PALMER, J., dissenting in part. Under General Statutes § 54-63c (b),[1] a police officer who has arrested a person for a family violence crime[2] may release that person with financial conditions or nonfinancial conditions or both. With respect to nonfinancial conditions, the officer may require, inter alia, that the arrestee comply with specified restrictions on his travel, association or residence for the protection of the alleged victim. General Statutes § 54-63c (b). Section 54-63c (b) also provides that any such nonfinancial conditions of release imposed by the police shall remain in effect until the arrestee's presentment in court in accordance with General Statutes § 54-1g (a).[3] Finally, § 54-63c (b) provides that, at the time of the presentment, the arrestee is entitled to a "hearing" pursuant to General Statutes § 46b-38c (e)[4] with regard to any protective order that the court may issue as a condition of bail or release. As the majority acknowledges, the sole claim that the defendant, Fernando A., raised in the trial court, and the sole claim that he raises on appeal, is that the term "hearing," as used in § 54-63c (b) with reference to § 46b-38c (e), means a full evidentiary hearing, that is, an adversarial, trial-like proceeding. The defendant contends on appeal, as he did in the trial court, that he has a right to such a hearing under both the due process clause of the fourteenth amendment to the federal constitution and §§ 54-63c (b) and 46b-38c (e). Even though the majority agrees with the trial court that the defendant is not entitled to such a hearing, the majority nevertheless sees fit to reverse the trial court. The majority further concludes that the hearing to which the defendant is entitled under §§ 54-63c (b) and 46b-38c (e) is a bifurcated proceeding that affords him greater rights than those accorded at all other hearings concerning all other conditions of bail or release. Although I agree with the majority that the defendant had no right to a full evidentiary hearing, I believe that the majority's reversal of the trial court is unsupportable, and unfair to the trial court, because the majority is clearly *affirming* the trial court's denial of the defendant's request for a full evidentiary hearing. More importantly, I also disagree with the majority's construction of the term "hearing" for purposes of §§ 54-63c (b) and 46b-38c (e) because that construction is utterly devoid of support in the pertinent statutory language, legislative history or elsewhere. Contrary to the determination of the majority, the trial court correctly concluded that a family violence arrestee enjoys the same rights under §§ 54-63c (b) and 46b-38c (e) that he would be entitled to at any other hearing involving a condition of bail or release. I therefore dissent in part.[5]

I

Before addressing the merits of the defendant's claims, it is necessary to underscore certain aspects of the history and substance of the statutory scheme at issue in this case. In 1986, the legislature enacted Public Acts 1986, No. 86-337, entitled "An Act Concerning Family Violence Prevention and Response," § 3 of which is now codified as amended at § 46b-38c. As the majority has explained, § 46b-38c was enacted in response to the domestic abuse of Tracey Thurman and the inadequate police response to that abuse. See 29 H.R. Proc., Pt. 14, 1986 Sess., pp. 5258–59, remarks of Representative Pauline R. Kezer. Subsections (a) and (b) of § 46b-38c provide for the creation of local family violence response and intervention units within the state judicial system to respond to cases of family violence. Subsection (c) provides that each such local family violence intervention unit shall, inter alia, "(1) [a]ccept referrals of family violence cases from a judge or prosecutor, (2) prepare written or oral reports on each case for the court by the next court date . . . [and] (3) provide or arrange for services to victims and offenders . . . ." General Statutes § 46b-38c (c). Subsection (d) of General Statutes § 46b-38c provides in relevant part: "In all cases of family violence, a written or oral report and recommendation of the local family violence intervention unit shall be available to a judge at the first court date . . . . A judge of the Superior court may consider and impose the following conditions to protect the parties, including, but not limited to: (1) Issuance of a protective order pursuant to subsection (e) of this section; (2) prohibition against subjecting the victim to further violence; (3) referral to a family violence education program for batterers; and (4) immediate referral for more extensive case assessment. . . ." Finally, General Statutes § 46b-38c (e) provides in relevant part that "[a] protective order issued under this section may include provisions necessary to protect the victim from threats, harassment, injury or intimidation by the defendant, including, but not limited to, an order enjoining the defendant from (1) imposing any restraint upon the person or liberty of the victim, (2) threatening, harassing, assaulting, molesting or sexually assaulting the victim, or (3) entering the family dwelling or the dwelling of the victim. . . . Such order shall be made a condition of the bail or release of the defendant . . . ." Although subsection (e) of § 46b-38c also indicates that a defendant charged with a family violence crime shall be given notice and an opportunity to be heard prior to the issuance of an order under that statutory section, there is nothing in § 46b-38c or elsewhere in our statutes that describes the nature of the hearing to which the defendant is entitled. The pertinent legislative history also is silent with respect to the required hearing.

In 2007, the legislature passed Public Acts 2007, No. 07-123 (P.A. 07-123), entitled "An Act Concerning Domestic Violence," which amended, among other stat-

utes, General Statutes (Rev. to 2007) § 54-63c. The primary purpose of the amendment to General Statutes (Rev. to 2007) § 54-63c was to protect the safety of victims of family violence by authorizing the police to order the release of a person charged with the commission of a family violence crime with nonfinancial conditions that "may require that the arrested person do one or more of the following: (1) Avoid all contact with the alleged victim of the crime, (2) comply with specified restrictions on the person's travel, association or place of abode that are directly related to the protection of the alleged victim of the crime, or (3) not use or possess a dangerous weapon, intoxicant or controlled substance." P.A. 07-123, § 1, codified at General Statutes § 54-63c (b). The legislature also added the following language to the statute: "Any nonfinancial conditions of release imposed pursuant to this subsection shall remain in effect until the arrested person is presented before the Superior Court pursuant to subsection (a) of section 54-1g. On such date, the court shall conduct a hearing pursuant to section 46b-38c at which the defendant is entitled to be heard with respect to the issuance of a protective order." P.A. 07-123, § 1, codified at General Statutes § 54-63c (b). Neither § 54-63c (b) nor its legislative history contains any other reference to the hearing to be conducted by the court in connection with the issuance of a protective order.

II

With this statutory background in mind, I now turn to the relevant undisputed facts and procedural history, some of which are set forth in the majority opinion. On August 8, 2007, the victim, who is the defendant's wife, filed an action seeking to dissolve her marriage to the defendant. At that time, the couple lived together with their two children, ages four and two. On August 27, the victim, in accordance with General Statutes § 46b-15,[6] sought and received an ex parte temporary protective order barring the defendant from, inter alia, entering the family dwelling. At two September, 2007 hearings conducted by the trial court, *Shay*, *J.*, in compliance with the requirements of § 46b-15, the victim testified that the defendant had threatened her and her parents, and that he had pushed her. She further testified that she was afraid of the defendant. With respect to the pushing incident, however, the victim acknowledged that she had not suffered any cuts or bruises as a result of the incident and that she had not sought medical attention.

At the conclusion of the hearings, the trial court declined to extend the protective order, concluding that the victim's allegations did not meet the stringent requirements of § 46b-15. The trial court did not discount or discredit the victim's testimony but found that the incidents about which the victim had testified were primarily verbal in nature and did not rise to the level of

"a continuous threat of present physical pain or physical injury" within the meaning of General Statutes § 46b-15 (a).

Several weeks later, on October 14, 2007, the police were called to the home shared by the victim and the defendant. According to the victim, who exhibited "a large golf ball sized bump" on her forehead, she and the defendant had had an argument during which the defendant pushed her down a flight of stairs and kicked her in the head. The couple's two children witnessed the victim's fall. After the incident, the defendant left the residence in his vehicle. The police called an ambulance to take the victim to the hospital, where she was treated for contusions on her head and knee. After taking a sworn statement from the victim and interviewing the victim's treating physician, the police arrested the defendant and charged him with assault in the third degree, two counts of risk of injury to a child, reckless endangerment and disorderly conduct. In accordance with § 54-63c (b), the police released the defendant on the conditions that he not enter the family home and that he avoid all contact with the victim.

The defendant was arraigned the next day, October 15, 2007. At that time, he requested a full evidentiary hearing prior to the issuance of any protective order, claiming that such a hearing was mandated both by §§ 54-63c (b) and 46b-38c (e), and by the due process clause of the fourteenth amendment to the United States constitution. The defendant also maintained that he was entitled to that hearing at that time, on the day of his presentment, a claim predicated on the express language of § 54-63c (b). The state objected to the defendant's request and sought a protective order prohibiting the defendant from contacting the victim or the couple's children, a request with which the victim's advocate and the family services counselor concurred. The trial court, *Pavia*, *J.*, denied the defendant's request for a full evidentiary hearing but continued the case to October 18, 2007, at which time the defendant could renew his request for such a hearing. In the meantime, however, Judge Pavia issued a protective order barring the defendant from entering the family home and from having any contact with the victim. Because the local family violence intervention unit had informed the court that it was "concerned about the children in terms of their involvement and proximity to" their parents' situation, Judge Pavia also indicated that the protective order "extend[ed] to the [victim's] minor children, with the caveat that the defendant [could] have third-party visitation . . . ."[7]

At the hearing on October 18, 2007, before the court, *Bingham*, *J.*, the defendant again claimed that he was entitled to a full evidentiary hearing—or what defense counsel referred to as a "trial-like" proceeding—for the purpose of challenging the issuance of the protective

order. Judge Bingham denied the defendant's request for such a hearing, explaining that the defendant was "not entitled to a full hearing, with the right to subpoena witnesses and the right to call the [victim]. This puts an undue burden on the [victim] because she . . . evidently . . . is afraid of the [defendant] . . . . And you're not entitled to a full trial here in this court." Thereafter, Judge Bingham explained that the hearing contemplated under §§ 54-63c (b) and 46b-38c (e) "is similar to a bail hearing, and you're not entitled to a full trial on a bail hearing." The court then stated: "So, your request, as stated by you, is denied." At no time did the defendant make any proffer or otherwise present any facts suggesting that the evidence or information on which the court had relied in issuing the family violence protective order was inaccurate or incorrect. The sole claim that the defendant raised, rather, was that he had a statutory and due process right to a full evidentiary hearing, at which (1) the state was required to establish the need for a protective order through the use of evidence that satisfied our evidentiary rules, and (2) the defendant had the right to cross-examine and call witnesses.

In these consolidated appeals from the decisions of the trial court, *Pavia*, *J.*, and *Bingham*, *J.*, the defendant claims that the court violated his right to due process and his rights under §§ 54-63c and 46b-38c by rejecting his request for a full evidentiary hearing. Thus, on appeal, the defendant raises the same claim of entitlement to a full evidentiary hearing that he raised in the trial court. According to the defendant, the term "hearing" in § 46b-38c (e) "plainly requires that the defendant be allowed to present evidence and test the state's evidence through cross-examination." In addition, the defendant claims that the state cannot rely on hearsay to establish the desirability of a family violence protective order. The defendant contends, rather, that §§ 54-63c (b) and 46b-38c (e) contemplate the same full-blown adversarial hearing that is provided in the context of a civil action brought under § 46b-15, including the right to subpoena the alleged victim and other witnesses to testify at the hearing.

The majority rejects the defendant's claim that he is entitled to a full evidentiary hearing. Specifically, the majority concludes that "§ 54-63c (b), and the cross-referenced . . . § 46b-38c, permit the trial court to issue a criminal protective order at the defendant's arraignment after consideration of oral argument and the family violence intervention unit's report . . . . [Nevertheless] the trial court is required to hold, at the defendant's request made at the initial hearing, a subsequent hearing within a reasonable period of time at which the state will be required to prove the continued necessity of that order by a fair preponderance of the evidence, which may include reliable hearsay." The majority also concludes, as a matter of statutory con-

struction, that the defendant does not have the right at that hearing either to require the state to proceed by way of admissible evidence or to subpoena the victim or other witnesses; according to the majority, however, he does have a qualified right to testify himself and to adduce other testimony. Finally, the majority reverses the decision of the trial court "[b]ecause the defendant did not receive this subsequent hearing as requested . . . ."

For the reasons that follow, I agree with the majority that the defendant is not constitutionally entitled to a full evidentiary hearing. Because there is nothing in the relevant statutes or legislative history to suggest that the defendant has a statutory right to a full evidentiary hearing, I also agree that the defendant has no such entitlement. I disagree, however, with the majority's conclusion that the hearing to which the defendant is entitled under our statutory scheme is different from a bail hearing.[8] Furthermore, because the majority agrees with the trial court's decision to reject the only claim that the defendant raised, namely, that he has a statutory and constitutional right to a full evidentiary hearing, the majority's reversal of the decision of the trial court, *Bingham*, *J.*, is improper even under its own flawed conclusion regarding the nature of the hearing to which the defendant is entitled.

