 17 (2020); *State* v. *Damone*, 148 Conn. App. 137, 170–74, 83 A.3d 1227 (ultimate determination of mental illness and dangerousness is legal decision that rests with court and involves consideration of entire record available, including acquittee's history of mental illness, present and past diagnoses, past violent behavior, nature of criminal offense, need for continued medication and therapy, and prospects for supervision if released), cert. denied, 311 Conn. 936, 88 A.3d 550 (2014); see also General Statutes § 17a-593 (g).

[20] We note that the acquittee has not raised an independent substantive due process claim under the state constitution.

[21] Practice Book § 10-30 (a) provides: "A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process."

The acquittee did not cite to this rule of practice in his motion to dismiss alleging a violation of substantive due process, nor has he appeared to challenge the jurisdiction of the trial court or explain why a motion to dismiss is the proper procedural vehicle to raise his specific constitutional claims.

[22] Our Supreme Court expressly has noted that these statutory procedures for the recommitment of acquittees implicate the liberty interest of such individuals. See *State* v. *Long*, 268 Conn. 508, 524, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004); see also *State* v. *Long*, 301 Conn. 216, 238, 19 A.3d 1242, cert. denied, 565 U.S. 1084, 132 S. Ct. 827, 181 L. Ed. 2d 535 (2011).

[23] For example, the court stated: "*But my choice*, and you'll correct me if I'm wrong, *seems to be*, *under the statute*, *a binary one*. I can either grant the petition for continued commitment or deny it. You want me to deny it; correct? . . . Which means that [the acquittee] could just walk out of here. I mean, he's certainly done his term and more, and he could just walk out

of here and do whatever he wants, which would be wonderful for a person who wasn't demonstrably a danger to himself or others. But it causes the court, you know, considerable concern, because there's no way I can impose any supervision on him or treatment. *I just have the binary choice of either grant or deny*, and it's not a question of deciding what punishment he deserves. *It's just a question of whether the state has met its burden of proof*, and I have to be guided by the concern for safety of society. So, that's where I am. It may be that, if he was receiving some inhumane treatment, he might have some other legal recourses, but that would not be addressed here." (Emphasis added.)

During a colloquy with the acquittee's counsel, the court subsequently distilled the proceeding as if the state had satisfied its burden with respect to the questions of mental illness and a danger to himself or others, then it would have to grant the state's petition for continued commitment, and if it did not, it would have to deny the petition. Finally, in its closing remarks, the court stated: "*And, fortunately or unfortunately, I have to make a binary choice that, either—that is, either at the end of the day, the state's petition for recommitment must be either granted or denied.*" (Emphasis added.)

[24] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[25] In *Fasulo* v. *Arafeh*, supra, 173 Conn. 477, our Supreme Court considered the procedural due process claims of two individuals committed indefinitely to a state hospital and confined for periods of twenty-six years and thirteen years. It held that "the due process clause of the Connecticut constitution mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement." Id., 479. Furthermore, the state must bear the burden of proof with respect to the necessity of recommitment under our constitution. Id., 480–81. Finally, it explained that a discretionary provision with uncertain legal standards was insufficient to safeguard the constitutional rights of individuals such as the plaintiffs. Id., 482.

General Statutes § 17a-498 (c) (3) provides in relevant part: "If the [Probate Court] finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status . . . ."

General Statutes § 17a-498 (g) provides in relevant part: "If the patient's last annual review did not result in a hearing, and *in any event at least every two years, the Probate Court shall*, within fifteen business days, *proceed with a hearing* in the manner provided in subsections (a), (b), (c) and (f) of this section. . . ." (Emphasis added.)

The acquittee was found not guilty by reason of mental disease or defect pursuant to § 53a-13, and therefore his status under the relevant statutory framework is distinguishable from the civilly committed individuals in *Fasulo* v. *Arafeh*, supra, 173 Conn. 477.

[26] As noted by our Supreme Court, following the acquittee's initial five year commitment to the jurisdiction of the board, the court, on five occasions, recommitted the acquittee for three years, two years, eighteen months, eighteen months, and two years. *State* v. *Long*, supra, 268 Conn. 518–19.

[27] To the extent that the acquittee contends that the court's authority to impose a continued commitment is limited to two years, we conclude that that claim is without merit.

[28] Even if we were to consider the acquittee's arguments regarding the board's nonbinding recommendation, we would consider them to be without merit. Aside from a general reference to a canon of statutory construction and a cursory discussion of the legislative history, the acquittee has not established why a specific statutory authorization is necessary for the board to offer its opinion as to the length of continued commitment following a petition filed by the state.

As we previously have recognized, "the [trial] court, in its role as finder of fact in matters brought under § 17a-593, may properly credit the board's

opinions and rely on its findings. . . . [U]nder the acquittee statutory scheme, the board has general and specific familiarity with all acquittees beginning with their initial commitment and, therefore, is better equipped than courts to monitor their commitment. By placing oversight of these individuals in a single administrative agency, such as the board, which is comprised of laypersons and experts in relevant areas, including psychiatry, psychology, probation, and victim advocacy, the legislature reasonably could have believed that the board, with its expertise and familiarity with the mental status of each acquittee, would be better equipped than a court to monitor the individuals' recommitment." (Citation omitted; internal quotation marks omitted.) *State* v. *Warren*, 100 Conn. App. 407, 422, 919 A.2d 465 (2007); see also *State* v. *Dyous*, 198 Conn. App. 253, 270, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020); *State* v. *Metz*, 92 Conn. App. 206, 210 n.5, 883 A.2d 1264, cert. denied, 276 Conn. 934, 890 A.2d 572 (2005). Given the board's expertise, its recommendation, albeit nonbinding, properly serves to assist the court in determining the appropriate length of continued commitment of an acquittee.