STATE OF CONNECTICUT *v.* EDUARDO SANTIAGO
(SC 17413)

Rogers, C. J., and Norcott, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille, Js.

Argued April 27, 2011—officially released June 12, 2012

Mark Rademacher, assistant public defender, for the appellant (defendant).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robert J. Scheinblum*, *Donna Mambrino* and *John F. Fahey*, senior assistant state's attorneys, for the appellee (state).

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NORCOTT, J. The jury in this case found that, for the price of a snowmobile, Marc Pascual hired the defendant, Eduardo Santiago, to murder the victim, Joseph Niwinski, and that the defendant then acted in concert with Matthew Tyrell to break into the victim's home and fatally shoot him in the head while he lay sleeping. The jury then returned a verdict finding the defendant guilty of all of the charged offenses in the ten count information, including: capital felony in violation of General Statutes §§ 53a-54b (2)[1] and 53a-8;[2] two counts of burglary in the first degree in violation of General Statutes (Rev. to 1999) § 53a-101 (a) (1) and (2)[3] and General Statutes § 53a-8; conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a)[4] and 53a-54a (a);[5] and two counts of conspiracy to commit burglary in the first degree in violation of §§ 53a-48 (a) and 53a-101 (a) (1) and (2).[6] Following a penalty phase hearing held pursuant to General Statutes (Rev.

to 1999) § 53a-46a,[7] the jury returned a verdict finding that death was the appropriate punishment in this case. The trial court, *Lavine*, *J.*,[8] rendered a judgment of conviction and, in accordance with the jury's verdict, sentenced the defendant to a total effective sentence of death by lethal injection plus imprisonment for forty-five years and ninety days. The defendant now appeals[9] from the judgment of conviction, raising a multitude of claims arising from both the guilt and penalty phases of the trial.

Although we will outline fully the defendant's twenty-seven appellate claims in part I C of this opinion, we describe at the outset those that present questions of greater legal significance. In addition to claiming that the trial court, *Solomon*, *J.*, improperly found probable cause that the defendant had committed capital felony by murder for hire, and that the trial court, *Lavine*, *J.*, improperly denied the defendant's motions to suppress his statement made at the police station, and should also have suppressed evidence of the murder weapon itself, the defendant also contends, through sufficiency of the evidence and instructional claims, that he could not and should not have been convicted as an accessory to capital felony by murder for hire under §§ 53a-54b (2) and 53a-8, in the absence of evidence of a hiring agreement between the principal, Tyrell, and Pascual. Guided by *State* v. *McGann*, 199 Conn. 163, 506 A.2d 109 (1986), and *State* v. *Solek*, 242 Conn. 409, 699 A.2d 931 (1997), we disagree, and conclude that a defendant may be held accessorily liable for capital felony under §§ 53a-54b (2) and 53a-8 if he acts as a principal with respect to one element of the crime, namely, the hiring relationship, and an accessory with respect to the other, namely, the actual killing. Accordingly, we affirm the underlying judgment of conviction.

The penalty phase of the defendant's proceedings presents the most significant issue in this appeal, namely, whether the trial court, *Solomon*, *J.*, properly conducted an in camera review and disclosed only limited portions of the confidential and privileged file kept by the department of children and families (department)[10] with respect to the defendant's family, thus violating the defendant's right under the eighth amendment to the United States constitution[11] to present mitigating evidence. We agree with this claim in part and conclude that, under *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 61–65, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (plurality opinion in part), and *State* v. *Colon*, 272 Conn. 106, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005), although the trial court properly protected the defendant's due process rights under the fourteenth amendment to the United States constitution[12] when it reviewed the department's file in camera, the scope of its review failed to disclose significant and relevant mitigating evidence, thus requiring that the defendant receive a new penalty phase hearing to be conducted following a new in cam-

era review of the department's records.

With respect to issues of law that are likely to arise on remand at the new penalty phase hearing, the defendant, in addition to raising numerous claims that are foreclosed by existing precedent, contends that: (1) we should decline to follow the United States Supreme Court's decision in *Lowenfield* v. *Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), and conclude that it violates article first, §§ 8, 9, 10 and 20, of the Connecticut constitution[13] for the sole aggravating factor under § 53a-46a (i) to duplicate an element of the underlying capital felony; (2) the trial court improperly instructed the jury that the defendant bore the burden of proving the mitigating factor of lingering doubt regarding whether he was the shooter; (3) the trial court improperly failed to instruct the jury, sua sponte, to consider the statutory mitigating factor of minor involvement under § 53a-46a (h) (4); and (4) the language of General Statutes (Rev. to 1999) § 53a-46a (d) requiring the jury to consider the "facts and circumstances of the case" with respect to determining whether a mitigating factor exists, as well as the defendant's accompanying burden of proving that a factor is "mitigating in nature, considering all the facts and circumstances of the case," are unconstitutional under, inter alia, the United States Supreme Court's decision in *Tennard* v. *Dretke*, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004). We disagree with these claims.

I

BACKGROUND FACTS AND PROCEDURAL HISTORY

A

Guilt Phase

The record reveals the following background facts, which the jury reasonably could have found, and procedural history. Pascual,[14] who owned Marine Tech, a boat, snowmobile and all-terrain vehicle sales and service business in Torrington, had become friendly with the victim through their common interest in boating and the victim's work at a marina. The friendship between Pascual and the victim deteriorated when Pascual developed romantic feelings for Rosemary Cusano, the victim's girlfriend, and decided that he did not like the way that the victim treated her. The relationship further deteriorated when several business deals that Pascual had with the victim failed.[15] Pascual then decided to have the victim killed.

Pascual became friendly with the defendant because Marine Tech was located next to a restaurant that was owned by the defendant's stepfather. Pascual asked the defendant whether he knew anyone who would kill the victim; the defendant then offered to kill the victim for $5000, but Pascual declined the offer as too expensive. Approximately one to two weeks later, on Sunday,

December 10, 2000, the defendant returned to Marine Tech to check on a motorcycle that was being repaired, renewed the discussion about killing the victim and offered to do so in exchange for a Polaris snowmobile that was currently for sale at Marine Tech. Pascual and the defendant then agreed that the defendant would kill the victim within the next week in exchange for that snowmobile.

The following day, the defendant went to Marine Tech with Tyrell, a good friend of his at the time,[16] and asked Pascual how big the victim was, when the victim was generally at home, and requested that Pascual show the defendant and Tyrell where the victim lived. The three men then drove to the victim's apartment, which was located above a garage in West Hartford, and examined the property, which included determining whether the premises had an alarm system. The next evening, Tyrell and the defendant returned to Marine Tech. Pascual asked Tyrell and the defendant whether they had a gun; the defendant replied that they had a gun, but no bullets. After purchasing gloves and masks at a Wal-Mart store in Torrington, and a Louisville Slugger baseball bat at a K-Mart store, the trio then drove back out to the victim's apartment and surveyed the premises again.

Thereafter, on Wednesday, December 13, the defendant and Tyrell again returned to Marine Tech with gloves, ski masks, a rifle[17] and .222 caliber[18] ammunition that the defendant had purchased from a sporting goods store in Winsted. Tyrell and the defendant then went outside, where they crafted and tested a silencer for the rifle using electrical tape and soda bottles filled with paper towels. The defendant then went back into the shop and used a scribing tool to carve the word "JOE" on the bullets.[19]

Subsequently, Tyrell, Pascual and the defendant, dressed in dark clothes, ski masks and double sets of both cloth and latex gloves, drove back to West Hartford in Pascual's Ford Bronco and parked on a side street near the victim's apartment. The defendant noted that the alarm on the victim's apartment had not been set, took a spare set of keys that had been left in the mailbox, went upstairs and entered the second floor apartment with Tyrell. Tyrell carried the rifle, and the defendant carried the bat. Tyrell then gave the defendant the rifle, exited the apartment and informed Pascual that the victim was sleeping, and then reentered the apartment. At that point, both went upstairs, where the defendant shot the sleeping victim in the head without waking him up or asking any questions regarding any debts that the victim owed to Pascual. Tyrell then went back and told Pascual, who had heard the shot fired, that the victim was "done."

Pascual then entered the apartment with Tyrell and saw the now deceased victim lying in the bed, and the defendant rummaging through the house, at which point

the defendant took a handgun from a cabinet and Pascual took a motor vehicle title to a Nissan Pathfinder that belonged to Cusano's sister. The defendant also stole $200 from the apartment, and Tyrell stole two Movado watches that he left in the defendant's car, and $2500 from a toolbox in the garage below the apartment. The trio then hid in the apartment as an automobile stopped nearby and sounded its horn, while someone telephoned the victim's landline and cell phones repeatedly, before the car pulled away.

The trio then drove back to Torrington,[20] at which point Pascual telephoned Cusano to say that he was leaving work; a few minutes later, the defendant called Cusano and left her a message with heavy breathing sounds, which was something that Pascual had told the defendant that the victim often did. Upon returning to Marine Tech, the trio burned the gloves, Tyrell put the bat underneath the stairwell in the shop area, and the defendant placed the rifle in the trunk of his car.

The night after the shooting, December 14, 2000, the defendant and Tyrell returned to Marine Tech, and the defendant asked Pascual when the snowmobile would be ready. Pascual, who estimated the snowmobile's value to be $2000, told the defendant it would be ready after he returned from a trip to Florida and had a chance to repair the snowmobile's clutch.

West Hartford police officers found the victim in his bed on December 14, 2000, after he failed to answer multiple telephone calls to both his landline and cell phones, from friends and Cusano.[21] The officers found that the victim had bled profusely from the gunshot wound to his head[22] and that there were small bits of tissue paper in his hair and on his mattress. The victim's wallet and its contents were scattered on his head, and contained only a $1 bill, some lottery tickets, business cards and miscellaneous papers.

Thereafter, on Saturday, December 16, West Hartford police officers questioned Pascual about his involvement in the victim's death, but he denied knowing anything at that time. Pascual then went to Florida, during which time the defendant telephoned him to inquire about the status of the snowmobile, because it had snowed in Connecticut. Upon Pascual's return to Connecticut on December 21, the West Hartford police again called upon him and asked him to take a polygraph examination, which he subsequently took and failed.

On the morning of December 22, 2000, members of the West Hartford police tactical team executed an arrest warrant and took the defendant into custody at his apartment in Torrington.[23] In conducting a protective sweep of the apartment while serving the arrest warrant, officers located a .223 caliber bolt action scoped rifle[24] atop a chest under a pile of clothing, which subsequently was seized pursuant to a search warrant,[25]

along with numerous boxes of .222 caliber ammunition. Subsequent to his arrest and multiple advisements and waivers of his *Miranda*[26] rights, the defendant gave a statement describing his involvement in the shooting[27] to Detectives Gregory Brigandi and William Kinahan, of the West Hartford police department.[28]

Following the defendant's arrest, the state charged him in a ten count information with capital felony in violation of §§ 53a-54b (2) and 53a-8, murder in violation of §§ 53a-54a (a) and 53a-8, felony murder in violation of General Statutes §§ 53a-54c[29] and 53a-8, two counts of burglary in the first degree in violation of §§ 53a-101 (a) (1) and (2) and 53a-8, conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a (a), two counts of conspiracy to commit burglary in the first degree in violation of §§ 53a-48 (a) and 53a-101 (a) (1) and (2), stealing a firearm in violation of General Statutes §§ 53a-212 (a)[30] and 53a-8, and larceny in the sixth degree in violation of General Statutes (Rev. to 1999) § 53a-125b (a)[31] and § 53a-8. See also footnotes 1 through 5 of this opinion. Following a hearing held pursuant to General Statutes § 54-46a,[32] the trial court, *Solomon*, *J.*, found probable cause for the prosecution to proceed on all charges. The state then gave notice of its intent to seek the death penalty, and the trial court, *Solomon*, *J.*, granted, subject to redaction after an in camera review, the defendant's motion for disclosure of the department's records for use in preparing his mitigation case. After the trial court, *Lavine*, *J.*, denied the defendant's motions to suppress his statement to the police,[33] the case was tried to the jury, which found him guilty on all counts.[34]

B

Penalty Phase

Subsequently, a penalty phase hearing was held pursuant to § 53a-46a, at which the state claimed as the sole aggravating factor that "the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value . . . ." General Statutes (Rev. to 1999) § 53a-46a (i) (6). Without objection from the defendant, the trial court granted the state's motion to incorporate by reference all of the evidence that it had presented during the guilt phase of the trial, in order to prove the existence of that aggravating factor.