III

As I have indicated, the defendant claims on appeal, as he claimed in the trial court, that whatever hearing rights he may be afforded under §§ 54-63c and 46b-38c, he has a due process right to a full evidentiary hearing before a court may issue a protective order under those provisions. Even though the defendant devotes the bulk of his brief to this contention, the majority disposes of the claim in a footnote. See footnote 21 of the majority opinion. Although I agree with the majority that the defendant cannot prevail on his constitutional claim, I do not believe that the majority's analysis of the claim is satisfactory. Therefore, before addressing the hearing rights to which the defendant is statutorily entitled, I turn to his claim of a constitutional violation.

Both the state and the defendant utilize the balancing test set forth by the United States Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), for determining whether a governmental practice or procedure satisfies the requirements of due process. Neither the state nor the defendant, however, mentions the more recent, and more narrow, test adopted by the court in *Medina* v. *California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), for evaluating whether such practices or procedures satisfy due process standards in the criminal context. For the reasons that follow, I am inclined to agree with the parties that the *Mathews* test is the appropriate test for purposes of the present case. Nevertheless, as I also explain

more fully hereinafter, the defendant cannot prevail under either of the two tests.[9]

In *Mathews*, the court explained that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . Accordingly, resolution of the issue whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: 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." (Citations omitted; internal quotation marks omitted.) *Mathews* v. *Eldridge*, supra, 424 U.S. 334–35. Although *Mathews* arose out of a dispute concerning the adequacy of the administrative procedures afforded a recipient of social security disability benefit payments prior to the termination of those benefits; see id., 323–26, 332–33; both this court and the Appellate Court have applied that test in criminal cases. See, e.g., *State* v. *Patterson*, 236 Conn. 561, 569–76, 674 A.2d 416 (1996) (applying *Mathews* test and concluding that criminal defendant's federal constitutional right to procedural due process at sentencing does not include right to presentence investigation report); *State* v. *Lopez*, 235 Conn. 487, 492–93, 496–97, 668 A.2d 360 (1995) (applying *Mathews* test and concluding that trial court's order rectifying transcript without evidentiary hearing did not violate criminal defendant's federal constitutional right to procedural due process); *State* v. *Washburn*, 34 Conn. App. 557, 564–66, 642 A.2d 70 (applying *Mathews* test and concluding that requirements of federal due process are not violated by imposition of mandatory minimum thirty day jail sentence against criminal defendant who drove vehicle during summary twenty-four hour suspension period applicable to persons arrested for operating under influence of alcohol), cert. denied, 230 Conn. 912, 645 A.2d 1017 (1994); cf. *State* v. *Joyner*, 225 Conn. 450, 471, 625 A.2d 791 (1993) ("[b]orrowing the methodology of *Mathews*" in concluding that requiring criminal defendant to prove his insanity defense by preponderance of evidence does not violate state constitutional right to due process).

Following its decision in *Mathews*, however, the United States Supreme Court, in *Medina*, addressed a claim that principles of procedural due process bar a

state from imposing on a criminal defendant the burden of establishing his incompetence to stand trial. See *Medina* v. *California*, supra, 505 U.S. 439. In resolving the claim, the court held that the *Mathews* balancing test did not apply; id., 443; concluding, instead, that the standard first identified in *Patterson* v. *New York*, 432 U.S. 197, 201–202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), was applicable. *Medina* v. *California*, supra, 445. The court explained: "[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process. E.g., *People* v. *Fields*, 62 Cal. 2d 538, 542, 399 P.2d 369 [42 Cal. Rptr. 833] (competency hearing 'must be regarded as part of the proceedings in the criminal case') . . . cert. denied, 382 U.S. 858 [86 S. Ct. 113, 15 L. Ed. 2d 95] (1965).

"In the field of criminal law, we 'have defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the [b]ill of [r]ights, the [d]ue [p]rocess [c]lause has limited operation.' . . . The [b]ill of [r]ights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the [d]ue [p]rocess [c]lause invites undue interference with both considered legislative judgments and the careful balance that the [c]onstitution strikes between liberty and order." (Citations omitted.) *Medina* v. *California*, supra, 505 U.S. 443.

The court further explained that "[t]he proper analytical approach . . . is that set forth in *Patterson* v. *New York*, [supra, 432 U.S. 201–202], which was decided one year after *Mathews*. In *Patterson*, [the court] rejected a due process challenge to a New York law [that] placed on a criminal defendant the burden of proving the affirmative defense of extreme emotional disturbance. Rather than relying [on] the *Mathews* balancing test, however, [the court] reasoned that a narrower inquiry was more appropriate: 'It goes without saying that preventing and dealing with crime is much more the business of the [s]tates than it is of the [f]ederal [g]overnment . . . and that we should not lightly construe the [c]onstitution so as to intrude [on] the administration of justice by the individual [s]tates. Among other things, it is normally "within the power of the [s]tate to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the [d]ue [p]rocess [c]lause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' . . . As *Patterson* suggests, because the [s]tates have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference

to legislative judgments in this area. The analytical approach endorsed in *Patterson* is thus far less intrusive than that approved in *Mathews*." (Citations omitted.) *Medina* v. *California*, supra, 505 U.S. 445–46.

A threshold issue, therefore, is whether the *Mathews* test or the *Medina* test applies to the determination of whether the trial court properly concluded that the defendant was not entitled to a full evidentiary hearing for the purpose of challenging the issuance of the protective order barring him from the family home during the pendency of his criminal case. The answer to this question hinges on whether the procedures pursuant to which protective orders are issued in criminal cases involving family violence "are part of the criminal process"; id., 443; or, put differently, "part of the proceedings in the criminal case . . . ." (Internal quotation marks omitted.) Id.

Although it is true, of course, that §§ 54-63c (b) and 46b-38c (e), the provisions at issue, implicate the procedures to be used in determining the conditions of release in certain criminal cases, I do not read *Medina* as necessarily requiring the application of the narrow test set forth therein to any criminal statute that may be characterized as procedural in nature. In fact, on the basis of the analysis employed by the United States Court of Appeals for the Second Circuit in a recent line of cases, a persuasive argument can be made that the *Mathews* balancing test, and not the *Medina* historical test, applies in the present case.

In the first of these cases, *Hines* v. *Miller*, 318 F.3d 157 (2d Cir.), cert. denied, 538 U.S. 1040, 123 S. Ct. 2089, 155 L. Ed. 2d 1075 (2003), the court affirmed the judgment of the District Court, which denied the petition for a writ of habeas corpus of Jesse Hines, who had alleged, inter alia, that he was denied due process when the New York state trial court declined to order an evidentiary hearing on his motion to withdraw his guilty plea to second degree murder. Id., 158–59, 164. The Court of Appeals concluded that, although the District Court properly had denied Hines' habeas petition, the District Court improperly had used the *Mathews* balancing test in doing so. Id., 161. The Court of Appeals reached this conclusion with little analysis, however, stating only that "[t]he [United States] Supreme Court has stated that it is inappropriate to employ the *Mathews* balancing test in criminal cases"; id.; and that "[t]he proper analytical approach" to deciding the issue was the approach set forth in *Medina*. (Internal quotation marks omitted.) Id., 161–62.

Soon after *Hines*, in *United States* v. *Abuhamra*, 389 F.3d 309 (2d Cir. 2004), the court addressed a claim by the defendant, Mohammed Abuhamra, following his conviction on federal charges, that the District Court had violated his due process rights by considering certain ex parte, in camera submissions when it denied

him bail pending a resolution of his appeal. See id., 314. Applying the *Mathews* balancing test; id., 318; the Court of Appeals concluded that, as a general matter, principles of due process prohibit a District Court from using materials submitted ex parte and in camera for the purpose of determining whether to grant postconviction bail but that an exception to the prohibition against the use of such materials exists in certain narrowly specified circumstances.[10] Id., 328–29, 332. The court remanded the case to the District Court for reconsideration of Abuhamra's application for bail in light of the exception to the general rule of exclusion that the court had carved out. See id., 332.

In *Krimstock* v. *Kelly*, 464 F.3d 246 (2d Cir. 2006), the court was required to decide whether the due process clause of the fourteenth amendment barred state prosecutors from unilaterally deciding to retain, as evidence in a criminal prosecution, motor vehicles that had been seized as instrumentalities of the crime of operating a vehicle under the influence of alcohol or drugs. Id., 248. In determining what process was due the owner of such a vehicle before it could be impounded by the state as evidence in a pending case, the court carefully considered whether to apply the *Mathews* balancing test or the historical approach approved by *Medina* and applied by the court in *Hines*. See id., 253–54. The court distinguished both *Hines* and *Medina*, stating that those cases "considered challenges to the process afforded during criminal proceedings themselves." Id., 254. The court further observed that *Krimstock* "involve[d] no challenge to an underlying criminal proceeding or the procedural rights due the criminal defendant. Rather, it involve[d] the deprivation of property pending a criminal proceeding . . . ." Id. The court then proceeded to apply the *Mathews* test, concluding that it "weigh[ed] in favor of having review by a neutral fact-finder of a prosecutor's decision to retain a vehicle as potential evidence . . . although no adversarial hearing [was] required."[11] Id., 255.

The final case is *McKithen* v. *Brown*, 481 F.3d 89 (2d Cir. 2007), cert. denied, U.S. , 128 S. Ct. 1218, 170 L. Ed. 2d 59 (2008), in which the court considered whether the plaintiff, Frank McKithen, had a due process right to postconviction DNA testing of certain evidence in the possession of the government. Id., 92. The court ultimately remanded the case to the District Court; id., 108; which had dismissed McKithen's claim for lack of subject matter jurisdiction. Id., 95. On remand, the District Court was required to decide whether McKithen's "post-conviction liberty interest encompasse[d] an interest in accessing or possessing potentially exonerative biological evidence"; id., 106–107; and, if so, the "contours of that right . . . ." Id., 93. The Court of Appeals made it clear that, if the District Court decided the first issue in McKithen's favor, then the District Court was required to apply the

*Mathews* test, rather than the *Medina* test, to determine whether McKithen was entitled to such testing in the particular circumstances presented. Id., 107. In reaching its conclusion, the court expressly relied on the rationale of *Krimstock* with respect to the *Mathews/Medina* distinction, explaining that *Mathews* is applicable "because McKithen [was] not bringing a challenge to his underlying conviction or to 'the process afforded during criminal proceedings themselves' . . . but instead [was] seeking *post*-conviction access to evidence."[12] (Citation omitted; emphasis in original.) Id., quoting *Krimstock* v. *Kelly*, supra, 464 F.3d 254.

These cases, taken together, suggest that *Mathews*, and not *Medina*, represents the applicable due process test when, as in the present case, the challenged procedure is not directly related either to the process by which the defendant's guilt or innocence is adjudicated or to the accuracy of that adjudication. Because the essential protections of the bill of rights relate primarily to rights associated with the adjudicative process itself, and because the rationale of *Medina* is predicated on the fact that the specific guarantees of the bill of rights, in contrast to the "open-ended rubric" of the due process cause; *Medina* v. *California*, supra, 505 U.S. 443; "[speak] in explicit terms to many aspects of criminal procedure"; id.; a strong argument can be made that applying *Medina* to the present circumstances would be to read that case more expansively than its reasoning warrants. Indeed, as I previously noted, this court consistently has applied the *Mathews* balancing test in criminal cases, including cases decided after *Medina*. E.g., *State* v. *Patterson*, supra, 236 Conn. 569; *State* v. *Lopez*, supra, 235 Conn. 493. It is apparent, therefore, that this court does not view *Medina* as occupying the field with respect to due process challenges in the criminal arena.[13] Thus, although it would appear that the *Mathews* balancing test is the applicable test,[14] it need not be decided definitively whether *Mathews* or *Medina* applies because, for the reasons set forth hereinafter, the defendant cannot prevail under either test.