The defendant, claiming the existence of twenty-five nonstatutory[35] mitigating factors under § 53a-46a (d),[36] then put on his mitigation evidence over four days of trial. Most of the evidence concerning the defendant's life history was admitted through the testimony of Kenneth Selig, a physician who practices forensic psychiatry, who had conducted an evaluation of the defendant, his life and family history.[37] Selig's review of the defendant's life and family history began with a review of

numerous photographs of the defendant taken at various times throughout his childhood and teen years. Before turning to specific examples, Selig described the defendant as "the victim of substantial neglect, physical, emotional and sexual abuse," who was "raised in a very chaotic environment with a very impaired and irresponsible mother [Christina Hagarty (Christina)] . . . a depressed father and a very abusive stepfather [Dan Hagarty]," and had been in the department's custody "for an extensive period of time." Selig noted that this life experience had resulted in the defendant receiving psychiatric hospitalization and other therapies as a child, and although he had a high intellect and "personal moral compass," the defendant turned to drugs, specifically ketamine and ecstasy, to "help him manage his underlying pain as a result of his childhood." Contributing to this instability was the fact that the defendant had moved twenty-two times during his childhood, and spent only two six month periods living with Christina in the five year period from January, 1986, until February, 1991.

Christina was born on January 15, 1958, and grew up as one of eight children in a poverty-stricken home. With a long history of mental health and substance abuse issues, Christina was first married at the age of fifteen into a violent relationship that lasted less than one year. Christina had her first child, G,[38] in February, 1976, with a man to whom she was not married and with whom she had no relationship. A different man fathered Christina's second child, a daughter, D, who was born in March, 1977.

In August, 1977, Christina met the defendant's father, Eduardo Santiago, Sr. (Eduardo, Sr.), who himself had been raised in orphanages. Eduardo, Sr., and Christina had three children, the defendant, who was born in September, 1979, the defendant's brother, C, born in February, 1983, and the defendant's sister, J, who was born in May, 1985.[39] Eduardo, Sr., and Christina were married in 1981, and lived together on-and-off in New York in a volatile relationship until 1983, when Christina took the children and returned to Connecticut. During that time, however, Christina was unable to manage the children and sent them to live with her grandmother in New York until April, 1984. In September, 1984, Christina's sister informed the department that Christina, who was pregnant with J at the time, was living under financial and domestic stress and was hitting her children frequently, particularly the defendant, who had been hit so hard with a plastic bat that Christina did not want to send him to school because of the visible bruising.

Shortly after J was born in May, 1985, Christina met and moved in with Hagarty, who was born in January, 1960. Christina and Hagarty subsequently had another child, S, in December, 1986. Prior to that time, in Decem-

ber, 1985, a neighbor from a nearby apartment entered Christina's and Hagarty's apartment and found the children home alone, a frequent occurrence, with the five year old defendant present there with his jacket on fire. After the neighbor extinguished the fire, the defendant told her that he did not want to get beaten any more.

Shortly thereafter, in January, 1986, the department became involved with the defendant's family. The same neighbor that had extinguished the fire called the police to the family's apartment because she could hear that Hagarty was beating the children, and had hit the six and one half year old defendant thirty times with a belt with his pants pulled down, which Selig testified was "psychiatrically [considered] to be a significant humiliation." As reflected in both the records reviewed by Selig and in the testimony of William Mathiasen, the Winsted police officer who responded to the neighbor's call and heard the ongoing beating before entering the apartment, the defendant had numerous bruises, marks and welts on his buttocks, ribs, back and legs as a result of the beating. All three children were hospitalized and placed in foster care, and the police arrested Hagarty for his role in the assault. The defendant and G both told the hospital staff that they had seen sexually explicit photographs of Christina and Hagarty, and G told the hospital staff that she had seen them smoking marijuana in the house regularly. Prior to being arrested on risk of injury charges arising from the beating, Christina told the children when they were taken to the hospital that foster homes were bad places and that she was going to beat them if they came home.

Once placed in a foster home, the defendant told his foster mother that he was afraid to return home; he also could not sleep, wet the bed routinely and was aggressive. When Christina visited with the children in their foster homes, three separate foster mothers reported that she would talk inappropriately with them about sex. Additionally, she was completely uncooperative with the department. During one telephone call, which was very upsetting to the defendant, Christina also encouraged the defendant to steal a notebook that his foster mother was keeping to journal his behavior.

The defendant's behavioral difficulties continued in school, where, because of his aggressive behavior toward other children, he was "labeled . . . as socially and emotionally maladjusted" and placed in a special education room. Teachers and foster parents reported that the defendant could be "lovable and . . . very endearing," but also was prone to impulsive, moody and violent behavior. Indeed, his first psychological testing, performed in May, 1986, showed the defendant to be a "disturbed" and "very dependent child" who "required constant supervision and a highly structured environment . . . ." After a court adjudicated the defendant as neglected in June, 1986, and therapy began

in August, 1986, the defendant began to exhibit self-destructive behaviors such as tearing at his neck with a stick and riding his bicycle in the middle of the street, "indicat[ing] that he wanted to die . . . ."

Shortly thereafter, the defendant, one month shy of his seventh birthday, was admitted to Riverview Hospital (Riverview) for inpatient psychiatric treatment; he remained there from August, 1986, until December, 1986. At Riverview, the defendant was found to be of above average intelligence, with " 'good ego strength,' " which is the ability to repress painful thoughts and feelings in order to attempt to keep the thoughts, feelings and his own behavior from getting out of control. During his time at Riverview, the defendant reported that Christina had sexually abused him. Riverview physicians subsequently diagnosed the defendant with adjustment disorder with mixed disturbance of emotions and conduct, and placed him on prescribed medications; it was reported that he responded well to the structured environment at Riverview. Nevertheless, the defendant also continued to be fearful and to suffer from nightmares, and demonstrated varying ability to get along with other children—sometimes he would play cooperatively, while other times he would tease and bully the other children. A contemporaneous evaluation of Christina at Riverview found her to be "highly anxious, chaotic, naive . . . [and] confused," resistant to therapy, and inclined to choose Hagarty over her children.

In December, 1986, the defendant was discharged from Riverview to a foster home and continued to receive outpatient psychiatric and psychological treatment. Eduardo, Sr., became more involved in the defendant's life by the spring of 1987, and visited him often at the foster home. In July, 1987, when the defendant was seven years and ten months old, with the department's approval, the defendant went to live with Eduardo Sr. and his girlfriend in upstate New York. At that point, the defendant continued therapy at a school for troubled boys and began to do extremely well with his father, who was nurturing and was pursuing permanent legal custody with the encouragement of the department. On Christmas Eve in 1988, however, after living with the defendant for eighteen months, Eduardo, Sr., committed suicide because he was unable to support himself or his family, leaving the defendant to live among his aunts, including Christina's sister, in New York for several months. In the meantime, the department, which was not aware of Eduardo, Sr.'s death, had closed the defendant's case file.

In June, 1989, the defendant returned to Connecticut at the age of ten and went to live with Christina again. In December of that year, Christina, who was having problems in her relationship with Hagarty, took all of the children, except for the defendant, and moved to

Florida, again sending the defendant to live in New York with one or more aunts. Thereafter, in the spring of 1990, Hagarty went to Florida to retrieve Christina and she married him in May, 1990, since her marriage to Eduardo, Sr., had legally ended as a result of his suicide.

In the summer of 1990, the defendant returned to Connecticut to live with Christina and Hagarty again. Hagarty, who was the primary caretaker of the children due to Christina's heavy work schedule as an in-home nursing aide, resumed beating the defendant, who was the "main target of . . . [Hagarty's] physical abuse . . . ." Specifically, in October, 1990, the Torrington public schools reported to the department that Hagarty had beaten the defendant with a metal extension tube from a vacuum cleaner, and would fling the defendant into walls and threaten him. The police became involved again in November, 1990, when both Christina and Hagarty were arrested following an alcohol fueled domestic dispute, the aftermath of which revealed that they would punish the children by forcing them to sleep from 2 p.m. until 8 p.m., and then wake the defendant at 11 p.m. and force him to clean the house with G until 1 or 1:30 a.m. The children would be confined to their rooms and beaten if they watched television. The children were so fearful of Hagarty that they would rather wet their beds than get up to go to the bathroom and risk passing Hagarty's bedroom.

In January, 1991, the department again removed the defendant from his home, after G had beaten him, put his head in the toilet, and run hot and cold water on him in the bathtub, all at the behest of Christina, who wanted to avoid another arrest for beating the defendant herself.[40] The defendant eventually fled the house in his socks, losing them when they became stuck in the ice. The defendant did not reenter the house until later that night, when Hagarty forced him to go back in.

At the recommendation of David Mantel, a psychologist who had evaluated the defendant in August, 1991, when the defendant was almost twelve years old,[41] the court placed the children in the department's custody, rather than return them to Christina and Hagarty. This was problematic for the defendant because he wanted to return to live with Christina and did not want to live in the specialized foster home to which he had been assigned. After his 1991 removal, the defendant did not do well in a foster home or large residential setting and continued to engage in behaviors like self-mutilation. Although he remained highly intelligent, the lack of stability contributed to his neediness and depression.

In June, 1993, the department returned the defendant to Christina's custody, and he lived with her and Hagarty until he graduated from high school in 1999, except for various points in time when he lived with Hagarty's mother, Connie Hagarty (Connie), to take care of her after her husband died, and with Barbara Case, as "part

of [her] family,"[42] when he had dated her daughter during high school. The defendant remained in the department's legal custody until 1994, when it "essentially threw up [its] hands" and closed the case, despite Christina's continued lack of compliance with conditions mandating individual and family treatment.[43]

Although his family life remained volatile because of Christina's and Hagarty's troubled relationship,[44] the defendant managed to graduate from high school in 1999,[45] despite his use of a "fair number of drugs" there, particularly ecstasy.[46] As a teenager, the defendant was helpful to the local police and gave them information that had prevented fights, drug sales and other crime in the Winsted area,[47] and was not himself convicted of any criminal offenses until the present case.[48] The defendant also established a work history, working at Hagarty's restaurant next to Marine Tech, where he met Pascual, the White Flower Farm in Litchfield, and "his best job ever," which was working in pool and Jacuzzi maintenance for a company in Litchfield. As described by Joseph Hagarty (Joseph), Hagarty's brother, and Laurie Lemere, Hagarty's sister, the defendant also babysat for children in Hagarty's extended family and cared for Hagarty's mother after her husband died,[49] which acts Selig characterized as the defendant's attempt "to be a nurturing presence in other people's lives that he'd never gotten" himself.[50]

Selig concluded that, at the time of the defendant's criminal trial, the defendant suffered from a psychiatric illness known as dysthymic disorder, which is a "chronic, long-standing, mild-to-moderate depression that typically does not impair one's ability to function but does cause either conscious distress or a sense of internal sadness or pressure." Selig described persons who suffer from dysthymic disorder as generally "feel-[ing] down in the dumps," but whose distress is not visible or readily apparent until you begin to talk with them about the things that upset or disturb them. Selig stated that the defendant was able to function because he had the ability to control his anger, depressive feelings and longings for closeness and nurturance. Selig further observed that, in contrast to the adjustment disorder that the defendant had been diagnosed with as a child, dysthymic disorder is a longer term distress, rather than a response to a particularly disturbing event. Selig stated that the child abuse that the defendant had experienced left him "substantially affected and that he carries with him a tremendous amount of pain," despite the fact that he had otherwise been able mostly to suppress those feelings and to act normally. Selig also testified that the defendant has substance abuse problems, albeit with no evidence of dependency, from his use of ecstasy and ketamine.

Selig further testified that the defendant began to cry during the evaluation interview when he talked about

having been told by Pascual that the victim had been abusive to Cusano's children.[51] That was the only point in the evaluation during which the defendant cried or exhibited a change in demeanor. Selig did not believe these tears to be contrived because they were spontaneous, and he had found himself able to empathize professionally with the defendant's feelings, which is a contraindication of malingering or faking symptoms.[52]

After five and one-half days of deliberation, the jury returned a verdict finding unanimously that the state had proven the claimed aggravating factor beyond a reasonable doubt and that the defendant had proven by a preponderance of the evidence one or more of the claimed mitigating factors. See footnote 36 of this opinion. The jury then found, beyond a reasonable doubt, that the state had proven that the aggravating factor, namely, that "the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"; General Statutes (Rev. to 1999) § 53a-46a (i) (6); outweighed the mitigating factor or factors that the defendant had proven and, therefore, also made the corollary finding that death is the appropriate punishment for the defendant.

Thereafter, the trial court denied the defendant's posttrial motions seeking the imposition of a life sentence or a new penalty phase hearing[53] and rendered judgment in accordance with the jury's verdict, merging the three homicide offenses, the three conspiracies and the two burglary counts, and sentenced the defendant to a total effective sentence of death by lethal injection plus imprisonment for forty-five years and ninety days. This direct appeal followed.[54] Additional relevant facts and procedural history will be set forth in detail in the context of each claim on appeal.

C

Outline of Claims on Appeal

The defendant raises a litany of claims on appeal challenging some portion of every phase of the proceedings in this case. With respect to his pretrial claims in the guilt phase, the defendant first claims that the trial court, *Solomon*, *J.*, improperly found probable cause that he had committed capital felony by murder for hire when the only evidence of a hiring at the outset consisted of Pascual's statement to the defendant, " 'I've got a job for you.' " The defendant next claims that the trial court, *Lavine*, *J.*, improperly denied his motions to suppress his statement made at the police station because: (1) he had not voluntarily waived his rights under *Miranda*; and (2) the statement was obtained in violation of *State* v. *Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988). We disagree with these claims and further conclude that the record is inadequate to review the defendant's unpreserved suppression claims, namely,

that the trial court should have suppressed: (1) his statement about the location of the murder weapon made shortly after his arrest; and (2) the murder weapon itself as the product of an overly broad protective sweep of his apartment, pursuant to the bypass doctrine of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Finally, we conclude that, as a result of our decision in part VII of this opinion remanding this case for a new penalty phase hearing, we need not review the defendant's claim that the trial court, *Lavine*, *J.*, improperly granted the state's challenges for cause to three members of the venire pursuant to the death qualification process outlined in, inter alia, *Wainwright* v. *Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

With respect to the remainder of the defendant's guilt phase claims, we disagree with his sufficiency of the evidence claim and conclude that there was legally sufficient evidence to support the jury's finding of guilt of capital felony as an accessory in violation of §§ 53a-54b (2) and 53a-8 because, under *State* v. *McGann*, supra, 199 Conn. 163, and *State* v. *Solek*, supra, 242 Conn. 409, a defendant may be held accessorily liable for capital felony if he acts as a principal with respect to one element of the crime, namely, the hiring relationship, and an accessory with respect to the actual killing.

The defendant also raises numerous challenges to the guilt phase jury instructions, namely, that the trial court improperly: (1) failed to instruct the jury that, before it could convict him as an accessory to capital felony under §§ 53a-8 and 53a-54b (2), the state had to prove beyond a reasonable doubt that Tyrell had been hired to kill the victim; (2) failed to define adequately the essential element of a hiring for pecuniary gain under § 53a-54b (2); (3) instructed the jury with respect to conspiracy to commit burglary under §§ 53a-48 and 53a-101 (a) (2) by charging the defendant with a noncognizable crime, namely, conspiracy to commit a reckless act; and (4) instructed the jury pursuant to *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000), that it could not draw an adverse inference from the state's failure to produce cell phone records corroborating Pascual's testimony. We conclude that, with the exception of an improper, but harmless, instruction on the charge of conspiracy to commit burglary, the trial court's instructions were a proper statement of the law. Accordingly, we affirm the underlying judgment of conviction.

With respect to the penalty phase of the proceedings, the defendant first claims that the trial court, *Solomon*, *J.*, improperly refused to disclose the entire file of the department pertaining to his family, thus violating his right under the eighth amendment to the United States constitution to present mitigating evidence. We agree with this claim in part and conclude that, although the

trial court properly protected the defendant's due process rights under the fourteenth amendment to the United States constitution when it reviewed the department's file in camera, the scope of that court's review nevertheless failed to disclose potentially mitigating evidence relevant under the eighth amendment, thus requiring that the defendant receive a new penalty phase hearing subsequent to a new in camera review of the department's records to be performed by the trial court. Engaging in the sentence review required by General Statutes § 53a-46b (b),[55] we further conclude that a new penalty phase hearing—rather than a directed life sentence—remains necessary, as we reject the defendant's challenges to the factual bases for the jury's sentencing verdict.

As a result of our conclusion that a new penalty phase trial is required, we need not reach the defendant's other principal claim, namely, that the trial court improperly failed to conduct an adequate inquiry into juror misconduct during the penalty phase deliberations, or to grant him a new trial on that basis. We do, however, address a plethora of other penalty phase claims that we deem likely to arise on remand. Specifically, notwithstanding the defendant's arguments to the contrary, we conclude that, consistent with the United States Supreme Court's decision in *Lowenfield* v. *Phelps*, supra, 484 U.S. 231, it does not violate article first, §§ 8, 9, 10 and 20, of the Connecticut constitution for the sole aggravating factor under § 53a-46a (i) to duplicate an element of the underlying capital felony. Guided by our recent decisions in, inter alia, *State* v. *Rizzo*, 266 Conn. 171, 833 A.2d 363 (2003) (*Rizzo I*), and *State* v. *Reynolds*, 264 Conn. 1, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004), we also reject the defendant's claims that the trial court's jury instructions improperly charged the jury: (1) using an inadequate definition of the pecuniary gain aggravating factor; (2) that there is no time or premeditation requirement in General Statutes (Rev. to 1999) § 53a-46a (i) (6) attendant to the defendant's " 'expectation of the receipt . . . of anything of pecuniary value' "; (3) that the defendant bore the burden of proving the "lingering doubt" mitigating factor; (4) that the jury was not required to consider the cumulative effect of all the mitigating evidence; (5) that the jury was to consider only limited "unique" mitigating factors; (6) without instructing the jury, sua sponte, to consider the statutory mitigating factor of minor involvement under § 53a-46a (h) (3); and (7) collectively reducing the jury's sense of responsibility for imposing the death penalty.

Finally, the defendant raises numerous miscellaneous claims challenging the constitutionality of various aspects of Connecticut's death penalty scheme, including: (1) the "facts and circumstances" language defining mitigating factors under General Statutes (Rev. to 1999) § 53a-46a (d), and the defendant's accompanying bur-

den of proving that a "factor is mitigating in nature, considering all the facts and circumstances of the case," is unconstitutional under, inter alia, the United States Supreme Court's decision in *Tennard* v. *Dretke*, supra, 542 U.S. 274; (2) § 53a-46a unconstitutionally creates a presumption in favor of death, without the mandated individualized determination; and (3) the death penalty is a per se violation of the Connecticut constitution. Guided by, inter alia, our recent decisions in *State* v. *Rizzo*, 303 Conn. 71, 31 A.3d 1094 (2011) (*Rizzo II*), *State* v. *Colon*, supra, 272 Conn. 106, and *Rizzo I*, supra, 266 Conn. 171, we disagree with these additional claims.

II

DID PROBABLE CAUSE EXIST FOR THE DEFENDANT'S ARREST ON CAPITAL FELONY CHARGES UNDER § 53a-54b (2)?

Because it presents a threshold jurisdictional matter,[56] we begin with the defendant's claim that the trial court, *Solomon*, *J.*, improperly found probable cause that he had committed murder for pecuniary gain in violation of § 53a-54b (2) because the only evidence of a hiring at the outset consisted of Pascual's statement, " 'I've got a job for you,' " given that the defendant did not receive the snowmobile until after the murder. In response, the state argues that the trial court reasonably could have inferred that the word " 'job' " connoted consideration for performance of the task that the defendant was to perform, particularly given his preparation for the act by crafting a silencer, etching the victim's name into the bullet and casing the site of the crime. We agree with the state and conclude that Judge Solomon properly determined that the state established probable cause that the defendant had committed murder for hire.

The record reveals the following additional relevant facts and procedural history. Subsequent to the defendant's arraignment, the trial court, *Miano*, *J.*, appointed special public defenders for the defendant and scheduled the probable cause hearing required under § 54-46a,[57] which implements article first, § 8, of the Connecticut constitution.[58] At the probable cause hearing, the trial court, *Solomon*, *J.*,[59] heard testimony from numerous West Hartford police officers who had investigated the victim's death and apprehended the defendant, including Brigandi, Steven Hinckley and Paula Senyk. That court also reviewed the defendant's written statement to the police. See footnote 28 of this opinion. After hearing oral argument from counsel, which focused on, inter alia, whether Pascual's statement, " 'I've got a job for you,' " established a contract of murder for hire, the trial court found probable cause that the defendant had committed murder, capital felony via murder for pecuniary gain, and felony murder in the course of committing a burglary. The trial court determined that,

despite the lack of a formal contract, the use of the term " 'job' " by Pascual "has a certain connotation that reasonable men would attach to it, namely, I do something for you and you'll do something for me"—an expectation of pecuniary gain that was borne out with receipt of the snowmobile after the victim was killed. The trial court further noted that the defendant's participation in the preparations, including the procurement of the rifle, the inscription of the victim's name on the cartridges and the creation of the silencer, circumstantially established his intent to kill.

"Article first, § 8, of the constitution of Connecticut was amended in 1982 to guarantee the right to a probable cause hearing to those charged with crimes punishable by death or life imprisonment. [T]his new provision guarantees that no one will be forced to stand trial for a serious crime unless a court has first made a finding of probable cause at an open hearing in which the accused is provided with a full panoply of adversarial rights." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 506, 903 A.2d 169 (2006).

"The determination of whether probable cause exists under the fourth amendment to the federal constitution,[60] and under article first, § 7,[61] of our state constitution, is made pursuant to a totality of circumstances test. . . . Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed. . . . The probable cause test then is an objective one. . . .

"We consistently have held that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence. . . . [P]roof of probable cause requires less than proof by a preponderance of the evidence. . . . Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . The probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. . . . Probable cause is not readily, or even usefully, reduced to a neat set of legal rules. . . . Reasonable minds may disagree as to whether a particular [set of facts] establishes probable cause. . . .

"In reviewing a trial court's determination that probable cause to arrest existed, we consider whether [it is]

legally and logically correct and whether [it] find[s] support in the facts set out in the memorandum of decision . . . . Because a trial court's determination of the existence of probable cause implicates a constitutional claim, we must review the record carefully to ensure that its determination [is] supported by substantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 292–94, 764 A.2d 1251 (2001). "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on the issue, therefore, is subject to plenary review on appeal." (Internal quotation marks omitted.) *State* v. *Johnson*, 286 Conn. 427, 433, 944 A.2d 297, cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008).