A

I first consider the applicable standard under *Medina*, pursuant to which a defendant claiming a due process violation "must sustain the usual heavy burden that a due process challenge entails"; *Montana* v. *Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality opinion); by establishing that the challenged procedural rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Internal quotation marks omitted.) *Medina* v. *California*, supra, 505 U.S. 445. In other words, the defendant "must show that the principle of procedure *violated* by the rule (and allegedly required by due process) . . . was so deeply rooted at the time of the [f]ourteenth [a]mendment (or

perhaps has become so deeply rooted since) as to be a fundamental principle which that [a]mendment enshrined." (Citation omitted; emphasis in original.) *Montana* v. *Egelhoff*, supra, 47–48 (plurality opinion). "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." Id., 43. In the present case, the procedural provision at issue, General Statutes § 54-63c (b), provides in relevant part that "the court shall conduct a hearing . . . at which the defendant is entitled to be heard with respect to the issuance of a protective order." As the majority and I agree, however, the defendant's right to be heard under § 54-63c (b) does not include the right to call the alleged victim as a witness at the hearing on the protective order. Thus, for purposes of the defendant's due process claim, the issue that we must decide is whether the right to call the alleged victim as a witness at the hearing is so deeply rooted in our history as to be considered fundamental. The answer to that question is plainly no.

That answer is dictated by a review of the case law governing the procedural due process rights of defendants at pretrial proceedings and, in particular, at post-arrest bail and release hearings. In *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), the United States Supreme Court concluded that the state "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." Id., 125. Most importantly for our purposes, however, the court also concluded that "the [c]onstitution does not require an adversary determination of probable cause." Id., 123; see also id., 120. The state is therefore free to establish a procedure for the determination of probable cause that is not accompanied by the "adversary safeguards . . . [consisting of] counsel, confrontation, cross-examination, and compulsory process for witnesses." Id., 119. Because these protections are not required, the probable cause determination may be made informally, without an adversarial hearing, on the basis of hearsay evidence and written testimony. Id., 120. Thus, although an arrestee cannot be held pending trial without a judicial determination of probable cause, the constitution does not require that the arrestee be afforded the right to challenge that determination in an adversarial setting. Because *Gerstein* permits the state to obtain an ex parte finding of probable cause by the court, it undermines the defendant's claim in the present case.

Furthermore, a protective order issued in a family violence case as a condition of bail or release in accordance with §§ 54-63c and 46b-38c is akin to other conditions of bail or release that may be set by the court in any other criminal case. See General Statutes § 54-64a (providing guidelines for release of defendants by judi-

cial authority); Practice Book § 38-4 (same). In fact, a court may impose the very same condition of release that was imposed in the present case, namely, a bar against returning home, in virtually any other felony case. See General Statutes § 54-64a (c) (2) and (6) (upon determination that nonfinancial condition of release is appropriate, court may order, inter alia, that defendant "comply with specified restrictions on [his or her] travel, association or place of abode" and "avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense"); Practice Book § 38-4 (d) (2) and (6) (same). Moreover, "[a]s in the case of other pretrial proceedings such as arraignments and 'probable cause' determinations for warrants, bail hearings are 'typically informal affairs, not substitutes for trial or even for discovery. Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it.' *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 206 (1st Cir. 1985) (Breyer, J.); see also *United States* v. *Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (bail hearing cannot become a 'mini-trial' or 'a discovery tool for the defendant')." *United States* v. *LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000). Thus, it is well established that an arrestee has no constitutional right to compulsory process in a bail hearing. See, e.g., *United States* v. *Edwards*, 430 A.2d 1321, 1336 (D.C. 1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); see also *Querubin* v. *Commonwealth*, 440 Mass. 108, 118, 795 N.E.2d 534 (2003) ("[a] full-blown evidentiary hearing that includes the right to present and cross-examine witnesses is not needed or required [at a bail proceeding]"); cf. *Mendez* v. *Robertson*, 202 Ariz. 128, 130, 42 P.3d 14 (App. 2002) (no right to evidentiary hearing on defendant's request to modify conditions of release). Thus, the right of a defendant to call an adverse witness at a bail hearing is subject to approval by the court in the exercise of its sound discretion. In fact, I am aware of no case in which a court has concluded that a defendant has an unconditional right to present evidence for the purpose of challenging a condition of bail, and there is no reason why a family violence protective order that is imposed as a condition of release should be subject to any different procedural requirements.[15]

Finally, in *United States* v. *Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), the United States Supreme Court upheld the constitutionality of certain provisions of the federal Bail Reform Act of 1984 (act), Pub. L. No. 98-473, § 203 (a), 98 Stat. 1976 (1984), codified as amended at 18 U.S.C. § 3141 et seq., authorizing the preventive detention of a person charged with a federal offense on the ground that he poses a danger to any other person or the community. *Salerno* and its progeny also defeat the defendant's contention that he is entitled to a full evidentiary hearing for the purpose of

challenging the issuance of a family violence protective order as a condition of release.

A brief explanation of the act is necessary to an understanding of the court's holding in *Salerno*. "The [a]ct represent[ed] the [n]ational [l]egislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.' . . .

"To this end, [18 U.S.C. § 3141 (a)] requires a judicial officer to determine whether an arrestee shall be detained. Section 3142 (e) [of title 18 of the United States Code] provides that '[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.' Section 3142 (f) [of title 18 of the United States Code] provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify *and present witnesses in his behalf, as well as proffer evidence*, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, [18 U.S.C.] § 3142 (i), and support his conclusion with 'clear and convincing evidence,' [18 U.S.C.] § 3142 (f).

"The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the [g]overnment's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. [18 U.S.C.] § 3142 (g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. [18 U.S.C. § 3145 (b) and (c)]." (Citation omitted; emphasis added.) *United States* v. *Salerno*, supra, 481 U.S. 742–43.

The court in *Salerno* concluded that the act did not violate either substantive or procedural due process. Id., 746, 751–52. With respect to the latter, the court rested its determination primarily on the fact that "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." Id., 751. As the court explained, among the procedural

safeguards contained in the act is the right of the defendant to "present information by proffer or otherwise . . . ." Id.

Although the act contains certain procedural protections, including the right of the defendant to present evidence at a detention hearing; see 18 U.S.C. § 3142 (f) (2006); courts uniformly have concluded that the right to call witnesses under the act is conditional and not absolute. In other words, whether a defendant will be permitted to call an adverse witness to testify at a detention hearing conducted under the act is a matter within the sound discretion of the trial court, with due consideration of the particular facts and circumstances of the case. See, e.g., *United States* v. *LaFontaine*, supra, 210 F.3d 131 (District Court did not abuse its discretion in declining to permit defendant to call witness to testify at detention hearing); *United States* v. *Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (defendant has no right to confront nontestifying, adverse witnesses at detention hearings); *United States* v. *Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987) (defendant has only conditional right to call adverse witnesses in detention hearing); *United States* v. *Winsor*, 785 F.2d 755, 756 (9th Cir. 1986) (defendant "has no right to cross-examine adverse witnesses who have not been called to testify" at detention hearing); *United States* v. *Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986) (District Court did not abuse its discretion in denying defendant's request to call witness, who was described as "the government's primary source of information," at detention hearing); *United States* v. *Delker*, 757 F.2d 1390, 1397–98 (3d Cir. 1985) (District Court did not abuse its discretion in denying defendant's request to subpoena material government witnesses to testify at detention hearing); *United States* v. *Sanchez*, 457 F. Sup. 2d 90, 92 (D. Mass. 2006) (defendant does not have absolute right to subpoena adverse witnesses at detention hearing); *United States* v. *Goba*, 240 F. Sup. 2d 242, 247–49 (W.D.N.Y. 2003) (court declined to exercise its discretion to require in-court testimony from government agents at detention hearing).

Of course, an order of preventive detention results in physical confinement, a condition aptly characterized as "the ultimate deprivation of liberty"; *United States* v. *Melendez-Carrion*, 790 F.2d 984, 998 (2d Cir.) (Newman, J.), cert. dismissed, 479 U.S. 978, 107 S. Ct. 562, 93 L. Ed. 2d 568 (1986); see also *United States* v. *Perry*, 788 F.2d 100, 113 (3d Cir.) ("civil detention order results in the deprivation of the most fundamental of all personal liberties"), cert. denied, 479 U.S. 864, 107 S. Ct. 218, 93 L. Ed. 2d 146 (1986); whereas the protective order issued in the present case merely barred the defendant from returning to his home. Without minimizing the nature of the deprivation that occurs when a person is ordered to stay away from his own home, such a restriction cannot compare to the loss of liberty

that a person suffers upon being incarcerated without bail in advance of trial. Because a defendant has no absolute right to call witnesses or to require the government to present live testimony even at a detention hearing; see, e.g., *United States* v. *Acevedo-Ramos*, supra, 755 F.2d 207–208;[16] a defendant has no greater procedural rights when, as in the present case, he remains at liberty pending trial.[17]

B

The defendant also cannot prevail under the *Mathews* balancing test. As I previously noted, that test is fact bound and requires consideration of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of [that] interest" upon application of the challenged procedures, "and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the [state's] interest, including the function involved and the fiscal and administrative burdens" resulting from any additional or substitute procedural requirement. *Mathews* v. *Eldridge*, supra, 424 U.S. 335. Analysis of these factors "requires balancing the [state's] interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Internal quotation marks omitted.) *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). Furthermore, "[t]here is no per se rule that an evidentiary hearing is required whenever a liberty interest may be affected." *State* v. *Lopez*, supra, 235 Conn. 492–93. "When determining what procedures are constitutionally required, we must bear in mind that [t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice of the case against him and [an] opportunity to meet it. . . . The elements of notice and opportunity, however, do not require a judicial-type hearing in all circumstances. . . . [As] long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens on the state under the guise of due process." (Citations omitted; internal quotation marks omitted.) Id., 493. With these principles in mind, I conclude that the hearing contemplated under §§ 54-63c (b) and 46b-38c (e), pursuant to which the trial court may, in its discretion, require the state to adduce nonhearsay testimony or permit the defendant to subpoena a particular witness or witnesses, fully complies with the dictates of due process.

With respect to the first factor, it cannot be disputed that the defendant's liberty interest in residing at his home with his children is an extremely significant one. As the defendant maintains, courts have acknowledged that these interests are compelling. See, e.g., *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53–54, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) ("right

to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance"); *Lehrer* v. *Davis*, 214 Conn. 232, 237, 571 A.2d 691 (1990) ("right to family integrity includes the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state" [internal quotation marks omitted]). It is important to underscore, however, that the liberty deprivation at issue in the present case is both temporary in duration and limited in nature. The deprivation is temporary because the order is effective only until the defendant's criminal case is resolved, at which time the terms of the order will be revisited, depending, of course, on the outcome of the trial. The defendant, moreover, has both a constitutional and a statutory right to a speedy trial,[18] rights that guarantee that he will not be subjected to indefinite delay in the adjudication of his case. The deprivation is limited in the sense that the defendant retains the vast majority of the rights that he was free to exercise before his arrest. Aside from avoiding contact with the victim, he is free to go anywhere except the family home. Furthermore, under the terms of the modified protective order, the defendant apparently is entitled to liberal visitation with his children. Thus, although the defendant's interests are substantial, the deprivation is limited, both in time and scope.

The second factor entails an evaluation of the risk of an erroneous deprivation of liberty under the existing statutory provisions, which include the right to be heard, the right to provide the court with any relevant evidence or information, and the right to rebut any evidence or information that the state may offer. Because the defendant does not have a statutory right to a full evidentiary hearing at which he is entitled to call the victim as a witness, this second *Mathews* factor also requires consideration of the probable value that such a hearing would have in safeguarding the defendant's interests, with due regard for the fact that the defendant retains the right to seek the court's permission to subpoena and question the victim. In support of his contention that the risk of an erroneous deprivation of his significant liberty interests is sufficiently high to require such a hearing, the defendant points to an empirical study indicating that the substantiation rate for allegations of domestic abuse of the kind alleged in the present case is approximately 74 percent.[19]

It is no doubt true that, at least in some instances, permitting the defendant in a case involving a family violence crime to adduce testimony from the victim of that crime would increase the likelihood of an accurate determination of the need for a protective order barring the defendant from returning to his home. This is so because the court would be able to evaluate the victim's credibility upon cross-examination by the defense. See

*California* v. *Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (characterizing cross-examination as "the greatest legal engine ever invented for the discovery of truth" [internal quotation marks omitted]). Existing procedures, however, provide the defendant with significant safeguards. The defendant's arrest for a family violence offense necessarily is predicated on a judicial finding of probable cause; see *Gerstein* v. *Pugh*, supra, 420 U.S. 114; and the defendant is entitled to notice and an opportunity to be heard with respect to the issuance of a protective order. See General Statutes § 46b-38c (e). As I have explained; see footnote 15 of this opinion; the defendant is free to provide the trial court with reasons why it should decline to credit the evidence and information adduced by the state in support of the issuance of a protective order and why the victim's testimony is necessary to ensure a fair resolution of the issue. In addition, the report and recommendation of the local family violence intervention unit must be made available to the court when it makes its determination as to the propriety of a protective order. General Statutes § 46b-38c (d). The report and recommendation provide the court with valuable, neutral information and advice regarding the need for a protective order, and represent important procedural safeguards of the rights of those charged with family violence crimes. Furthermore, the defendant may obtain a modification or dissolution of the protective order at any time during the pendency of the criminal case if the defendant has adequate grounds for obtaining such relief. See Practice Book § 38-13 ("[t]he judicial authority shall have the power to modify or revoke at any time the terms and conditions of release as provided for in these rules"). Finally, the defendant is entitled to an expedited review procedure. See General Statutes § 54-63g ("Any accused person or the state, aggrieved by an order of the Superior Court concerning release, may petition the Appellate Court for review of such order. Any such petition shall have precedence over any other matter before said Appellate Court and any hearing shall be heard expeditiously with reasonable notice."). These existing procedural protections substantially reduce the risk of an unwarranted infringement on the defendant's rights.