In the present case, we conclude that Judge Solomon properly determined that the state established probable cause that the defendant had committed murder for hire. Although we agree with the defendant that a "hiring relationship" is an essential element of capital felony by murder for hire under § 53a-54b (2), pursuant to which there must be "an agreement to compensate the defendant for his services" such that a "reasonable person" would "realiz[e] that he was committing a murder for compensation"; *State* v. *McGann*, supra, 199 Conn. 176–77; we nevertheless conclude that the evidence adduced at the probable cause hearing provides more than a "mere suspicion," without resort to conjecture, that the defendant reasonably would have known that he was committing a murder for hire. In addition to the inferences reasonably drawn by the trial court from the defendant's statement via Pascual's use of the word " 'job' " in describing the act to be completed, and the subsequent compensation received by the defendant in the form of the snowmobile and Pascual's offer to help with the defendant's credit card debts, the trial court admitted, over the defendant's objection, Senyk's hearsay testimony that Pascual had stated that the snowmobile was to be the payment for the murder. Coupled with evidence of the defendant's preparation for the attack on the victim, this was sufficient evidence of a planned murder for hire to support the trial court's finding of probable cause on the capital felony charge.

III

SUPPRESSION ISSUES

The defendant next claims that certain evidence, namely, his confession to the West Hartford police and the rifle used as the murder weapon, was obtained in violation of his constitutional rights and should have been suppressed at trial.[62]

A

Additional Relevant Facts and Procedural History

The record reveals the following additional facts rele-

vant to the various suppression claims, as found by the trial court, and procedural history. As previously noted, at approximately 6 a.m. on December 22, 2000, the West Hartford police tactical team went to the defendant's apartment in Torrington and executed an arrest warrant that had been issued for him. After other tactical team members took the defendant into custody and detained his sister, Kevin McCarthy, a West Hartford police officer, performed a protective sweep of the apartment's back room to find any possible suspects or civilians who might pose a risk to the police. During his sweep, McCarthy found a bolt action scoped rifle underneath a pile of clothing that was sitting atop a large foot locker or chest. McCarthy moved the pile of clothing because it seemed to be a potential hiding spot. McCarthy described the foot locker as a "sea chest" that was wide and deep enough to be "capable of hiding a person . . . a small framed person." McCarthy did not remove the rifle from the apartment; Richard Aniolowski, a detective, subsequently went to the apartment after obtaining a warrant that afternoon, which authorized a search for the rifle, and removed it from the apartment.

Brigandi, who was lead investigator in this case, and Robert Moylan, another detective, first saw the defendant sitting in the backseat of a Torrington police cruiser, shortly after the tactical team had taken him into custody. Brigandi advised the defendant that he was under arrest and read the defendant his *Miranda* rights. In response to Brigandi's inquiry, the defendant indicated that he understood his rights. Brigandi next asked the defendant if he desired an attorney, and the defendant declined. Brigandi then asked the defendant where the rifle was, and the defendant replied, "I didn't shoot him," and told Brigandi that the rifle, which McCarthy previously had found during the protective sweep, was upstairs in the apartment's front bedroom, next to a dresser, under some clothing. Brigandi and Moylan then located the rifle in the apartment where the defendant said it was, but did not remove it at that time.

Accompanied by Moylan, Brigandi then transported the defendant back to West Hartford police headquarters; there was no conversation during the trip, and the defendant remained silent at that point. Brigandi also checked the defendant's arrest record and learned that he had two prior arrests.

Upon arriving at the West Hartford police station, Brigandi and Moylan brought the defendant to a third floor conference room for an interview. After entering the room, the police officers removed the defendant's handcuffs. After they readvised the defendant of his rights using a standard waiver of rights form, he indicated that he was twenty-one years old, had completed the twelfth grade at Gilbert High School in Winsted, and could read and write. The defendant then read each

of his rights out loud, initialed next to each statement, and acknowledged at 7:44 a.m. that he understood and was voluntarily waiving his rights. The defendant, who was cooperative, calm and appeared awake and coherent, and did not appear to be under the influence of alcohol or drugs, had no questions concerning his rights, and did not ask to speak to an attorney. The defendant did not indicate that he was tired or hungry, or request food or drink, but Brigandi testified that he would have provided some had the defendant so requested. Brigandi did not, however, inform the defendant that an attorney would be furnished at his arraignment, which was to be held the following Tuesday.[63]

Moylan testified that he was unarmed during the interview because he always locks his firearm in his office when questioning a suspect in a controlled environment. Moylan further testified that neither he nor Brigandi used written statements from Pascual or Tyrell during their interview of the defendant; indeed, Tyrell was not interviewed until after the defendant's interview had concluded.

Brigandi and Moylan then obtained from the defendant a verbal account of his involvement in the victim's murder; see footnote 28 of this opinion; which the defendant then repeated in the presence of another detective, Kinahan, who typed it into a written statement. The detectives then printed a copy of the written statement for the defendant, who read it and informed the detectives under oath that it was a true and accurate account, after which he signed it. The interview process concluded shortly after 10 a.m.

In the afternoon of December 22, 2000, Martin Epstein, the public defender assigned to the former geographical area number sixteen courthouse in West Hartford, went into the lockup[64] and learned from an arrestee there that there was another arrestee on the third floor, which typically was only used to separate male arrestees from women, or in other special circumstances. Upon going to the third floor, and learning that the arrestee was the defendant, Epstein asked an officer if he could speak to the defendant. The officer, upon consulting with a superior, refused Epstein access. Another officer then came, and appearing agitated, told Epstein that he could not see the defendant. Epstein then shouted into the room to the defendant not to say anything until after he talked with an attorney.

It is undisputed that the sole issue before the trial court was whether the state had proven by a preponderance of the evidence that the defendant had knowingly and intelligently waived his right to remain silent, as the state conceded that he was in custody when the questioning at issue occurred. The trial court denied the defendant's motion to suppress, concluding that he was lawfully in custody when questioning occurred and that the state had proven by a preponderance of the

evidence that the defendant knowingly, voluntarily and intelligently waived his rights when he gave the statement. Applying the analysis set forth in *State* v. *Toste*, 198 Conn. 573, 504 A.2d 1036 (1986), the trial court first noted the defendant's prior experience with the criminal justice system, having been previously advised of his rights by an arresting officer and twice by judges in court. The trial court also observed that the defendant is a high school graduate with a full command of the English language who, in court, appeared to be alert, intelligent and articulate, and was able to seek clarification when he did not understand questions or statements. The trial court then credited the testimony of Brigandi and Moylan that they had advised the defendant of his constitutional rights both orally and in writing, that the defendant appeared to understand them, and that he had voluntarily submitted to the interview. The trial court also found that there was no credible evidence of coercion or intimidation, and specifically rejected as incredible the defendant's testimony that Moylan had put his gun on the table in front of someone who had just been arrested for murder, and that Brigandi had promised to spare the defendant from the death penalty.[65]

The trial court then found that the length of the detention, approximately four and one-half hours, was not "lengthy," and that there was no evidence of physical punishment or coercion other than the reasonable restraint used by the tactical team in taking the defendant into custody. Subsequently, that court noted that there was no other testimony presented indicating that the defendant had complained of fatigue or hunger at any time, and that there was no testimony, beyond that of the defendant, that he appeared to be visibly under the influence of ketamine, particularly given that the defendant had noted on the waiver of rights form that he was not under the influence of alcohol or drugs.

Finally, the trial court rejected the defendant's claim that there was a violation of the principle set forth in *State* v. *Stoddard*, supra, 206 Conn. 157, despite the fact that Epstein did not attempt to communicate with him before he gave his statement, because under the "totality of the circumstances," the conduct of the police on the afternoon of December 22 in attempting to prevent Epstein from speaking to the defendant meant that the court could infer that Epstein similarly would not have been allowed to contact or see the defendant if he had been present at the police station in the morning prior to the defendant giving his statement. The trial court rejected this claim as based on speculation and conjecture, and found that no violation under *Stoddard* had taken place because no attorney had attempted to communicate with the defendant before he gave his statement to the police.

B

Should the Trial Court Have Suppressed the Defendant's Statement Made in the Police Cruiser about the Location of the Rifle?

The defendant first claims that the trial court should have suppressed his statement regarding the location of the rifle made shortly after his arrest while sitting in a police cruiser. Although the defendant acknowledges the receipt of *Miranda* warnings prior to making that statement, he contends that, under *State* v. *Wilson*, 183 Conn. 280, 439 A.2d 330 (1981), his acknowledgment that he understood those rights was not the equivalent of a waiver of those rights, and that his response to Brigandi's question was involuntary when viewed in light of the defendant's lack of sleep, as well as the fact that he had just been arrested by force during the early morning tactical team raid on his apartment. In response, the state contends that this claim is unreviewable because the defendant's broadly drafted motion to suppress was not targeted to this statement, and the defendant did not argue before the trial court for the exclusion of this particular statement. The state then relies on, inter alia, *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), to support its contention that the defendant is not entitled to review under *State* v. *Golding*, supra, 213 Conn. 239–40, because the record is inadequate for *Golding* review as the trial court never made factual findings as to whether the defendant had actually waived his rights and whether the tactical team's use of force attendant to the arrest rendered involuntary the defendant's waiver.[66] We agree with the state and conclude that the defendant's unpreserved claim is not reviewable under *Golding* because the factual record is not adequately developed regarding the extent of his waiver prior to making the statement regarding the location of the rifle.

We begin by noting that whether a "defendant has knowingly and intelligently waived his rights under *Miranda* depends in part on the competency of the defendant, or, in other words, on his ability to understand and act upon his constitutional rights." (Internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 51. This inquiry is "ultimately factual," although "our usual deference to fact-finding by the trial court is qualified, on questions of this nature, by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence." (Internal quotation marks omitted.) Id.

"In *State* v. *Golding*, supra, 213 Conn. 239–40, this court set forth four conditions that a defendant must satisfy before he may prevail, on appeal, on an unpreserved constitutional claim.[67] Because a defendant cannot prevail under *Golding* unless he meets each of those four conditions, an appellate court is free to reject a

defendant's unpreserved claim upon determining that any one of those conditions has not been satisfied. . . . Indeed, unless the defendant has satisfied the first *Golding* prong, that is, unless the defendant has demonstrated that the record is adequate for appellate review, the appellate tribunal will not consider the merits of the defendant's claim. . . .

"We note, moreover, that *Golding* is a narrow exception to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court. The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . Nevertheless, because constitutional claims implicate fundamental rights, it also would be unfair automatically and categorically to bar a defendant from raising a meritorious constitutional claim that warrants a new trial solely because the defendant failed to identify the violation at trial. *Golding* strikes an appropriate balance between these competing interests: the defendant may raise such a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Brunetti*, supra, 279 Conn. 54–56; see also *State* v. *Jenkins*, 298 Conn. 209, 231, 3 A.3d 806 (2010) (declining to consider whether defendant's consent to search his vehicle was affected by patdown search when legality of patdown was not raised before trial court and "the state was not alerted to the need to develop a factual record concerning whether potentially permissible bases, such as consent, existed"); *State* v. *Brunetti*, supra, 61–64 (holding that record was ambiguous concerning whether defendant's mother had actually denied her consent to search premises in question, and therefore record was inadequate for *Golding* review of claim that state constitution requires consent of both present joint occupants).

We find particularly illustrative *State* v. *Medina*, 228 Conn. 281, 636 A.2d 351 (1994), which we followed in *Brunetti*, wherein we found the record inadequate for review of the defendant's claim that the state constitution's right against compelled self-incrimination provided greater protection than the due process clause of the federal constitution as interpreted by *Colorado* v. *Connelly*, 479 U.S. 157, 163–64, 107 S. Ct. 515, 93

L. Ed. 2d 473 (1986), which requires coercive police conduct to render an involuntary statement inadmissible, regardless of the defendant's mental status at the time he made the statements at issue. We noted in *Medina* that, "[a]t no time [after defense counsel renewed his motion to suppress statements made by the defendant while allegedly under custodial interrogation] did the defendant argue or identify any claim of involuntariness other than his claim under *Miranda*, or otherwise alert the court that he was pressing any such claim. Nor did he request that the court amplify its rulings on the motion to suppress, even though those rulings clearly were limited to a consideration of the issue of custodial interrogation." *State* v. *Medina*, supra, 299. We observed that, "because the defendant did not clearly raise such a state constitutional claim in the trial court, the state was not put on notice that it was required to defend against such a claim. Thus, neither the state nor the trial court—nor this court on appeal—had the benefit of a complete factual inquiry into the defendant's mental condition at the time his statements were made." Id., 300.

We conclude, therefore, that the record is inadequate for review of the defendant's claim that his statement concerning the location of the rifle was not the voluntary product of a valid *Miranda* waiver. In reviewing the trial court's oral memorandum of decision, we note at the outset that the trial court did not make any findings with respect to the validity of any *Miranda* waiver regarding the defendant's statement given while in the police cruiser. Rather, the trial court's findings focus exclusively on the issues that were argued before it following the receipt of evidence during the suppression hearing, namely, the admissibility of the defendant's statement made *at police headquarters* in light of the defendant's claims that it was the product of a violation of *Stoddard* and an invalid *Miranda* waiver. Indeed, viewed in light of the controlling legal principles as stated in *State* v. *Wilson*, supra, 183 Conn. 285–87,[68] the memorandum of decision is ambiguous on this point, as it finds that the defendant *understood* his rights when they were read to him in the police cruiser and again at the police station, but then only mentions waiver with regard to the police station, remaining silent on that point concerning statements made in the cruiser. Indeed, there are significant and unresolved factual disparities between the testimony of the police officers about the events as they unfolded, and the defendant's account of the events, including his claim that the arresting police officers had thrown him into the snow and that the officers had questioned him about the gun without advising him of his *Miranda* rights at all. Accordingly, we conclude that the state of the record bars review of this unpreserved claim under the first prong of *Golding*.

C

Did the Trial Court Improperly Deny the Defendant's Motion to Suppress His Statement Made at the Police Station?

The defendant next claims that the trial court improperly denied his motion to suppress his statement made at the police station because: (1) his *Miranda* waiver was not knowing, intelligent and voluntary; and (2) he did not knowingly and intelligently waive his right to counsel because the conduct of the police of isolating him in the police station in order to delay his arraignment and prevent him from obtaining the assistance of local public defenders violated *State* v. *Stoddard*, supra, 206 Conn. 157.

1

Was the Defendant's *Miranda* Waiver Voluntary?

The defendant claims that his waiver of his *Miranda* rights, which led to his subsequent confession at the West Hartford police station, was not knowing and voluntary because it followed an involuntary statement made in the police cruiser, rough treatment at the hands of the tactical team in the hours preceding his arrest, and sleep deprivation in that he had only slept for a few hours beforehand. In response, the state contends that this claim is inadequately briefed and that the record remains inadequate to review the claims arising from the defendant's statement in the cruiser. We conclude that this claim is briefed adequately because the defendant's brief contains sufficient analysis coupled with citations to the relevant legal authorities and evidence in the record; see, e.g., *State* v. *Madigosky*, 291 Conn. 28, 48, 966 A.2d 730 (2009); and, further, that substantial evidence supports the trial court's conclusion that the defendant's *Miranda* waiver and subsequent confession were knowing, intelligent and voluntary.

"Whether the defendant has knowingly and intelligently waived his rights under *Miranda* depends in part on the competency of the defendant, or, in other words, on his ability to understand and act upon his constitutional rights. . . . Factors which may be considered by the trial court in determining whether an individual had the capacity to understand the warnings include the defendant's experience with the police and familiarity with the warnings . . . his level of intelligence, including his IQ . . . his age . . . his level of education . . . his vocabulary and ability to read and write in the language in which the warnings were given . . . intoxication . . . his emotional state . . . and the existence of any mental disease, disorder or retardation. . . . Although the issue [of whether there has been a knowing and voluntary waiver] is . . . ultimately factual, our usual deference to fact-finding by the trial court is qualified, on questions of this nature, by the necessity for a scrupulous examination of the record

to ascertain whether such a factual finding is supported by substantial evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 51; see also *State* v. *Toste*, supra, 198 Conn. 580–81; *State* v. *Harris*, 188 Conn. 574, 580, 452 A.2d 634 (1982), cert. denied, 460 U.S. 1089, 103 S. Ct. 1785, 76 L. Ed. 2d 354 (1983).

Moreover, "[i]rrespective of *Miranda*, and the fifth amendment itself . . . any use in a criminal trial of an involuntary confession is a denial of due process of law. . . . In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker. . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of the confession offends due process. . . . The determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it . . . including both the characteristics of the accused and the details of the interrogation. . . .

"Under the due process clause of the fourteenth amendment, [however] in order for a confession to be deemed involuntary and thus inadmissible at trial, [t]here must be police conduct, or official coercion, causally related to the confession . . . . Because of this essential link between coercive activity of the [s]tate, on the one hand, and a resulting confession by a defendant, on the other . . . mere examination of the [defendant's] state of mind [although relevant to an assessment of the defendant's susceptibility to police coercion] can never conclude the due process inquiry. . . .

"We have stated that the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . . Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . .

"The trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . On the ultimate issue of voluntariness, however, we will conduct an independent and scrupulous examination of the entire record to ascertain whether the trial court's finding is supported by substantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 54–55, discussing, inter alia, *Colorado* v. *Connelly*, supra, 479 U.S. 157.

Likely because the trial court's factual findings with respect to the defendant's intelligence and competency to understand and waive his rights are amply supported by the record, as demonstrated by the fact that the defendant is a literate high school graduate who was not visibly under the influence of alcohol or other drugs, and had executed a written waiver; see, e.g., *State* v. *Reynolds*, supra, 264 Conn. 52–53; the defendant focuses his analysis on the impact that the actions of the tactical team during the raid had on his thinking afterward. The defendant notes that, "[h]aving slept for only a few hours, [tactical] team members, heavily armed and clothed in black, rousted [the defendant] from his sleep by knocking down his apartment door and jumping on him, pointing semi-automatic rifles with flashlights in his face," after which he was questioned "in the backseat of a cruiser without a valid waiver of his *Miranda* rights." Although we do not consider in our analysis the legality of the defendant's *Miranda* waiver in the cruiser; see part III B of this opinion; we note that the trial court found that the measures and restraint that the tactical team used to take the defendant—a murder suspect—into custody were reasonable, and that there was no evidence that the team had used excessive force in making the arrest. Indeed, ample authority holds that a waiver of rights is not rendered involuntary solely by virtue of the fact that it was made subsequent to the excitement of a police raid that was executed with reasonable force. See, e.g., *United States* v. *Chaney*, 647 F.3d 401, 407 (1st Cir. 2011) (concluding that raid of motel room by five officers with guns drawn did not create "coercive atmosphere" that rendered consent to search involuntary, and that "the mere fact of having been recently asleep does not necessarily affect one's capacity to voluntarily grant consent"); *United States* v. *Jones*, 523 F.3d 31, 38 (1st Cir.) (rejecting defendant's argument that it was "inherently coercive" when "some ten to fifteen government agents, guns drawn, entered his hotel suite without knocking, handcuffed him, [and] placed him in a separate room"), cert. denied, 555 U.S. 901, 129 S. Ct. 228, 172 L. Ed. 2d 174 (2008); *Williams* v. *State*, 937 S.W.2d 23, 27–29 (Tex. App. 1996) (en banc) (consent given fifteen minutes after raid on apartment not involuntary when defendant was not handcuffed and officers had put their guns away). Thus, we disagree with the defendant's claim that the waiver of his *Miranda* rights and subsequent confession were not knowing, intelligent and voluntary.

2

Did the Police Violate the Defendant's Rights under *Stoddard*?

Relying on *State* v. *Stoddard*, supra, 206 Conn. 157, and *State* v. *Cobb*, 251 Conn. 285, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d

64 (2000), the defendant next claims that he did not knowingly and intelligently waive his right to counsel under the state constitution because, after arresting him early in the morning on Friday, December 22, 2000, the police isolated him for an interview and kept him from going to court immediately that same morning where he would have been arraigned and had counsel appointed. The defendant argues that, in order to secure a confession, the police segregated him from other suspects awaiting arraignment and put him in a rarely used lockup area, which kept Epstein, a public defender who would regularly visit arrestees before arraignment court started, from interviewing him. Referring to the "West Hartford police department's practice of delaying arraignment and appointment of counsel in order to obtain confessions," the defendant further contends that his waiver of the right to counsel was not knowing and intelligent because the police did not clarify what "appointed counsel" meant, specifically by failing to explain that, because of the Christmas holiday weekend, the defendant would have to spend four days in jail prior to arraignment and the opportunity to speak to an attorney.

In response, the state contends that this claim is unpreserved and unreviewable because of an inadequate factual record concerning the West Hartford police department's regular practices with respect to the interview and arraignment of arrestees brought in before the start of arraignment court sessions at 10 a.m., as well as whether the interview of the defendant was performed with the intent of depriving him of legal counsel and, finally, whether simply distributing applications for public defender services before court sessions constituted "an 'effort by counsel to render pertinent legal assistance' " of which the police would have to inform the defendant. The state also argues that the defendant is not entitled to any relief under *Stoddard* because Epstein did not attempt to reach the defendant until after the defendant already had spoken to the police. We agree with the state and conclude that the record is inadequate to review the defendant's claims with respect the alleged practice of the West Hartford police being intentionally calculated to deprive him of his right to counsel. We also conclude that the defendant is not entitled to relief under *Stoddard* because Epstein did not arrive at the police station or otherwise communicate with the officers until after the defendant had given his statement.

"In *State* v. *Stoddard*, supra, 206 Conn. 164, 166–67, we determined that article first, § 8, of the Connecticut constitution requires that police inform a suspect of diligent and timely efforts by counsel to render pertinent legal assistance. What is required of counsel is a reasonably diligent, timely and pertinent request to consult with a client. A request is diligent if all necessary steps have been taken to notify the police clearly in the

ordinary course of business, timely if made prior to the giving of incriminatory statements, and pertinent if counsel clearly indicates that access to the suspect is sought for the general purpose of providing legal assistance. . . . The duty imposed on the police requires only that the[y] . . . act as a neutral conduit for the pertinent and timely requests by counsel to meet with a custodial suspect. . . . Based upon the totality of the circumstances . . . [t]he critical question is whether the information not conveyed by the police would likely have changed the defendant's appraisal and understanding of the circumstances. . . . Of particular, but not exclusive, relevance are such facts and circumstances as the relationship of the suspect to the attorney, the nature of counsel's request, the extent to which the police had reasonable notice of counsel's request and the conduct of the suspect. . . . Thus . . . the state has the burden of proving by a preponderance of the evidence that the efforts of counsel, if properly communicated, would not have altered the defendant's decision to speak with the police. . . .

"[O]ur scope of review over this issue is plenary and . . . it is our obligation to consider the totality of the circumstances as disclosed by the record as a whole, including the relevant historical facts found by the trial court, and to determine from that record the critical question, namely, whether the pertinent information not communicated to the defendant would have altered his decision to speak with the police when he did." (Citations omitted; internal quotation marks omitted.) *State* v. *Foreman*, 288 Conn. 684, 703–704, 954 A.2d 135 (2008); see also *State* v. *Cobb*, supra, 251 Conn. 355–57.