Application of the third *Mathews* factor leads to the conclusion that the state has a strong interest in retaining the existing procedures. As the state has explained, "[a]llowing the government to establish both the factual predicate and need for a criminal protective order by the use of police reports, victim affidavits and the report and recommendation of the local family services unit, without also requiring that the victim subject herself to cross-examination, greatly advances the government's compelling interest in protecting victims of domestic violence and their children before a defendant charged with a family violence crime is released

into the community [or permitted to return to the family home] pending trial . . . and, at the same time, serves to enhance the integrity of the criminal trial process itself by reducing the risk of witness intimidation."

Because the state may take reasonable steps to ensure that a trial will take place, "[p]rocedures may . . . be used both to secure the defendant's presence at trial and to prevent the defendant from aborting the trial by intimidating witnesses or physically harming them." *United States* v. *Melendez-Carrion*, supra, 790 F.2d 1002. The concern of witness intimidation is especially great in domestic violence cases. As one court has stated, due to the nature of the relationship between the victim and the abuser, "even a victim who reports an abusive family member to police may later protect the person by denying, minimizing, or recanting the report. . . . Thus, the prosecution of domestic violence cases presents particular difficulties. Unlike conventional cases . . . [in which] prosecutors rely on the cooperation and participation of complaining witnesses to obtain convictions, in domestic violence cases prosecutors are often faced with exceptional challenges. Such challenges include victims who refuse to testify, who recant previous statements, or whose credibility is attacked by defense questions on why they remained in a battering relationship." (Citations omitted; internal quotation marks omitted.) *People* v. *Brown*, 33 Cal. 4th 892, 899, 94 P.3d 574, 16 Cal. Rptr. 3d 447 (2004); see also *State* v. *Borrelli*, 227 Conn. 153, 168–69, 629 A.2d 1105 (1993) (approving state's use of testimony concerning "battered woman's syndrome" to explain why victims of domestic abuse sometimes remain in destructive relationships, do not report abuse in timely manner, and recant their complaint or testimony concerning abuse); *State* v. *Foreman*, 680 N.W.2d 536, 538 (Minn. 2004) (same). Because victims of family violence are unusually susceptible to intimidation and frequently are fearful of confronting their abusers, I agree with the state that requiring a victim of such abuse to testify in a court proceeding, during which she is subject to examination by defense counsel, no more than a few days after reporting the crime, would be very likely to cause significant further trauma to the victim. Such a requirement also would deter some victims of family violence from reporting their abuse to the authorities. Because family violence "is a problem of immense proportions . . . [that] has long been recognized as being at the core of other major social problems . . . [including] [c]hild abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse"; (internal quotation marks omitted) *State* v. *Karas*, 108 Wash. App. 692, 700, 32 P.3d 1016 (2001); the state has a compelling interest in encouraging victims of family violence to come forward. Granting to defendants in family violence cases the unconditional right to interrogate their alleged victims within days of

their arrest would immeasurably undermine this important state interest.

It also would result in a serious administrative burden. Under the scheme advocated by the defendant, the trial court would be obligated to conduct a full evidentiary hearing, at the defendant's request, in any case in which the state seeks a family violence protective order that, if issued, would result in a significant deprivation of the defendant's liberty. Although the majority does not attempt to identify the kinds of liberty deprivations that would trigger the right to a full evidentiary hearing, a defendant necessarily would be entitled to such a hearing in any case in which the court was considering a financial condition of release that the defendant could not make, thereby resulting in his pretrial confinement in lieu of bail.[20] Nonfinancial conditions of release other than a condition that the defendant cannot return home, such as a curfew, home confinement, strict travel limitations and restrictions on child visitation, all involve significant liberty deprivations that implicate fundamental rights; consequently, they, too, presumably would give rise to a full evidentiary hearing.

Moreover, there is no reason why entitlement to a full evidentiary hearing would be restricted to defendants in family violence cases whose conditions of release have resulted in a significant liberty deprivation. In fact, the due process principle that the defendant advances would apply to any defendant who, as a result of a condition of bail or release, suffers a significant deprivation of liberty. Consequently, the administrative burden on our courts would not be limited to family violence cases but would extend to many other cases. This burden on the state and on the courts would be great.

In addition, the evidentiary hearing contemplated by the defendant would be a minitrial on the merits of the state's case against the defendant. This is the necessary result of the constitutional claim that the defendant raises because the propriety of an order barring the defendant from residing at his home will depend largely, if not entirely, on whether the trial court is persuaded by the state's evidence that the defendant, in fact, had committed the family violence offense with which he was charged. If so, then it is extremely likely that the court will issue the protective order. The more questions that the defendant can raise about the state's case—for example, by casting doubt on the veracity of the state's witnesses, including, most importantly, the victim—the better the defendant's chances are that the court will not issue the order that the state has sought. Thus, a full evidentiary hearing regarding the issuance of the protective order would closely resemble, if not mirror, the criminal trial itself. The state "has an obvious interest in not conducting a full-blown criminal proceeding twice, once for [purposes of determining the

conditions of release] and a second time for the trial on the charges." *United States* v. *Edwards*, supra, 430 A.2d 1337. "[W]ith regard to the [state's] witnesses, and particularly the complaining witness, the [state has] an interest in preventing premature discovery. It also has an interest in protecting the emotional and physical well-being of its witnesses." Id., 1338.

Balancing the relevant factors, including, of course, the risk that use of the procedures now in place will result in an erroneous deprivation of the defendant's right to remain in his home pending trial, I believe that it is clear that the defendant has failed to establish that his interest in an unconditional right to cross-examine the victim at the hearing on the protective order outweighs the state's countervailing interest in a proceeding that does not necessarily involve such testimony. Although the defendant has a significant stake in the outcome of the hearing, his interests are protected by several important procedural safeguards, including the opportunity to persuade the trial court that live testimony, from the victim or anyone else, is necessary to a fair determination of whether the defendant should be barred from returning to his home.

This result, which is mandated by *Mathews*, also is dictated by the fact that the condition imposed on the defendant as a result of the protective order is no different than any other condition of bail or release, and no jurisdiction ever has held that the imposition of such a condition gives rise to an absolute right to a full evidentiary hearing. Indeed, as I explained previously, because a defendant is not entitled to call adverse witnesses at a pretrial detention hearing or at a bail hearing that results in the setting of a financial condition of release that the defendant cannot meet, thereby resulting in his pretrial incarceration, then, ipso facto, a defendant who is released into the community subject to one or more conditions has no absolute right to call adverse witnesses. I note, finally, that this conclusion also finds support in cases in which this court has determined that due process does not require an adversarial evidentiary hearing before a trial court may order a defendant to register as a sex offender; *State* v. *Arthur H.*, 288 Conn. 582, 609, 953 A.2d 630 (2008); that it is not a violation of due process for a trial court to rely on an unsworn statement in an arrest warrant to determine whether the defendant poses a risk to public safety, as long as the statement contains a minimum indicia of reliability; *State* v. *Bletsch*, 281 Conn. 5, 20–22, 912 A.2d 992 (2007); and that due process is not violated when a trial court's determination rests on reasonably reliable, unsworn or out-of-court information at the time of sentencing. *State* v. *Eric M.*, 271 Conn. 641, 649–50, 858 A.2d 767 (2004).

IV

My first and primary disagreement with the majority

stems from its analysis and conclusion with respect to the nature of the hearing required under §§ 54-63c (b) and 46b-38c (e). The majority construes those provisions, first, as establishing a bifurcated hearing procedure and, second, as granting a defendant certain procedural rights and denying him certain others.[21] Even a most cursory review of the majority opinion, however, reveals that its interpretation of the term "hearing" in § 54-63c (b) is founded on nothing more than a series of bald assertions that are unsupported by analysis or evidence. Primarily because the legislature has elected to treat a protective order issued under those statutory provisions in the same manner as any other condition of bail or release; see General Statutes § 46b-38c (e) (any order of protection issued thereunder "shall be made a condition of the bail or release of the defendant"); there is no reason to conclude that the hearing to which a defendant has a right under §§ 54-63c (b) and 46b-38c (e) is any different from any other hearing to which a defendant is entitled for purposes of challenging a condition of bail or release.

Recognizing that § 54-63c (b) expressly provides for a hearing at the time of presentment in accordance with § 54-1g (a), which in turn provides that a person arrested for a family violence crime shall be presented on the next day that court is in session, the majority first concludes that the hearing contemplated under §§ 54-63c (b) and 46b-38c (e) is a bifurcated one. Thus, under the construction that the majority advances, a person arrested for a family violence crime is entitled to a preliminary hearing on the protective order the day that he is presented pursuant to § 54-1g (a) and, upon the request of the defendant at that first proceeding, a second, more expansive hearing within a reasonable time thereafter.

The majority next identifies with specificity the parameters of the more expansive hearing under § 46b-38c (e). In particular, the majority concludes that the term "hearing" for purposes of that provision means that (1) the state may, if it wishes, establish the need for a protective order on the basis of "reliable hearsay,"[22] (2) if the state presents live witnesses, those witnesses are subject to cross-examination by the defendant, (3) the state must demonstrate the need for a family violence protective order by a preponderance of the evidence, (4) the defendant does not have a right to call the alleged victim, (5) the defendant also does not have the right to subpoena other adverse witnesses to the hearing, (6) the defendant may, in the court's discretion, testify at the hearing, and (7) the defendant also may, in the court's discretion, call other witnesses who are willing to testify on his behalf. As I explain more fully hereinafter, the bifurcated hearing comprised of the foregoing multiple components is nowhere to be found in our statutory scheme; rather, it has been fashioned out of whole cloth by the majority.

The majority's determination that § 54-63c (b) contemplates a bifurcated hearing procedure is truly startling in light of the complete lack of support for that interpretation. There is absolutely nothing in the statutory language, the pertinent legislative history or anywhere else to substantiate the majority's interpretation. Indeed, it would appear that the majority's construction is barred by General Statutes § 1-2z,[23] which mandates application of the plain language of a statute unless that language leads to a bizarre or unworkable result. The relevant statutory language is perfectly clear; General Statutes § 54-1g (a) provides that a person arrested for a family violence crime "*shall be promptly presented before the superior court sitting next regularly* for the geographical area where the offense is alleged to have been committed"; (emphasis added); and General Statutes § 54-63c (b) provides that, "[*o*]*n such date*, the *court shall conduct a hearing* pursuant to section 46b-38c *at which the defendant is entitled to be heard* with respect to the issuance of a protective order." (Emphasis added.) The majority's conclusion regarding the bifurcated nature of the hearing under § 46b-38c (e) contradicts the language of § 54-63a (b), which plainly and unambiguously provides that a person arrested for a family violence crime is entitled to the hearing established under § 46b-38c (e) *at his presentment*. Under the majority's interpretation, however, the defendant is denied a meaningful opportunity to be heard at the time of presentment and, instead, must wait until the scheduling of a second hearing, to be held within some unspecified "reasonable period of time" in the future, and then only "[upon] the defendant's request made at [the time of the first hearing] . . . ." The majority simply announces that this bifurcated procedure is statutorily mandated upon request but makes no attempt to explain the rationale, linguistic or otherwise, underlying its assertion.