We begin by noting that much of the defendant's appellate claim under *Stoddard* is unpreserved, as he did not contend before the trial court that his rights were violated by the standard prearraignment interview practices of the West Hartford police vis-à-vis the same day arraignment of defendants. The failure to develop this claim before the trial court precludes review under *State* v. *Golding*, supra, 213 Conn. 239–40, because the record is inadequate under the first prong of that bypass doctrine.[69] See footnote 67 of this opinion. Specifically, there is no factual support for the defendant's claim that he was not treated as a "normal arrestee," nor was there any evidence presented that the West Hartford police treated the defendant as they did with the intent of violating his right to counsel—particularly given that it is undisputed that the defendant was arraigned in a timely manner under our statutes and rules of court, namely, General Statutes § 54-1g (a)[70] and Practice Book § 37-1,[71] which require that a person be arraigned on the next court day following the date of arrest lest any confession be rendered inadmissible under General Statutes § 54-1c.[72] See, e.g., *State* v. *Piorkowski*, 43 Conn. App. 209, 217, 682 A.2d 582 (1996), aff'd, 243 Conn. 205, 700 A.2d 1146 (1997); *State* v. *Hardy*, 11

Conn. App. 238, 239–40, 526 A.2d 562 (1987) (per curiam). Indeed, the defendant cites no authority for the proposition that the police were required to inform him when exactly he would have an opportunity to speak to an attorney. Cf. *Moran* v. *Burbine*, 475 U.S. 412, 422–23, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) ("[W]e have never read the [c]onstitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. . . . Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the [s]tate's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." [Citations omitted.]).

Moreover, we conclude that the trial court properly determined that the remainder of the defendant's claim under *Stoddard* fails, because despite Epstein's efforts to speak with the defendant on the afternoon of December 22, the defendant already had made his statement to the police that morning. See *State* v. *Foreman*, supra, 288 Conn. 705–706 (trial court properly denied *Stoddard* motion to suppress DNA evidence because defendant's attorney "arrived at the detention center after the defendant had already consented to a DNA sample being taken by the police" and attorney "could in no way have influenced the defendant's decision about whether to give consent if she was not present to render such advice"). Thus, the defendant's reliance on *State* v. *Cobb*, supra, 251 Conn. 355–57, is misplaced, because in that case, wherein we assumed that there was a *Stoddard* violation but concluded that it had been waived by the defendant's conduct in speaking freely to the police, a public defender had specifically communicated to a sheriff that he wanted to speak to the defendant upon the defendant's arrival at the courthouse, and the sheriff had not communicated that message to the defendant before he confessed to detectives in the courthouse lockup.[73] See id. Accordingly, we conclude that the defendant's state constitutional rights under *Stoddard* were not violated.

D

Did the Police Illegally Seize the Murder Weapon during the Protective Sweep of the Defendant's Apartment?

The defendant next claims that the trial court should have suppressed, under the fourth and fourteenth amendments to the United States constitution and article first, §§ 7, 8 and 9, of the Connecticut constitution; see footnotes 13, 58, 60 and 61 of this opinion; the rifle used to kill the victim, which was found in his apartment. Acknowledging that this claim was not raised before the trial court, the defendant claims that we should review this claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, and hold that the rifle was

not validly seized during a protective sweep conducted under *Maryland* v. *Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). The defendant contends specifically that the rifle was not validly seized because it was taken from under clothes found atop a chest that was too small to hide a person, which was located outside of the area of the apartment "immediately adjoining the place of the arrest." In response, the state first contends that the record is inadequate to review this unpreserved claim because, for purposes of applying *Maryland* in evaluating the propriety of the protective sweep conducted in the present case, there are no specific factual findings regarding, inter alia, how far the chest was from the location in the apartment where the defendant was arrested, or whether the pile of clothes or the chest physically could hide a person.[74] We agree with the state and conclude that the record is inadequate for review of this claim because it lacks the predicate factual findings vis-à-vis the scope of the protective sweep.

"In *Maryland* v. *Buie*, supra, 494 U.S. 327, the United States Supreme Court addressed the level of justification . . . required by the [f]ourth and [f]ourteenth [a]mendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. In *Buie*, an arrest warrant had been issued for the defendant and his suspected accomplice following an armed robbery that had been committed by two men. . . . When the police went to the defendant's house to execute the warrant, the defendant was in the basement. He emerged from the basement peacefully, and the police arrested him. . . . One of the officers then entered the basement to determine whether anybody else was there and he observed certain incriminating evidence in plain view. . . .

"Drawing upon its earlier decisions in *Terry* [v. *Ohio*, 392 U.S. 1, 24–25, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] and [*Michigan* v. *Long*, 463 U.S. 1032, 1049–50, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)], which had authorized limited frisks for weapons in the interest of officer safety, the court recognized an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. . . . The court further explained: The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the

disadvantage of being on his adversary's turf. An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings. . . .

"Recognizing the often competing interests of the individual's expectation of privacy and the officers' safety, the court therefore determined that there were two levels of protective sweeps. Concerning the first tier of protective sweeps, the court concluded that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. . . . Concerning the second tier of protective sweeps, the court concluded: Beyond that . . . we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . . The court further emphasized that a protective sweep may extend only to a cursory inspection of those spaces where a person may be found . . . and lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." (Citations omitted; internal quotation marks omitted.) *State* v. *Spencer*, 268 Conn. 575, 587–89, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004).

We agree with the state that the record is inadequate for review of this unpreserved claim under the first prong of *State* v. *Golding*, supra, 213 Conn. 239–40, primarily because of unresolved factual questions that are beyond our province to resolve on appeal. Indeed, "[o]ur recent case law addressing whether a record is adequate for review under the first prong of *Golding* makes clear that this preservation exception operates in a very restrictive manner, particularly in the fact-sensitive context of illegal search and seizure claims." *State* v. *Jenkins*, supra, 298 Conn. 227. This principle remains applicable with respect to review of the legality of the protective sweep, given the fact-sensitive nature of that determination as to the size of the apartment and potential hiding areas therein from which "an attack could be immediately launched." (Internal quotation marks omitted.) *State* v. *Spencer*, supra, 268 Conn. 588; see *United States* v. *Thomas*, 429 F.3d 282, 287 (D.C. Cir. 2005) (The court declined to "narrowly define the place of arrest . . . merely in order to avoid permitting the police to sweep the entirety of a small apartment. The safety of the officers, not the percentage of the home searched, is the relevant criterion."), cert. denied, 549 U.S. 1055, 127 S. Ct. 660, 166 L. Ed. 2d 519 (2006); *United States* v. *Lauter*, 57 F.3d 212, 213, 216–17 (2d Cir. 1995) (permitting protective sweep of adjacent room of

apartment that "consisted of two small rooms"); see also *United States* v. *Lauter*, supra, 217 (agent "was justified in looking in the space between the bed and the wall, as a person certainly could have been hiding in that location").

Thus, although the defendant in the present case contends that photographs of the rifle atop the chest indicate that it is too small a space in which a person could hide,[75] accepting this argument would require us to discredit McCarthy's testimony to the contrary, and thus to engage in fact-finding on appeal, which we do not do even in the context of *Golding* review. See, e.g., *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716, 946 A.2d 1203, cert. denied, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); cf. *State* v. *Torres*, 230 Conn. 372, 379–80, 645 A.2d 529 (1994) (affording *Golding* review to claim that police lacked reasonable and articulable suspicion to conduct dog sniff of defendant because issue was question of law, record contained undisputed factual predicate and "the state [did] not claim that, had the defendant questioned in the trial court the validity of the canine sniff, the state would have presented more or different evidence to support its validity"). Accordingly, we conclude that the defendant's unpreserved protective sweep claim is unreviewable on appeal.

IV

JURY SELECTION CLAIMS

The defendant next claims that the trial court violated his rights under the sixth, eighth and fourteenth amendments[76] to the United States constitution, and article first, §§ 8, 9, 10 and 20, of the Connecticut constitution,[77] when, during jury selection, it improperly granted the state's challenges for cause, pursuant to the death qualification process outlined in *Wainwright* v. *Witt*, supra, 469 U.S. 412, and *Witherspoon* v. *Illinois*, 391 U.S. 510, 522, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968),[78] to three members of the venire on the ground that their stated opposition to capital punishment would preclude them from exercising their responsibilities as jurors by following the law as instructed by the court. Because we order a new penalty phase hearing; see part VII of this opinion; we need not reach the defendant's jury selection claims.

Specifically, we note that the defendant does not contend that a death qualified jury is more prone to convict during the guilt phase of the trial, and therefore lacks the requisite impartiality; that claim previously has been rejected as a matter of both federal and state constitutional law. See, e.g., *Lockhart* v. *McCree*, 476 U.S. 162, 173–74, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); *State* v. *Griffin*, 251 Conn. 671, 708–709, 741 A.2d 913 (1999). Indeed, there is ample authority that stands for the corollary proposition that "a *Witt-Witherspoon*

error precludes the government from imposing the death penalty. It does not, however, mandate reversal of the underlying conviction." *United States* v. *Quinones*, 511 F.3d 289, 305 (2d Cir. 2007), cert. denied, 555 U.S. 910, 129 S. Ct. 252, 172 L. Ed. 2d 190 (2008); see also, e.g., *Bumper* v. *North Carolina*, 391 U.S. 543, 545, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968) (*Witherspoon* error did not require reversal of rape conviction because defendant received life sentence, rather than death penalty); *People* v. *Cahill*, 2 N.Y.3d 14, 49, 809 N.E.2d 561, 777 N.Y.S.2d 332 (2003) ("The errors as to both jurors related to their ability to serve impartially only during the penalty phase. Errors of that type do not infect the guilt phase and by no means warrant a reversal of the entire trial."); *Ransom* v. *State*, 920 S.W.2d 288, 297 (Tex. Crim. App.) ("[v]oir dire error does not inevitably affect the guilt/innocence phase of a trial"), cert. denied, 519 U.S. 1030, 117 S. Ct. 587, 136 L. Ed. 2d 516 (1996). Accordingly, we need not reach the defendant's claims pursuant to *Witt* and *Witherspoon* arising from the jury selection process because the claims are of no import to the jury's verdict in the guilt phase.

V

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GENERAL VERDICT FINDING THE DEFENDANT GUILTY OF CAPITAL FELONY IN VIOLATION OF § 53a-54b (2) UNDER A THEORY OF ACCESSORIAL LIABILITY PURSUANT TO § 53a-8?

Relying on *State* v. *McGann*, supra, 199 Conn. 163, and *State* v. *Hope*, 203 Conn. 420, 524 A.2d 1148 (1987), the defendant next claims that there is insufficient evidence to support the jury's general verdict finding him guilty of capital felony on the basis of a murder for hire as an accessory in violation of §§ 53a-54b (2) and 53a-8. Specifically, the defendant contends that, with respect to the state's alternative theory of accessorial liability for the murder, if the jury credited his statement to the police that Tyrell had been the shooter; see footnote 28 of this opinion; then the defendant could not have been an accessory to a murder for hire because there is no evidence of a hiring agreement between Tyrell and Pascual, or anyone else, rendering the defendant's accessorial liability for that crime a legal impossibility and mandating reversal of the general verdict under *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994). In response, the state notes that Tyrell had pleaded guilty to capital felony by the time of the defendant's trial in the present case; see footnote 16 of this opinion; and argues further that *McGann* and *Hope* are confined to their unique facts, and that this court has subsequently clarified, in *State* v. *Solek*, supra, 242 Conn. 409, that a defendant is guilty of capital felony if he acts as a principal with respect to one element of

the crime and an accessory with respect to the other. Thus, the state emphasizes that the defendant personally satisfied the requisite elements of the hiring relationship, rendering him accessorily liable for capital felony even if it was Tyrell who actually fired the fatal shot.[79] We agree with the state and conclude that there was legally sufficient evidence to hold the defendant accessorily liable for capital felony under §§ 53a-54b (2) and 53a-8.