The statutory construction that the majority adopts apparently is predicated on its belief that it would be impracticable for arraignment courts to hold the kind of hearing that the majority concludes is required by the statutory scheme. Putting aside the issue of whether that concern is justified in view of the relatively limited nature of the hearing that the majority asserts has been established under § 54-63c (b), a hearing that the majority itself states is likely to be "brief"; footnote 26 of the majority opinion; I submit that the majority's bifurcated hearing procedure is nothing more than a construct to accommodate the conclusion that the defendant is entitled to something more than a bail hearing. Thus, the majority, not the legislature, has created the two stage hearing; if the legislature had intended to create such a procedure, it easily could have manifested that intent expressly. E.g., *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 299, 933 A.2d 256 (2007) (legislature knows how to convey its intent

expressly).

Of course, under our law, bail hearings routinely are conducted in arraignment court. It is far more likely, therefore, that the legislature, aware of that fact, fully expected that the hearing under § 54-63c (b) would be conducted at the defendant's first court appearance and would be the same as a hearing on any other condition of bail or release.

This conclusion also finds strong support in the fact that, under General Statutes § 46b-38c (e), a protective order is expressly deemed a "condition of the bail or release of the defendant . . . ." This language constitutes powerful evidence that the legislature intended to treat the issuance of a protective order under § 46b-38c (e) in the same manner as any other bail condition. Indeed, in the absence of any evidence of a contrary legislative intent—and the majority identifies none—the legislative decision to treat a protective order as a condition of release is alone sufficient to defeat the conclusion that the hearing contemplated by the legislature for purposes of §§ 54-63c (b) and 46b-38c (e) differs in any way from a bail hearing.

The majority's construction suffers from other serious infirmities. First, as the majority has observed, "[a] review of other criminal procedure statutes demonstrates that, when the legislature has desired to impose specific requirements on the conduct of a pretrial hearing, it has said so explicitly." The majority offers as examples General Statutes § 54-82r, which authorizes courts to impose protective orders prohibiting the harassment of witnesses in criminal cases, and General Statutes § 54-64f, which authorizes courts to impose different conditions of release or to revoke the bail of defendants who have violated one or more release conditions. Each of these provisions delineates the general nature of the hearing established thereunder.[24] If the legislature had intended to provide for a hearing under §§ 54-63c (b) and 46b-38c (e) that differs materially from the kind of hearing that our courts conduct routinely in setting all other conditions of bail and release, the legislature no doubt would have said so. E.g., *Windels* v. *Environmental Protection Commission*, supra, 284 Conn. 299.

In addition, General Statutes § 54-63a (b) provides for a hearing "pursuant to [§] 46b-38c . . . ." As I previously noted, § 46b-38c (e) is silent with respect to the procedures to be followed at the hearing on the issuance of a family violence protective order. Under that statutory subsection, however, the court has broad discretion to impose conditions of release designed to protect the victim of the alleged family violence crime. Because there is no reason to conclude that the fundamental nature of the hearing required pursuant to § 46b-38c differs depending on the nature of the protective order at issue in any particular case, the hearing procedure

that the majority adopts necessarily will be the same whether the court is contemplating an order that impinges on an important liberty interest of the defendant, such as the order in the present case, or one that falls at the other end of the spectrum, such as an order "enjoining the defendant from . . . threatening, harassing, assaulting, molesting or sexually assaulting the victim . . . ." General Statutes § 46b-38c (e). Aside from the fact that there is no evidence whatsoever to suggest that the legislature intended to adopt a "one size fits all" hearing formula, I see no reason why the legislature would have intended to do so.

Furthermore, the majority's holding leads to an untenable, if not bizarre, result, namely, it creates one set of procedures for bail hearings in nonfamily violence cases in which the court imposes an order of protection, and another set of procedures for such hearings in cases involving family violence crimes. As I previously have indicated; see part III A of this opinion; in most felony cases, a court may impose, under § 54-64a (c), a nonfinancial condition of release such as requiring the defendant to "comply with specified restrictions on [his or her] travel, association or place of abode" for the express purpose of protecting the safety of the alleged victim. In those cases, the defendant is entitled to a hearing that is no different from any other bail hearing. In a case involving a crime of family violence, however, the majority asserts that a different hearing is required even when the very same condition is being imposed—for example, a condition, such as the one imposed in the present case, prohibiting the defendant from residing at his home—for the very same purpose. This is not a sensible or reasonable result, and the majority has identified nothing in our statutes or anywhere else to explain it.

A review of the majority opinion reveals that the majority's conclusion concerning the nature of the hearing established under §§ 54-63c (b) and 46b-38c (e) is based entirely on a single statement made on the floor of the House of Representatives by the sponsor of the bill that became P.A. 07-123 and on several *civil* cases from other states. Neither the legislative history nor the out-of-state precedent on which the majority relies bears even the slightest relevance to the issue presented by this case.

With respect to the majority's reliance on the legislative history of P.A. 07-123, the majority identifies what it characterizes as "the legislature's desire to satisfy the defendant's due process rights under the fourteenth amendment to the United States constitution . . . [as] reflected in the comments of the sponsor of the bill enacted as P.A. 07-123, who viewed it as an attempt to 'strike a very delicate balance here between the legitimate interests of law enforcement, and the important constitutional and civil liberty concerns that we would

have [as] citizens . . . .' 50 H.R. Proc., [Pt. 12, 2007 Sess.], p. 3904, remarks of Representative [Michael P.] Lawlor." Contrary to the conclusion of the majority, these remarks of Representative Lawlor in no way substantiate the elaborate gloss that the majority places on the statutory language at issue. First, the majority engages in no analysis as to why its statutory interpretation addresses any possible due process concerns; the majority's constitutional analysis is limited to a one paragraph footnote in which it dismisses the defendant's contention that he has a due process right to a full evidentiary hearing. See footnote 21 of the majority opinion. In fact, the reason that the majority gives for rejecting that claim, namely, that a defendant facing a protective order barring him from his residence until the conclusion of his criminal case can have no constitutional entitlement to a full evidentiary hearing if a person who is incarcerated pending trial has no such right; see id.; defeats the majority's suggestion that due process considerations militate in favor of its interpretation of §§ 54-63c (b) and 46b-38c (e). In other words, it is illogical to assume that the legislature would intend that a person who, like the defendant, has been barred by the court from returning to his home pending the disposition of his family violence case is entitled to greater procedural rights than a person who is subject to an order that requires his incarceration prior to trial.

In addition, and perhaps more to the point, the majority takes Representative Lawlor's comment completely out of context. The comment was made in response to a proposed amendment to the bill that ultimately became P.A. 07-123 concerning the authority of the police to release a person arrested for a family violence crime on a written promise to appear. See 50 H.R. Proc., supra, pp. 3902–3903, remarks of Representative Kevin Witkos. Representative Lawlor was expressing his support for the proposed amendment to its sponsor, Representative Witkos, and his comment had nothing at all to do with the nature of the hearing contemplated under the bill but, rather, with the bill's goal of balancing the rights of the family violence arrestee and the public in vesting the police with authority to impose conditions of release. Thus, the majority's reliance on Representative Lawlor's comment in an effort to rationalize its construction of §§ 54-63c (b) and 46b-38c (e) is entirely misplaced.

The only other authority on which the majority relies in support of its conclusion concerns its determination that the state must prove the need for a protective order by a preponderance of the evidence. Of course, with respect to other conditions of release, the trial court must exercise its sound discretion in determining whether a particular condition is appropriate in any given case. In the present case, however, the majority cites out-of-state precedent involving *civil* domestic violence protective orders as its primary basis for con-

cluding that such a standard applies under § 46b-38c (e). In doing so, the majority fails to explain why the standard of proof applicable to an application for a protective order in a civil case should guide our interpretation of the *criminal* statutory scheme at issue. In particular, the majority makes no effort to explain why a condition of bail or release, such as the protective order issued in the present case, should be subject to the same standard of proof that governs the issuance of such an order when it is sought by a private litigant in a civil matter.[25] The majority's failure to articulate even a plausible basis for equating the two is fatal to its conclusion that § 46b-38c (e), a criminal statute, embodies a civil standard of proof.[26]

Finally, the majority, in holding that a defendant in a family violence case is somehow entitled to greater procedural safeguards than any other defendant before a trial court may impose a protective order as a condition of bail or release, ignores the reason why the legislature included an express reference in P.A. 07-123, § 1, which is now codified at § 54-63c, to the hearing requirement of § 46b-38c. That reason is apparent: for the first time, the legislature, under P.A. 07-123, authorized the police to impose orders of protection as a condition of release, and the legislature wanted to ensure that a person who is subject to an order of protection imposed *by a police officer* would promptly be afforded a hearing before *a neutral and detached judicial officer* for a determination of whether that condition should be extended, modified or vacated. Instead of acknowledging this simple and obvious reason for the hearing mandated under §§ 54-63c (b) and 46b-38c (e), the majority tortures the statutory language and history to come up with an interpretation that is completely lacking in support and logic.[27]

V

I also disagree with the majority insofar as it reverses Judge Bingham's decision to reject the defendant's claim that he has a right to a full evidentiary hearing. Because the majority also concludes that the defendant was not entitled to such a hearing, the trial court's decision should be affirmed, not reversed. Of course, the defendant has a right under General Statutes § 54-69[28] to return to court for the purpose of challenging the protective order, and any such hearing necessarily will accord with the new standards set forth by the majority in its decision. But even under its own resolution of the present appeal, the majority is wrong in reversing the trial court.

The majority itself correctly characterizes the claim that the defendant raised in the trial court as follows: "The defendant argued that he was entitled to a full evidentiary hearing under both § 54-63c and the due process clause of the fourteenth amendment to the United States constitution . . . . Judge Bingham

denied the defendant's request for an evidentiary hearing, reasoning that the procedure for issuing a domestic violence protective order in criminal cases 'is similar to a bail hearing, and you're not entitled to a full trial on a bail hearing.' "

This is the same claim that the defendant has raised in this court. The majority aptly characterizes that claim, as well, explaining that the defendant contends on appeal that "the trial court improperly failed to conduct an evidentiary hearing prior to issuing a criminal protective order because § 54-63c (b) 'expressly require[d]' the trial court to hold such a hearing when he first appeared in court. The defendant argues that the word 'hearing,' as used in § 54-63c (b), means an adversarial and formal adjudicative proceeding at which issues of fact and law are tried, evidence is taken, and witnesses and parties are heard. The defendant further contends that the cross-reference in § 54-63c (b) to § 46b-38c, the family violence criminal procedure statute that authorizes courts to impose criminal protective orders at the defendant's first court appearance . . . requires that the criminal statute be applied consistently with the similarly worded . . . § 46b-15, which, he argues, contemplates a full evidentiary hearing within fourteen days of the ex parte issuance of a civil domestic violence temporary restraining order." (Citation omitted.) The defendant also claims on appeal that he is entitled to the same right to a full evidentiary hearing under the due process clause of the fourteenth amendment.[29]

Thus, as the majority expressly recognizes, the defendant consistently has claimed that he is entitled, both statutorily and as a matter of due process, to nothing less than a full evidentiary hearing before the court may issue a family violence protective order under §§ 54-63c (b) and 46b-38c (e).[30] Although the majority, like the trial court, concludes that the defendant is not entitled to such a hearing—the only issue that the trial court was asked to resolve—the majority nevertheless deems it appropriate to render judgment reversing the trial court. It is axiomatic, however, that this court will affirm the judgment of a trial court when, as in the present case, we agree with the result reached by the trial court even if we disagree with its reasoning. The majority's refusal to affirm the trial court in the present case, therefore, is completely unsupportable.

Indeed, the trial court characterized the hearing to which the defendant is entitled as "similar to a bail hearing . . . ." In fact, under the majority's interpretation of §§ 54-63c (b) and 46b-38c (e), the hearing to which a defendant is entitled thereunder *is* similar to a bail hearing. The majority agrees with the trial court that the defendant has no right to have the state prove its case with live testimony, no right to bar the state from using hearsay evidence, no right to call the alleged

victim and no right to subpoena witnesses. The defendant, however, may, in the court's discretion, testify and call witnesses who are willing to testify on his behalf. These procedural rules are no different than the rules governing bail hearings, and the majority does not contend otherwise. In any event, to the extent that the hearing contemplated by the majority differs at all from a bail hearing—at which the trial court must exercise its sound discretion in determining how to proceed under the particular circumstances presented—it certainly is *far* more akin to a bail hearing than the full evidentiary hearing that the defendant sought in the trial court and seeks on appeal to this court.

The majority asserts that, although Judge Pavia did afford the defendant the initial or preliminary hearing that, in the majority's view, is required under our statutory scheme, Judge Bingham must be reversed because the defendant "did not receive [the] subsequent hearing *as requested* . . . ." (Emphasis added.) This statement by the majority represents a mischaracterization of the record because *the defendant never requested the hearing to which the majority now concludes he was entitled*; indeed, he never even requested the opportunity to present any witnesses, evidence or other information. As I have explained, and as the majority expressly has acknowledged, the only hearing that the defendant sought was a full evidentiary hearing at which the state would be required to present testimony in compliance with the rules of evidence. The majority agrees that Judge Bingham properly denied the defendant's request for such a hearing. It is simply wrong, therefore, to assert that Judge Bingham must be reversed because he improperly declined to grant the defendant a hearing "as requested."

Unable to explain its reversal of Judge Bingham by reference to the facts and record of this case, the majority turns to another case, *Rowe* v. *Superior Court*, 289 Conn. 649, 960 A.2d 256 (2008), to support its conclusion. In *Rowe*, this court concluded, inter alia, that the plaintiff in error had preserved his common-law claim challenging the propriety of the trial court's imposition of multiple contempt findings against him. Id., 660, 663. *Rowe* is wholly inapposite, however, because the defendant in the present case *never* has claimed that he is entitled to anything other than a full, trial-like hearing, let alone the hearing that the majority determines he is entitled to under the applicable statutory scheme. Nevertheless, the majority's sole argument is derived from *Rowe*, namely, that reversing Judge Bingham will not result in what the majority characterizes as a "judicial ambush . . . ." Footnote 26 of the majority opinion. This assertion, however, has no basis in fact; reversing the trial court in the present case most certainly does achieve that unwarranted result because Judge Bingham, in rejecting the defendant's request for a full evidentiary hearing, *properly* resolved *the only*

*claim before him*. In other words, in contrast to *Rowe*, in which this court concluded, by express reference to the trial court proceedings, that the court had been placed on notice of the claim that the plaintiff in error raised on appeal; see *Rowe* v. *Superior Court*, supra, 662–63; the trial court in the present case had no such notice. In the present case, Judge Bingham was asked to decide only whether the defendant had a right to a full evidentiary hearing and not whether he had a right to the limited hearing that the majority has recognized today.[31]

Indeed, in characterizing the defendant's claim in the trial court and on appeal, the majority itself acknowledges that the defendant's claim is the same in both courts, namely, that he has a right to a full, trial-like hearing. Despite this express acknowledgment, the majority nonetheless asserts that it "represents a hypertechnical and unduly restrictive application of the rules of preservation" to conclude that the "particular conclusion of law that [the majority] adopt[s]" was not preserved. Footnote 26 of the majority opinion. The majority, however, completely ignores the sine qua non of preservation, namely, *fair notice* of the claim to the trial court. See, e.g., *State* v. *Ross*, 269 Conn. 213, 335–36, 849 A.2d 648 (2004) ("the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law" [emphasis in original]). Tellingly, the majority opinion makes no reference to the notice requirement and contains no discussion of how the defendant's arguments placed the trial court on fair notice of the statutory interpretation that the majority adopts today. Under settled principles of preservation, which the majority purports to apply, the majority would have to be satisfied that Judge Bingham was, in fact, accorded a fair opportunity to consider, for his acceptance or rejection, the interpretation of the statutory scheme that the majority has adopted. It simply is not possible to reach that conclusion, however, for as the majority expressly has acknowledged, the defendant "argued [in the trial court] *only* that he was entitled to a full, trial-like, evidentiary hearing." (Emphasis added.) Footnote 26 of the majority opinion. Undaunted by this logical flaw in its analysis, the majority nevertheless insists that it is appropriate to reverse Judge Bingham's ruling.

The majority also seeks to justify its conclusion by reference to the fact that, after Judge Bingham had denied the defendant's request for a full evidentiary hearing, defense counsel questioned the court about the nature of the hearing to which the defendant was entitled. Id. (asserting that reversal "[did] not operate as a judicial ambush of Judge Bingham, as, after he denied the defendant a full, trial-like hearing, defense counsel questioned [Judge Bingham] about the nature of the hearing to which the defendant was entitled"). Judge Bingham ultimately informed the defendant that

he was entitled to a hearing similar to a bail hearing. It is impossible to see how defense counsel's question and Judge Bingham's response to it support a reversal, as our trial courts are responsible for resolving issues presented to them, not for advising parties on how best to proceed. Moreover, in characterizing the hearing as akin to a bail hearing, Judge Bingham said nothing to mislead the defendant, who at no time sought to challenge the state's evidence or introduce any evidence of his own, by way of proffer or otherwise. Simply put, the majority countenances an ambuscade of Judge Bingham by reversing him on the basis of a nonconstitutional claim that never was raised in the trial court and has not been raised on appeal.

More importantly, the majority's approach to preservation—an approach that effectively dispenses with the heretofore critical component of fair notice—is unprecedented and unwarranted. The majority embraces a methodology pursuant to which it is enough to preserve a claim for appeal if the "issue" raised on appeal implicates the same issue that was raised in the trial court. Id. For purposes of the present case, the majority identifies that issue as "what type of hearing is required under § 46b-38c"; id.; and concludes that, because this court is deciding the same "issue" on appeal as the defendant raised in the trial court, the preservation requirement has been satisfied. Heretofore, that requirement would be met only if the *claim* that the defendant raised in the trial court, namely, that he is entitled to a full-blown evidentiary hearing, is also the claim to be decided on appeal. Under the new, issue-oriented approach that the majority invents, however, the preservation requirement is satisfied, irrespective of whether the claim raised on appeal mirrors the claim that had been raised in the trial court, as long as the latter can be characterized as implicating the same general "issue"—or, as the majority puts it, the same general "subject of [the] dispute"—as the former. Id.

For very good reason, this court never before has adopted the expansive view of preservation that the majority employs in the present case. Under the majority's approach, if a party claims in the trial court that a statute means one thing (X), and the trial court rejects the party's construction on the ground that the statute means something entirely different (Y), and, then, on appeal, the party argues that the statute has yet a third meaning (Z), the party's claim has been preserved because the "issue" at trial and on appeal is the same, that is, the meaning of the statute. Until now, this has not been the mode of analysis used to determine whether a claim has been preserved for purposes of appeal, and it should not be because, under that methodology, fair notice to the trial court simply is irrelevant; the trial court never was afforded the opportunity to address the party's claim, raised for the first time on appeal, that the statute means Z. In this example, the

only claim that the party has preserved is its claim that the statute means X; merely because the particular statutory interpretation urged by the party in the trial court—that is, the party's *claim*—implicated the broader "issue" of the statute's meaning, the party is not entitled to raise *any and all other competing interpretations* of the statute on appeal. That, however, is precisely the approach to preservation that the majority takes in the present case; the statutory interpretation that the defendant advocated in the trial court bears no resemblance to the interpretation of the statute that the majority adopts in the present appeal, yet the majority concludes that the preservation requirement has been satisfied.

A second scenario also highlights the extent to which the majority has departed from settled principles of preservation. Under present law, if a party objects to the admission of certain evidence on relevancy grounds, and the trial court overrules the objection, and, thereafter, the party claims on appeal that the evidence was inadmissible hearsay, the claim on appeal is not preserved. See, e.g., *State* v. *Cabral*, 275 Conn. 514, 531, 881 A.2d 247 (defendant's claim on appeal that evidence was inadmissible hearsay was not preserved and, thus, not reviewable because defendant raised different objection at trial), cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005); see also *State* v. *Meehan*, 260 Conn. 372, 388–90, 796 A.2d 1191 (2002) (because defendant raised one claim at trial as to why witness' testimony was inadmissible and asserted another, different claim of inadmissibility on appeal, defendant's appellate claim was unpreserved and, therefore, not reviewable). In light of the majority's decision in the present case, however, a party seeking relief on appeal could claim that the "issue" raised by his objection at trial was the inadmissibility of the evidence and, further, that, because his hearsay claim, which he raised for the first time on appeal, implicates that same "issue," the claim would be preserved. Under the analytical model that the majority adopts, I see no reason why that party would not prevail on his preservation argument.[32]

In sum, by focusing broadly on the *issue* raised in the trial court rather than the *claim* raised in that court, the majority approves of an approach to preservation that differs markedly from the methodology that this court consistently has employed for a very long time. If the majority does not believe that preservation requires fair notice of the claim to the trial court, then it should say so expressly and explain why it has reached that conclusion.[33] It is unacceptable, however, for the majority to purport to apply settled preservation principles, on the one hand, and, on the other, to endorse a far broader and different standard that effectively eliminates the fair notice requirement.[34]

Finally, although I disagree with the majority's determination as to the nature of the hearing contemplated under §§ 54-63c (b) and 46b-38c (e); see part IV of this opinion; I agree with the majority that we should take this opportunity to explicate the parameters of that hearing. We should do so, however, in the exercise of our supervisory authority over the administration of justice; see, e.g., *State* v. *Connor*, 292 Conn. 483, 518 n.23, 973 A.2d 627 (2009); because the issue is sufficiently important to warrant such an explication, not because the trial court's ruling on the defendant's claim was in any way wrong or improper. Moreover, because § 54-69 entitles the defendant to a modification of the conditions of his release whenever such a modification is warranted, he will be entitled to a hearing of the kind that the majority adopts today merely upon filing an application to dissolve or modify the protective order that was issued in the present case. The majority's reversal of Judge Bingham, however, is both wrong as a matter of law and manifestly unfair to Judge Bingham. "Unfortunately, the majority's conclusion also sends the wrong message to trial judges generally. It is one thing to hold our judges accountable for their decisions on claims that have been presented to them; it is another matter entirely to hold them responsible for failing to decide claims that never were raised. I submit that that is precisely what the majority has done in the present case."[35] *Rowe* v. *Superior Court*, supra, 289 Conn. 685 (*Palmer*, *J.*, concurring).

VI

A condition of bail or release that precludes a defendant from residing at his home during the pendency of his criminal case undoubtedly results in a significant liberty deprivation to that defendant. Consequently, our trial courts must carefully evaluate the particular circumstances of each case in deciding whether to impose such a condition. For obvious reasons, however, the imposition of such a condition will be prudent, if not absolutely necessary, in some cases involving family violence, which aptly has been characterized as a "modern-day scourge." J. Kaye, "Delivering Justice Today: A Problem-Solving Approach," 22 Yale L. & Policy Rev. 125, 139 (2004).

Contrary to the conclusion of the majority, there is nothing in our statutory scheme to suggest that the legislature has devised a hearing specially designed for the purpose of determining whether an order of protection should issue in a family violence case. In fact, such orders are no different than other conditions of bail or release, and the legislature expressly has designated them as such. Thus, as I previously explained, the state generally will be able to make its case for the issuance of a protective order on the basis of evidence, such as the alleged victim's sworn statement, that otherwise might not be admissible at trial. And most often, the

defendant will be unable to establish a sufficient basis for calling adverse or other witnesses for the purpose of challenging the issuance of such an order. Whether the existence of unusual circumstances may give rise to an exception to these general rules is a determination that must be made by the trial court, in the exercise of its sound discretion, on a case-by-case basis, with due regard for the interests of all parties. In recognition of the fact that our trial courts are best situated to make such judgments and, thus, to strike the appropriate balance between the rights of the defendant and the legitimate interests of the state and the alleged victim, the legislature has manifested its intent that the desirability of an order of protection shall be determined in the same manner as any other condition of bail or release. The majority, however, disregards this evident legislative intent and, instead, substitutes its own view of what the law should be for what the legislature has decreed by creating a hearing procedure under § 46b-38c (e) in derogation of the procedure endorsed by the legislature. Judicial lawmaking of this sort is never acceptable, least of all with respect to a subject matter of such vital concern as family violence. Within constitutional limits, it is the prerogative of our elected officials, not this court, to determine how best to deal with such public safety issues. Unfortunately, the majority ignores that fundamental principle in the present case. Accordingly, I dissent in part.

[1] See footnote 2 of the majority opinion for the text of § 54-63c (b).

[2] A "family violence crime" is defined as a misdemeanor or felony that "in addition to its other elements, contains as an element thereof an act of family violence to a family member . . . ." General Statutes § 46b-38a (3).

"Family violence" is defined as "an incident resulting in physical harm, bodily injury or assault, or an act of threatened violence that constitutes fear of imminent physical harm, bodily injury or assault between family or household members." General Statutes § 46b-38a (1).