The record reveals the following additional relevant facts and procedural history. During summations, the prosecutor first argued that the defendant was liable for capital felony as a principal on the basis of the testimony of Pascual and Tyrell that the defendant had shot the victim in the head with the rifle, after agreeing with Pascual to kill the victim in exchange for a snowmobile. The prosecutor then argued in the alternative in his rebuttal summation: after emphasizing that the jury need not be unanimous regarding whether the defendant had acted as principal or an accessory, the prosecutor contended that Pascual "wanted [the victim] killed" and "set the wheels in motion for these crimes to be perpetrated, and he set the wheels in motion for [the] defendant to help him do that. The defendant took the ball and then he ran with it. Everything else that you heard here was [the] defendant's idea. He was the mastermind of this murderous plot." Discussing the ski masks and other items found in the defendant's car, the prosecutor reminded the jury that the defendant was "charged under the theory of accessorial liability, whether you want to believe he's the one who actually stole that gun or not or whether you want to believe he was the one that did any of the acts or not. He did them . . . Tyrell did them with him . . . Pascual did them with him." The prosecutor then acknowledged that there was only a "casual relationship between Pascual and Tyrell. And, admittedly, [Tyrell was] brought in by the defendant. This defendant even admits it. There's no agreement to do anything between Pascual and Tyrell. The agreement is between Pascual and the defendant."[80]

The trial court then instructed the jury on the general principles of accessorial liability under § 53a-8, none of which are challenged by the defendant in this appeal; see footnote 87 of this opinion; and emphasized that the jury need not "unanimously agree that [the defendant] acted as the principal to convict . . . nor do you have to unanimously agree that he acted as an accessory to convict on any of these counts as long as you unanimously agree that he is guilty as either the principal offender or as an accessory." In charging the jury, the trial court did not instruct the jury that, to hold the defendant accessorily liable for capital felony under §§ 53a-54b (2) and 53a-8, it had to find proven beyond a reasonable doubt that Tyrell was hired to commit the murder for pecuniary gain.[81]

We note at the outset that the state does not challenge the defendant's request for review of this unpreserved claim under the constitutional bypass doctrine of *State* v. *Golding*, supra, 213 Conn. 239–40; see footnote 67 of this opinion; so we turn to its merits. Conceding that there is sufficient evidence factually to sustain the general verdict in this case, the defendant challenges the legal sufficiency of one of the alternative bases for that general verdict, namely, that he, having been hired to kill the victim, could be held accessorily liable for capital felony under § 53a-54b (2) if the jury found that Tyrell was the principal actor who killed the victim, despite the fact that it was undisputed that Tyrell was not a party to any hiring relationship. The defendant observes correctly that, if this alternative basis for conviction is legally insufficient, then the general verdict on the capital felony count cannot stand under *Griffin* v. *United States*, 502 U.S. 46, 59–60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). See, e.g., *State* v. *Chapman*, supra, 229 Conn. 539 (although "factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another, factually supported basis, is not a federal due process violation . . . [w]hen . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error" [citation omitted; internal quotation marks omitted]).

Whether a defendant may be held accessorily liable under § 53a-54b (2) for murder for hire, when the principal actor was not himself a party to the hiring transaction, presents an issue of statutory interpretation, which is a question of law over which our review is plenary. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 668, 998 A.2d 1 (2010). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine the meaning, General Statutes § 1-2z directs us first to consider 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . [W]hen the statute being construed is a criminal statute, it must be construed strictly against the state

in favor of the accused." (Citation omitted; internal quotation marks omitted.) Id., 668–69. "Our inquiry is also guided, however, by our prior case law construing these statutes." *State* v. *Nathan J.*, 294 Conn. 243, 251, 982 A.2d 1067 (2009).

Because it forms the basis for the defendant's claim, we begin with *State* v. *McGann*, supra, 199 Conn. 170, wherein the state had charged the defendant, John J. McGann, with capital felony, alleging that a woman, Geraldine Burke, had hired him, " 'for his pecuniary gain,' " to kill the victim, her husband. McGann, however, had brokered a deal with a third party to kill the victim, inflated the third party's price and kept for himself the difference between the actual price and the fee paid by Burke, and then only acted to kill the victim to save face after it became apparent that the third party had taken Burke's money with no intention of committing the murder. Id., 171–73. This court concluded that, on these facts, there was insufficient evidence "that the killing of the victim constituted a 'murder committed by a defendant who is hired to commit the same for pecuniary gain,' as required by . . . § 53a-54b (2) for the crime of capital felony murder." Id., 173. Citing legislative history describing § 53a-54b (2) "as pertaining to 'the hired assassin, the hired gunman,' " and noting that, "[i]n the House debate, 'murder by a kidnapper of a kidnapped person' was equated in culpability with 'murder for hire,' " this court emphasized that, under § 53a-54b (2), although McGann's "financial motivation for becoming involved in the transaction [was] adequately established, the statutory requirement of a *hiring* for pecuniary gain must also be satisfied." (Emphasis in original.) Id., 174–75. The court noted that Burke had no reason to know that she had hired McGann to kill the victim, and only would have reason to believe that he was "carrying out the murder because of his friendship with her and his embarrassment over the financial loss she had sustained as a result of [McGann's] recommendation of [the third party]." Id., 176.

More significantly, this court concluded that McGann "similarly cannot reasonably be charged with the realization that he had been hired by [Burke] to commit the murder. Though the trial court could reasonably have found he was partially motivated by his desire to retain the money he had obtained by deceiving [Burke], those circumstances do not establish a hiring relationship because *the essential element of an agreement to compensate* [*McGann*] *for his services is absent. His motive to avoid having to return the money he had fraudulently obtained cannot be regarded as legally sufficient to constitute an agreement for compensation.* [Burke] had no knowledge of this aspect of his motivation and therefore could not have agreed to such compensation. From the viewpoint of [McGann] also, his desire to conceal his fraud and thus achieve a pecu-

niary gain could not have induced in a reasonable person a realization that he was committing a murder for compensation.

"A construction of the statute that treats [McGann] as hired simply because he assumed the responsibility of fulfilling an obligation of the person he had recommended and because he would gain financially by doing so is not readily apparent or reasonably foreseeable." (Emphasis altered.) Id., 176–77; see also id., 178 ("[i]n deciding whether a person has been hired to commit a murder for pecuniary gain we are concerned principally with adopting a construction of subsection [2] of § 53a-54b that effectuates the legislative intention, not with the technical niceties of contract law").

Although *McGann* makes clear the importance of a hiring relationship for the imposition of liability under § 53a-54b (2), the defendant's reliance on it in the present case, as well as our subsequent conclusion in *State* v. *Hope*, supra, 203 Conn. 423–24, that McGann's accomplice "can no longer be tried on a charge of capital felony murder in light of our determination that McGann was not a hired assassin under the terms of § 53a-54b (2)," is overstated.[82] Rather, our subsequent interpretation of General Statutes (Rev. to 1995) § 53a-54b (7),[83] now codified as § 53a-54b (6), in *State* v. *Solek*, supra, 242 Conn. 409, is dispositive of the defendant's claim that he could not be held liable as Tyrell's accessory to capital felony in the absence of evidence that Tyrell himself had a hiring relationship with Pascual or anyone else. In *Solek*, the state alleged that the defendant, Timothy Solek, " 'in the course of the commission of [s]exual [a]ssault in the [f]irst [d]egree, with intent to cause the death of another person, did intentionally aid one Scott Smith by striking with an iron, stabbing with a can opener, and kicking another person, while the said Scott Smith did strangle, and cause the death of the said other person, in violation of [General Statutes (Rev. to 1995) §] 53a-54b (7).' The state's theory of the defendant's liability for the offense was that, in the course of sexually assaulting the victim, the defendant aided Smith in killing the victim. Pursuant to § 53a-8, therefore, the defendant could be held criminally liable for murder on the basis of an accessory theory of liability. Moreover, because the defendant aided Smith in killing the victim during the course of committing his own sexual assault, the state asserted that the defendant also could be held criminally liable for capital felony." Id., 420.

This court concluded in *Solek* that the defendant therein could be held accessorily liable for capital felony, despite the fact that he personally had committed only the sexual assault element of the statute. Id. The court noted that a review of the legislative history of this portion of the capital felony statute "reveals that the legislature did not specifically contemplate whether its use of 'murder' in the wording of the offense encom-

passed murder committed by an accessory as well as murder committed by a principal. [The statute] must be read, however, in light of the principle of criminal law, based both in statutory and common law, that a defendant may be convicted of a substantive offense, through the use of accessory principles of liability, even though the defendant did not actually commit the substantive offense." Id., 421. Emphasizing that "principles of accessory liability were well established[84] when the legislature enacted [General Statutes (Rev. to 1995) § 53a-54b (7)]," this court concluded that "the legislature intended its use of 'murder' in the wording of the offense of capital felony to encompass murder committed by an accessory as well as murder committed by a principal."[85] Id., 422.

Solek, then, clearly stands for the proposition that one may be convicted of capital felony, even if he has committed some elements as a principal and others as an accessory. See id., 428 ("[T]he state's case against the defendant on the capital felony charge is not predicated solely on an accessory theory of liability. Rather, only one element of the state's case against the defendant, the murder element, is dependent upon accessory liability."). Thus, in the present case, even if we put aside the fact that Tyrell pleaded guilty to capital felony in connection with this case, and that the jury was aware of that plea; see footnote 16 of this opinion; for purposes of holding the defendant accessorily liable for capital felony, the lack of a hiring relationship between Tyrell and Pascual, or anyone else, is legally irrelevant, because there is sufficient evidence that the defendant satisfied the hiring element of the offense personally as a principal, even if he acted as Tyrell's accessory in the course of committing the murder.[86] Accordingly, we conclude that there was legally sufficient evidence to hold the defendant accessorily liable for capital felony under § 53a-54b (2).

VI

CLAIMS ARISING FROM THE GUILT PHASE JURY INSTRUCTIONS

The defendant next raises multiple claims arising from the jury instructions during the guilt phase, namely, that the trial court improperly: (1) failed to instruct the jury that, before it could convict him as an accessory to capital felony under §§ 53a-8 and 53a-54b (2), the state had to prove beyond a reasonable doubt that Tyrell had been hired to kill the victim; (2) failed to define adequately the essential element of a hiring for pecuniary gain under § 53a-54b (2); (3) instructed the jury with respect to conspiracy to commit burglary under General Statutes §§ 53a-48 and 53a-101 (a) (2) by charging the defendant with a noncognizable crime, namely, conspiracy to commit a reckless act; and (4) instructed the jury pursuant to *State* v. *Malave*, supra, 250 Conn. 722, that it could not draw an adverse infer-

ence from the state's failure to produce cell phone records corroborating Pascual's testimony. We note that none of these claims is preserved for appellate review, and the defendant seeks review of each pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40.

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Flores*, 301 Conn. 77, 93, 17 A.3d 1025 (2011). "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 599, 10 A.3d 1005, cert. denied, U.S. , 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

A

Did the Trial Court Properly Instruct the Jury about the Elements of Capital Felony under §§ 53a-54b (2) and 53a-8?

The defendant raises two claims arising from the trial court's jury instructions on the elements of capital felony under §§ 53a-54b (2) and 53a-8, namely, that the trial court improperly failed to: (1) instruct the jury that it had to find that Tyrell had a separate agreement with Pascual or the defendant to kill the victim for pecuniary gain before it could convict the defendant as an accessory to capital felony under §§ 53-54b (2) and 53a-8; and (2) define the essential element of a hiring for pecuniary gain.

The record reveals the following additional facts and procedural history relevant to the capital felony instruction. In discussing the individual counts of the ten count information, the trial court first instructed the jury on the concept of accessorial liability generally[87] and the elements of murder, and then charged the jury that § 53a-54b (2) "states as follows in relevant part: that capital felony includes murder committed by the defendant who is hired to commit the same for pecuniary

gain. Now, § 53a-8, as I've explained, charges accessorial liability.

"To evaluate this count . . . you must begin by evaluating whether a murder occurred. . . . Capital felony, however, has one additional element beyond the elements of murder. To prove capital felony the state must also prove beyond a reasonable doubt that [the defendant] committed murder having been hired to do so for pecuniary gain. 'Hired' has its usual meaning. Let me tell you what is meant by pecuniary gain.

" 'Pecuniary gain' refers to any gain in the form of money, property, or anything else having economic value, benefit or advantage. I stress it is for you and you alone in your fact-finding role to determine if the state has proven beyond a reasonable doubt that this defendant was hired to commit a murder for pecuniary gain.