[3] General Statutes § 54-1g (a) provides in relevant part: "Any arrested person . . . who is charged with a family violence crime . . . shall be promptly presented before the superior court sitting next regularly for the geographical area where the offense is alleged to have been committed. . . ."

[4] See footnote 4 of the majority opinion for the text of § 46b-38c (e).

[5] I agree with the majority only to the extent that it determines that the defendant is not entitled to a full evidentiary hearing and affirms the decision of the court, *Pavia, J.*

[6] See footnote 9 of the majority opinion for the relevant text of § 46b-15.

[7] On November 8, 2007, the court, *Bingham, J.*, modified the protective order by facilitating the defendant's visitation with his children.

[8] The majority does not articulate how the rights to which it asserts a defendant is entitled at a hearing under § 46b-38c (e) differ from the rights to which a defendant is entitled at any other bail hearing. One difference, of course, is that, in the case of bail hearings generally, the court must exercise its sound discretion in setting bail and imposing conditions of release; under the majority's interpretation of §§ 54-63c (b) and 46b-38c (e), however, the state must prove the need for a protective order by a preponderance of the evidence. Otherwise, however, it is not clear exactly how the hearing envisioned by the majority is different from a bail hearing. In view of the fact that the majority deems it appropriate to reverse the decision of the trial court, *Bingham, J.*, that the defendant was entitled to a hearing akin to a bail hearing, it must be presumed that, in the majority's view, the hearing rights afforded under §§ 54-63c (b) and 46b-38c (e) are greater than those ordinarily afforded at bail hearings.

[9] Ordinarily, it might be appropriate simply to adopt the analytical approach advanced by the parties. Because, however, this is an appeal under

General Statutes § 52-265a that implicates the public interest, and because the case involves a challenge to the constitutionality of one or more state statutes, it would not be proper to do so here.

[10] Although the court in *Abuhamra* applied the *Mathews* test, it did not discuss the *Medina* standard or explain why the *Mathews* test was applicable.

[11] The court in *Krimstock* also made it clear that prosecutors could seek a retention order ex parte. *Krimstock* v. *Kelly*, supra, 464 F.3d 255.

[12] In support of its determination that, on remand, the *Mathews* balancing test is applicable, the court also cited approvingly from the following analysis of Judge J. Michael Luttig, formerly of the Fourth Circuit Court of Appeals: "I believe that [*Mathews*], rather than [*Medina*], provides the proper analytical framework for determining whether there exists a procedural due process right to [postconviction] access [to evidence]. The asserted right of access does not entail a challenge to the underlying conviction, and neither (at least comfortably) is the state's denial of access equivalent to a state rule of criminal procedure governing the process by which one is tried and found guilty or innocent of criminal offense." *Harvey* v. *Horan*, 285 F.3d 298, 315 n.6 (4th Cir. 2002).

[13] It is noteworthy that, in adopting a test for criminal cases that is "far less intrusive" than the *Mathews* balancing test; *Medina* v. *California*, supra, 505 U.S. 446; the court in *Medina* explained that "substantial deference to legislative judgments in this area"; id.; is appropriate because "the [s]tates have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition . . . ." Id., 445–46. To some degree, therefore, the court in *Medina* was persuaded to adopt a far more narrow test for criminal cases on the basis of principles of federalism. To the extent that the *Medina* standard is predicated on such principles, that fact militates in favor of the application of the *Mathews* test when, as in the present case, a state procedural rule is subject to a due process challenge in state court. See *State* v. *Gonzales*, 130 N.M. 341, 356 n.1, 24 P.3d 776 (2001) (Bustamante, J., concurring) ("[t]he . . . [federalism] concerns [of the court in *Medina*] do not cast doubt on a state court's adaptation and use of the *Mathews* factors to determine what procedures are due in its own courts" [internal quotation marks omitted]).

[14] As I previously noted, in adopting a narrow test for due process challenges involving the criminal process, the court in *Medina* relied heavily on the fact that, because procedure in criminal cases is governed expressly by the bill of rights, the use of the broad language of the due process clause in such cases would invite "undue interference with both considered legislative judgments and the careful balance that the [c]onstitution strikes between liberty and order." *Medina* v. *California*, supra, 505 U.S. 443. Because the eighth amendment to the United States constitution, which itself is a provision of the bill of rights, expressly bars "[e]xcessive bail," and because a protective order issued under § 46b-38c "shall be made a condition of the bail or release of the defendant"; General Statutes § 46b-38c (e); it may be argued that the rationale underlying *Medina* is, indeed, applicable to the issue presented by this case. See *United States* v. *Abuhamra*, supra, 389 F.3d 323 ("[b]ail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial"); cf. *Higazy* v. *Templeton*, 505 F.3d 161, 173 (2d Cir. 2007) (bail hearing was "part of the criminal case against [the plaintiff]" for purpose of determining whether coerced statement that had been taken from plaintiff by federal agent and used against him in bail hearing gave rise to cognizable civil claim against that agent for violation of plaintiff's rights under fifth amendment).

[15] Thus, in the present case, the trial court could have permitted the defendant to call the victim as a witness if the court reasonably believed that unusual circumstances had warranted it. Before compelling the presence of an adverse witness such as the victim, however, the court should require a proffer from the defendant detailing why such testimony is truly necessary. As the court in *United States* v. *Edwards*, supra, 430 A.2d 1321, explained, "with regard to [the defendant calling] the government's witnesses, and particularly the complaining witness, the government does have an interest in preventing premature discovery. It also has an interest in protecting the emotional and physical well-being of its witnesses. . . . [Thus] cross-examination for the limited purpose of impeaching the witness' credibility is an insufficient reason to compel a witness' presence. The requirement of a preliminary proffer [by the defendant], regarding the manner in which a witness' testimony will tend to [demonstrate the impropriety of the challenged financial or nonfinancial condition], is a reasonable limitation on the

accused's right to call witnesses in his favor." (Citation omitted.) Id., 1338; see also id., 1334 ("If the court is dissatisfied with the nature of the proffer, it can always, within its discretion, insist on direct testimony. But the discretion should be left to the court without imposing on it the burden of limiting admissibility to [what] it would permit a jury to hear." [Internal quotation marks omitted.]). Although it will be the rare case in which the court permits a defendant to subpoena the victim of a family violence crime to testify at the defendant's bail hearing, I believe that principles of due process militate strongly in favor of according the court that discretion. Thus, although bail hearings generally are relatively informal and brief, I agree with the statement of the Second Circuit Court of Appeals that, "while the informality of bail hearings serves the demands of speed, the [judicial officer] must also ensure the reliability of the evidence, 'by selectively insisting [on] the production of the underlying evidence or evidentiary sources [when] their accuracy is in question.' " *United States* v. *LaFontaine*, supra, 210 F.3d 131. In the present case, however, the defendant failed to provide the court with any facts or information to suggest that the victim's testimony was necessary; instead, he relied solely on his claimed unconditional right to call the victim as a witness.

[16] In *Acevedo-Ramos*, the court concluded that "the magistrate or judge possesses adequate power to reconcile the competing demands of speed and of reliability, by selectively insisting [on] the production of the underlying evidence or evidentiary sources [when] their accuracy is in question. Through sensible exercise of this power of selection, the judicial officer can make meaningful [the] defendant's right to cross-examine [and to compel the attendance of witnesses] without unnecessarily transforming the [detention] hearing into a full-fledged trial or [the] defendant's discovery expedition." *United States* v. *Acevedo-Ramos*, supra, 755 F.2d 207–208.

[17] I note that, in addition to its historical analysis, the court in *Medina* also considered whether the challenged procedure "transgresses any recognized principle of fundamental fairness in operation." (Internal quotation marks omitted.) *Medina* v. *California*, supra, 505 U.S. 448. As the Oregon Court of Appeals has observed, "[t]he recognized principles of fundamental fairness, aside from those enumerated in the [b]ill of [r]ights, are narrow in scope. [*Dowling* v. *United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)]. They concern matters that are basic to our conception of justice and that define the community sense of fair play, so that a failure to protect the principles in any given case would necessarily deprive a defendant of a fair [hearing]. Id., 353. . . . They are also the sorts of principles about which there can be no reasonable disagreement." *State* v. *Amini*, 175 Or. App. 370, 379–80, 28 P.3d 1204, review denied, 333 Or. 73, 36 P.3d 974 (2001). No such established principle of fundamental fairness is violated by operation of the statutory scheme at issue in the present case. This aspect of the *Medina* test, therefore, provides no support for the defendant's claim that he is entitled to a full evidentiary hearing to challenge the protective order issued in this case.

[18] General Statutes § 54-82m provides in relevant part that, "in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of a criminal offense shall commence within twelve months from the filing date of the information or indictment or from the date of the arrest, whichever is later . . . ." Practice Book § 43-39 (c) provides for the same right. Of course, the defendant also has federal and state constitutional rights to a speedy trial; see U.S. Const., amends. VI and XIV; Conn. Const., art. I, § 8; but those rights do not carry any specific time requirements within which the trial must take place.

[19] The cited study used published judicial opinions in cases alleging family violence for the purpose of determining the substantiation rate of those claims. M. Shaffer & N. Bala, "Wife Abuse, Child Custody and Access in Canada," 3 J. Emotional Abuse 253, 257 (2003). Because of the difficulties associated with proving abuse, the authors of the study suggest a likelihood that the 74 percent figure represents an understatement of the actual percentage of well founded abuse claims. Id., 259–61.

[20] This is so because a defendant who is incarcerated pending trial suffers a far greater liberty deprivation than a defendant who is banned from the family home until the conclusion of his criminal case but who nevertheless remains at liberty.

[21] As I previously indicated, I agree with the majority's conclusion that the defendant is not entitled to a full-blown evidentiary hearing under §§ 54-63c (b) and 46b-38c (e). I cannot agree with that portion of the majority's

analysis, however, in which it relies on the doctrine of legislative acquiescence with respect to its construction of P.A. 07-123, which amended General Statutes (Rev. to 2007) § 54-63c (b) in 2007. Specifically, the majority contends that we may presume that when the legislature amended General Statutes (Rev. to 2007) § 54-63c (b), it was aware of *State* v. *Doe*, 46 Conn. Sup. 598, 609–10, 765 A.2d 518 (2000), a Superior Court case in which the court held that an evidentiary hearing is not constitutionally required under § 46b-38c, and that the legislature's failure "to amend [that] statute by imposing specific hearing requirements when it enacted P.A. 07-123" is "significant" in light of the holding of *Doe*. In my view, the majority stretches the doctrine of legislative acquiescence beyond its breaking point. Although we presume that the legislature is aware of this court's interpretation of statutes; see, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494–95, 923 A.2d 657 (2007); we indulge in that presumption in large measure because the construction of a statute by this court represents the definitive, legally binding interpretation of that statute for *all* future cases and purposes in this state, unless and until the legislature amends the statute. For the same reason, it may be appropriate to apply the doctrine of legislative acquiescence to Appellate Court cases involving the construction of a statute because the statutory interpretation adopted by the Appellate Court also is binding statewide unless and until this court overrules the Appellate Court's interpretation or the legislature amends the statute. A Superior Court decision, by contrast, is binding only on the parties to that particular case. I therefore see no basis for reading anything into the legislature's failure to act in response to one Superior Court decision—irrespective of whether that decision, like *Doe*, has been published in the Connecticut Supplement—because the legislature generally will have little, if any, incentive to do so in light of the fact that the case has no binding effect on any court in the state. It therefore is unreasonable to presume that the legislature's failure to act in response to *Doe* signals its agreement with that case. It is just as likely that the legislature either was not aware of the case at all or that it did not view the case, standing alone, as being sufficiently important to warrant any remedial legislative action.

[22] The majority does not explain what it means by "reliable" hearsay.

[23] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[24] Under General Statutes § 54-82r (a), "a court may issue a protective order prohibiting the harassment of a witness in a criminal case if the court, *after a hearing at which hearsay evidence shall be admissible, finds by a preponderance of the evidence* that harassment of an identified witness in a criminal case exists or that such order is necessary to prevent and restrain the commission of [the crime of tampering with a witness in] violation of section 53a-151 or [the crime of intimidating a witness in violation of §] 53a-151a. *Any adverse party named in the complaint has the right to present evidence and cross-examine witnesses at such hearing.*" (Emphasis added.) Subsections (b) and (c) of General Statutes § 54-64f provide for "an evidentiary hearing *at which hearsay or secondary evidence shall be admissible*" and require proof of a violation of a condition of release "*by clear and convincing evidence* . . . ." (Emphasis added.)

[25] It is noteworthy that the majority dismisses the defendant's claim that §§ 54-63c (b) and 46b-38c (e) entitle him to the same trial-like proceeding to which a civil litigant is entitled in challenging an application for a family violence protective order but then relies on cases involving civil protective orders to support its conclusion that the state must establish the need for a criminal protective order by a preponderance of the evidence. The majority fails to explain this logical inconsistency.

The majority also relies on § 54-82r (a), which pertains to protective orders barring the harassment of a witness in a criminal case, to support its conclusion that §§ 54-63c (b) and 46b-38c (e) require the state to prove the necessity of a protective order by a preponderance of the evidence. The majority's reliance is entirely misplaced, however, because § 54-82r, in marked contrast to §§ 54-63c (b) and 46b-38c (e), expressly provides for that standard of proof. Thus, if the legislature had intended to impose such a requirement under §§ 54-63c (b) and 46b-38c (e), it no doubt would have done so in express terms. Indeed, the majority has acknowledged this principle in rejecting the defendant's claim that he is entitled to a full evidentiary

hearing because, as the majority has explained, other related statutory provisions indicate that the legislature uses express statutory language to establish such a standard of proof when it intends to do so. In relying on § 54-82r, however, the majority simply ignores this principle without providing any justification for doing so.

[26] The majority's holding that the state must prove the need for a family violence protective order by a preponderance of the evidence places an additional burden on the state, one that the state does not bear in any other context involving the imposition of conditions of bail or release. Indeed, the state bears no such burden when it seeks a financial or nonfinancial condition of release for purposes of any other case. In all other such cases, the state makes a request for a condition of release and presents its reasons and supporting evidence or information. The defendant is entitled to respond, by way of proffer or, if appropriate, through the presentation of live testimony. The court then must exercise its sound discretion in determining what condition or conditions, if any, to impose. Indeed, even when the state seeks a financial condition of release that the defendant most likely will be unable to meet, the state carries no burden of proof with respect to the propriety of that condition. In such a case, the state merely must demonstrate to the court that the condition is reasonable under the circumstances. After hearing from the defendant, the court then is free to impose whatever financial condition it deems appropriate. In light of the new burden that the majority has placed on the state in family violence cases, the state may be prompted to—or even compelled to—present evidence at the hearing on the protective order that it would not have presented prior to the majority's decision in this case.

[27] It may be that the statutory construction that the majority adopts stems from its own concern that the imposition of a criminal protective order in a family violence case "amounts in practice to state-imposed de facto divorce"; J. Suk, "Criminal Law Comes Home," 116 Yale L.J. 2, 42 (2006); because, it has been asserted, the issuance of such an order "shifts the very goal of pursuing criminal charges away from punishment to control over the intimate relationship in the home." Id., 50; see footnote 18 of the majority opinion (quoting Suk). To whatever extent that consideration may have affected the majority's construction of the statutory scheme at issue, there is nothing in the statutory scheme or its history to suggest that the legislature had any such consideration in mind when it included a reference to the hearing requirement of § 46-38c (e) in § 54-63c (b).

I note, in addition, my general agreement with the observation of Justice Schaller in his concurring and dissenting opinion that the "special" hearing created by the majority under §§ 54-63c (b) and 46b-38c (e) is "unwise," "unworkable" and "unnecessary . . . ." I emphasize, however, that my disagreement with the majority stems from the fact that this court may not substitute its view of what is wise, workable or necessary for the considered judgment of the legislature, and the legislature has made it clear, contrary to the conclusion of the majority, that the hearing contemplated under §§ 54-63c (b) and 46-38c (e) is to be held at the time of the defendant's presentment and is no different from the hearing that is routinely conducted at that time with respect to all other conditions of bail or release.

[28] General Statutes § 54-69 provides in relevant part: "(a) Whenever in any criminal prosecution the state's attorney for any judicial district or the assistant state's attorney is of the opinion that the bond without or with surety given by any accused person is excessive or insufficient in amount or security, or that the written promise of such person to appear is inadequate, or whenever any accused person alleges that the amount or security of the bond given by such accused person is excessive, such state's attorney or assistant state's attorney or the accused person may bring an application to the court in which the prosecution is pending or to any judge thereof, alleging such excess, insufficiency, or inadequacy, and, after notice as hereinafter provided and hearing, such judge shall in bailable offenses continue, modify or set conditions of release upon the first of the following conditions of release found sufficient to provide reasonable assurance of the appearance of the accused in court: (1) Upon such person's execution of a written promise to appear, (2) upon such person's execution of a bond without surety in no greater amount than necessary, (3) upon such person's execution of a bond with surety in no greater amount than necessary. . . ."

[29] The majority asserts that the defendant does not claim that he is constitutionally entitled to call or question the victim at the hearing required under §§ 54-63c (b) and 46b-38c (e). See footnote 21 of the majority opinion. This assertion is erroneous. The defendant claims that he has a due process right

to a full evidentiary hearing at which he is entitled to "present evidence and cross-examine witnesses." In setting forth his claim, the defendant makes no suggestion that his constitutionally protected right to such a hearing does not include the right to question the victim. On the contrary, the defendant contends that " 'written submissions [by the state] are a wholly unsatisfactory basis for [a] decision' " because such evidence does not provide an adequate opportunity to challenge the state's factual contentions. Indeed, the defendant maintains that, because cases involving the issuance of family violence protective orders should not be "decided without hearing both sides," principles of due process grant him the right to have the alleged victim "testify in an adversarial court hearing to ensure that [the] . . . protective order is issued [on the basis of] accurate information." Thus, at no time has the defendant conceded that he does not have a constitutional right to examine the victim at the hearing.

[30] I note that the defendant's appellate counsel reiterated that position at oral argument before this court.

[31] The majority predicts that the hearing to which the defendant will be entitled on remand will be "a brief hearing." Footnote 26 of the majority opinion. By contrast, the full, trial-like hearing to which the defendant consistently has claimed he is entitled—a hearing at which the state would be required to proceed on the basis of admissible, live testimony and the defendant would have the right to call the victim if the state failed to do so—is hardly comparable to the "brief" hearing that the majority contemplates.

[32] The majority incorrectly asserts that I advocate a position pursuant to which a claim would not be preserved for appeal unless the party raising the claim on appeal also made the specific *argument* in support of that claim in the trial court that he relies on on appeal. See footnote 26 of the majority opinion. I take no such position. Indeed, the majority's contention appears to be based on a fundamental misunderstanding of the difference between an argument and a claim. Generally speaking, an argument is a point or line of reasoning made in support of a particular claim. Only claims are subject to our rules of preservation, not arguments. In the present case, the sole claim that the defendant raised in the trial court—and the sole claim he raises on appeal—is entitlement to a full evidentiary hearing. Contrary to the majority's assertion, I do not suggest that, on appeal, the defendant is barred from raising arguments in support of that claim that he did not raise in the trial court. Indeed, the defendant makes *many* more such arguments in his submissions to this court than he made in the trial court, and properly so; in light of the different circumstances under which claims are made at trial and on appeal, that will almost always be the case. It is settled law, however, that a defendant cannot raise a new *claim* on appeal. In the present case, the interpretation of the statute that the majority adopts never has been the subject of a claim by the defendant and, accordingly, it reasonably cannot be characterized as preserved.

[33] Of course, for the reasons set forth previously, I do not believe that any modification of our preservation principles is either necessary or appropriate.

[34] The majority responds to my analysis of its new approach to preservation as follows: "[W]e simply state that, if a defendant asks for relief [in] the trial court that encompasses elements A, B, C and D, that request is adequate to permit relief on appeal that only grants elements A and B, but not C and D. Under Justice Palmer's view, a defendant would need to argue explicitly that, 'if I'm not entitled to A, I am still entitled to B, C and D,' and 'if I'm not entitled to A and B, then I am still entitled to C and D,' and so on, in order to render that relief available on appeal.' That strikes us as an unduly onerous burden on litigants." Footnote 26 of the majority opinion. The problem with the majority's response is that it does not represent a fair characterization either of my position or of this case. It is true that, in a particular case, a defendant's claim may be broad enough to encompass several "elements" of relief, as the majority puts it, and yet specific enough to provide the trial court with *adequate notice* of *each* of those elements. The present case, however, manifestly is not such a case. The record is perfectly clear that the defendant raised one claim in the trial court and one claim in this court, namely, an entitlement to a full, trial-like proceeding. Of course, that claim necessarily encompasses other, more narrow claims, such as the statutory interpretation that the majority adopts today, but it most certainly did *not* place the state or the trial court *on fair notice* that the defendant was asserting any one or more of those more narrow claims. Indeed, the defendant rejected the opportunity to proceed as he would have proceeded at a bail hearing even though the trial court characterized the hearing as similar to a bail hearing, a characterization that fairly describes the hearing that the majority concludes is mandated under the statutory scheme. Because notice is the essence of preservation, and because the

trial court had no notice of the claim that the majority decides in the present case, the majority simply is wrong that that claim is preserved. Indeed, I do not doubt that both parties to this appeal will be surprised by the statutory interpretation that the majority has adopted because neither party ever has claimed or even suggested that the majority's interpretation is the proper interpretation of §§ 54-63c (b) and 46b-38c (e). In other words, even the parties themselves are not on notice of the statutory construction that the majority has announced. That is why we should decide this case under our supervisory authority, and not under the pretense of preservation.

[35] Justice Schaller, in his concurring and dissenting opinion, also disagrees with my "conclusions that the defendant failed to preserve his claim, that [Judge Bingham's ruling] should be affirmed rather than reversed, and that the majority is unfairly ambuscading [Judge Bingham]." Footnote 4 of the concurring and dissenting opinion. To support his conclusion, Justice Schaller, invoking *Rowe* v. *Superior Court*, supra, 289 Conn. 649; asserts that "the concept of preservation should be liberally interpreted to allow a claim to proceed to decision on the merits." Id. With all due respect to Justice Schaller, there simply is no possible way to conclude, no matter how liberally the record is construed, that Judge Bingham was on notice of the claim that the majority decides. Indeed, Justice Schaller himself acknowledges that "[t]he trial court's ruling certainly was not incorrect under the circumstances" and that "the trial court was not mistaken" in its ruling. Id. The trial court's ruling was correct, as Justice Schaller must concede, because that ruling properly resolved the only claim that the defendant raised, namely, that he was entitled to a full, trial-like hearing. Indeed, as I have explained, the defendant has never raised any other claim, even in this court. In such circumstances, it clearly is improper to reverse the ruling of Judge Bingham because, in doing so, the majority is reversing Judge Bingham with respect to a ruling that the majority *itself* agrees was correct. Although, as I have indicated, I agree that we should take this opportunity to go *beyond* the defendant's claim and explicate the contours of the hearing contemplated under §§ 54-63c (b) and 46b-38c (e), we do so not to resolve the claim that the defendant has raised. On the contrary, the majority, like the trial court, addressed and properly rejected the only claim that the defendant ever has raised, in the trial court or in this court, before setting out the contours of that hearing. It is appropriate to delineate the parameters of the hearing, rather, because this is a public interest appeal, not an appeal from a final judgment, and it is unlikely that we soon will have another opportunity to consider the statutory scheme at issue. As I previously observed, the defendant will benefit from the majority's decision with respect to the nature of that hearing because he is entitled to seek review of the protective order at any time under § 54-69, and he presumably would avail himself of the opportunity to do so under the new hearing protocol that the majority adopts. Nevertheless, the defendant most certainly is not entitled to a reversal of Judge Bingham's ruling on the basis of a nonconstitutional claim that he never has raised.

Moreover, although I agree with Justice Schaller that it should not lightly be asserted that a trial court has been ambushed by an appellate ruling, I can think of no clearer example of such an ambuscade than what the majority has done to the trial court in the present case, that is, reversing the trial court on the basis of a nonconstitutional claim that the court never was asked to resolve. Indeed, that is precisely the kind of appellate decision-making that this court—Justice Schaller included—repeatedly and consistently has refused to countenance. See, e.g., *Rowe* v. *Superior Court*, supra, 289 Conn. 663 (*Schaller*, *J.*) (allowing party to seek reversal of issue on appeal that party had failed to raise at trial would amount to ambush of trial court); *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 401, 957 A.2d 836 (2008) (*Schaller*, *J.*) (characterizing claim that was not raised at trial as "unreviewable" on appeal); *Smith* v. *Andrews*, 289 Conn. 61, 77, 959 A.2d 597 (2008) (*Schaller*, *J.*) (declining to review "unpreserved" claim not raised in trial court).