"Therefore, for you to find the defendant guilty of capital felony . . . the state must prove all three of the following elements beyond a reasonable doubt: First, that the defendant acted with the specific intent that a death be caused; and, second, that the defendant acting either as the principal offender or an accessory caused the death of another person; and, third, that the defendant was hired to commit the murder for pecuniary gain.

"To obtain a conviction on capital felony, as noted, the state must convict the defendant of murder. Therefore, the first element that the state must prove beyond a reasonable doubt . . . is that the defendant . . . acting as a principal offender or accessory acted with the specific intent to cause the death of another person. Please once again refer to my earlier instructions on intent, circumstantial evidence, and proximate cause, which are applicable here.

"The second element is that the defendant acting as a principal offender personally caused the death of the victim or that acting with that intent he intentionally aided someone else who had the specific intent to cause the death of the victim and who acting with that specific intent caused the death of the victim.

"The third element that must be proven beyond a reasonable doubt is that the defendant was hired to commit the murder for pecuniary gain, a term that I just defined for you a moment ago."

1

Was a Separate Agreement by Tyrell to Murder the Victim for Pecuniary Gain Necessary for the Defendant to Be Held Accessorily Liable under §§ 53a-54b (2) and 53a-8?

The defendant first contends that the trial court improperly failed to instruct the jury that it had to find that Tyrell had a separate agreement with the defendant

or Pascual to kill the victim for pecuniary gain before it could convict the defendant as an accessory to Tyrell's commission of murder for hire under the capital felony statute, § 53a-54b (2). As with his sufficiency of the evidence claims, the defendant contends that, under *State* v. *McGann*, supra, 199 Conn. 163, and *State* v. *Hope*, supra, 203 Conn. 420, an accessory may be convicted of murder for hire only if the principal first committed the offense. In response, the state again relies on *State* v. *Solek*, supra, 242 Conn. 409, for the proposition that "a defendant may be guilty of capital felony if he acts as a principal with respect to one element and an accessory with respect to another." For the reasons discussed in greater detail in part V of this opinion, we agree with the state and conclude that, under *State* v. *Solek*, supra, 242 Conn. 421–23, the trial court properly did not instruct the jury that, before it could hold the defendant accessorily liable for capital felony under §§ 53a-54b (2) and 53a-8, it first had to find that Tyrell had agreed separately with either the defendant or Pascual to kill the victim for pecuniary gain.

2

Did the Trial Court Improperly Fail to Define the Term "Hired" under § 53a-54b (2)?

We next address the defendant's claim that the trial court improperly failed to define the essential element of a "hiring" for pecuniary gain in its charge on the capital felony statute, § 53a-54b (2). Relying on *State* v. *Sostre*, 261 Conn. 111, 802 A.2d 754 (2002), the defendant contends that, by limiting the word hiring to its usual or ordinary meaning, the jury instructions failed to make clear that, to convict the defendant, the jury had to find that, at the time of their initial agreement and at all times thereafter, both Pascual and the defendant contemplated the defendant killing the victim in exchange for bargained for compensation from Pascual, rather than because of a unilateral expectation of compensation, or for some other reason. In response, the state contends that the defendant waived this claim by raising this issue before the trial court and then agreeing to a supplemental jury instruction on this point, and also that the supplemental instruction properly explained the term hired as a matter of law by emphasizing that the agreement to kill for pecuniary gain had to be in effect before and through the time of the murder. We agree with the state and conclude that, even if we assume, without deciding, that this claim was not waived before the trial court,[88] that court's instructions were a correct statement of the law.

The record reveals the following additional relevant facts and procedural history. After the trial court instructed the jury, it inquired whether counsel had any exceptions to the charge. Without taking an exception, defense counsel noted his concern that the jury might

return with a question regarding when the defendant had to have his expectation of pecuniary gain relative to the commission of the murder, and stated his desire to clarify that the expectation had to be in place prior to the commission of the offense. The state responded that it felt the existing charge was clear on the point that "implicit" in being hired for pecuniary gain is that the hiring "occurred before the actual event for which someone was hired. . . . You don't start work [until] you're hired. You know, you don't work and then get told that you've been hired necessarily." Acknowledging the defendant's concern that the compensation must be in the nature of an expected payment for services rendered, rather than a reward or gratuity, the trial court then invited both parties to file a short supplemental charge on that point for its consideration the next day.

The following day, after discussion before the trial court and the parties' review of the court's proposed written charge,[89] the trial court directed the jury's attention to the capital felony portion of the original written instructions and charged that the "third element of capital felony which the state must prove beyond a reasonable doubt is that [the defendant] was hired to commit murder for pecuniary gain. Let me explicitly state something to you: In order to prove this element, the state must prove that it was understood by [the defendant] at the time of any hiring and prior to the killing that the killing would be committed for pecuniary gain."

Again, even assuming, without deciding, that the defendant did not waive this claim, we note at the outset that we agree with the defendant that the mere receipt of money or property before or after the murder is not sufficient to hold a defendant liable for capital felony under § 53a-54b (2); the hiring element contemplates a bargained for exchange involving pecuniary gain as consideration for the commission of the murder. See *State* v. *McGann*, supra, 199 Conn. 176–77; cf. *State* v. *Sostre*, supra, 261 Conn. 114–15 (concluding that aggravating factor under § 53a-46a [i] [6], namely, that "defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," pertains to murders for hire, and not to capital felonies committed during robberies). We nevertheless conclude that all of the trial court's jury instructions were accurate statements of the law that could not have misled the jury with respect to the hiring element. Even if the defendant had developed a different or additional motivation for killing the victim, such as shared concern with Pascual about the way the victim had treated Cusano and her children,[90] or the desire to steal money or other objects from the victim's home following the commission of the murder, the trial court's original and supplemental instructions made clear that, to be held liable for capital felony under the "hired to commit [murder] for pecuniary gain" element

of § 53a-54b, that the defendant had to "under[stand] . . . at the time of any hiring *and prior to the killing* that the killing would be committed for pecuniary gain." (Emphasis added.) Indeed, the trial court repeatedly used the past tense in the original charge to describe the hiring relationship, noting that the state must prove that the defendant "was hired" or "having been" hired to commit the murder for pecuniary gain. Accordingly, we conclude that the trial court properly instructed the jury as to the hiring element of § 53a-54b (2).

B

Does the Concededly Improper Instruction on Conspiracy to Commit Burglary in Violation of §§ 53a-48 and 53a-101 (a) (2) Require Reversal of the Defendant's Conviction of That Charge?

We next address the defendant's claim that the trial court improperly instructed the jury in its charge on count eight of the information, conspiracy to commit burglary in violation of §§ 53a-48 and 53a-101 (a) (2).[91] The defendant contends that these instructions improperly informed the jury that one could conspire to commit a reckless act. The state concedes that the trial court's instructions on this count improperly included the statutory alternative of recklessly inflicting bodily injury, but relies on *State* v. *Manson*, 118 Conn. App. 538, 984 A.2d 1099 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010), for the proposition that, because the jury's verdict on the murder and capital felony counts indicates that it found that the defendant had acted intentionally, the claimed impropriety in the instructions is harmless beyond a reasonable doubt. We agree with the state and conclude that the improper charge on conspiracy to commit burglary was harmless beyond a reasonable doubt.

The record reveals the following additional relevant facts and procedural history. With respect to count eight of the information, conspiracy to commit burglary in the first degree in violation of §§ 53a-48 and 53a-101 (a) (2), the trial court first instructed the jury on conspiracy principles generally under § 53a-48, stating that there are "three elements to the crime of conspiracy. First, an intent that criminal conduct be performed; second, an agreement with one or more persons to engage in or cause the performance of that conduct; and, third, the commission of an overt act in pursuance of the agreement by any one or more of the persons who made the agreement during the life of the conspiracy." In discussing the applicable criminal conduct, the trial court noted that "the crime which the state claims was the object of the conspiracy was the crime of murder in count six, burglary in the first degree under § 53a-101 (a) (1) in count seven, and burglary in the first degree under § 53a-101 (a) (2) in count eight. Now, I

have previously instructed you as to the elements of murder and burglary in the first degree under both [§] 53a-101 (a) (1) and [2]. *Those instructions are applicable here and are hereby incorporated by reference.*" (Emphasis added.)

Turning specifically to count eight, the trial court instructed the jury that, "to convict the defendant on the charge of conspiracy to commit burglary in the first degree pursuant to § 53a-48a, the conspiracy statute, and . . . [§] 53a-101 (a) (2) . . . you must be satisfied that the state has proven all the following elements beyond a reasonable doubt: One, that the defendant had the intent that conduct constituting the crime of burglary in the first degree in violation of § 53a-101 (a) (2) be performed and that acting with that intent he agreed with one or more persons to engage in that conduct or cause the conduct to be performed; and, three, that either he or any of the other parties to the agreement committed an overt act in pursuance of that agreement.

"I have already instructed on the element[s] of § 53a-101 (a) (2) in my instructions on count five. *These instructions apply to this count also as do my previous instructions on conspiracy and intent.*" (Emphasis added.) The trial court's cross-referenced instructions on count five required the state to "prove beyond a reasonable doubt pursuant to § 53a-101 (a) (2) . . . that the defendant intentionally, knowingly or *recklessly* inflicted bodily injury on [the victim]."[92] (Emphasis added.)

At the outset, we note that the state acknowledges that conspiracy to commit a reckless act is not a cognizable crime in Connecticut because it is legally impossible to conspire to commit or achieve an unintentional or reckless result. See, e.g., *State* v. *Flowers*, 278 Conn. 533, 544, 898 A.2d 789 (2006); *State* v. *Crosswell*, 223 Conn. 243, 263, 612 A.2d 1174 (1992). Thus, as the state concedes, the conspiracy instructions, to the extent that their full incorporation by reference of the general burglary instructions permitted the jury to find that the defendant had conspired to act recklessly, were improper as a matter of law.

We further conclude, however, that the state has proven beyond a reasonable doubt that the instructional impropriety was harmless. The jury's verdict finding the defendant guilty of capital felony and murder, both of which require an intentional act, necessarily means that it could not have been misled into finding that the defendant had conspired to act recklessly. Compare *State* v. *Manson*, supra, 118 Conn. App. 555–56 (finding of guilt on charge of sexual assault in first degree, which requires intentional act, meant that jury was not misled by instruction that conceivably would have permitted finding of guilt under § 53a-101 [a] [2] for reckless attempt to cause bodily injury, which is not cognizable

offense), with *State* v. *Flowers*, supra, 278 Conn. 550 n.8 (instructional defect that defendant had committed burglary with intent to commit attempted assault was harmful "because the defendant was not charged with and thus was not convicted by overwhelming evidence of assault, [so] we cannot rely on the intent element of that crime to cure the defect in this case"). Thus, the jury's verdict convicting the defendant of crimes requiring intentional acts cured the defect in the jury instructions regarding any recklessness under § 53a-101 (a) (2). Accordingly, we conclude that the instructional impropriety on count eight of the information was harmless error not requiring reversal.

C

Did the Trial Court Improperly Instruct the Jury That It Could Not Draw an Adverse Inference from the State's Failure to Produce Certain Cell Phone Records?

The defendant next claims that the trial court improperly instructed the jury that it could not draw an adverse inference from the state's failure to produce cell phone records that would have corroborated Pascual's testimony concerning telephone calls between himself and the defendant.[93] The defendant contends that this instruction, given after his closing argument, violated this court's decision in *State* v. *Malave*, supra, 250 Conn 722, to abandon the missing witness rule in criminal cases, as well as his due process right to present a closing argument under *Herring* v. *New York*, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975), and *State* v. *Arline*, 223 Conn. 52, 612 A.2d 755 (1992). In response, the state contends that the defendant waived this unpreserved claim by agreeing to the trial court's jury instruction after the state had objected to his closing argument, and also that, under *Malave* and *State* v. *West*, 274 Conn. 605, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005), this is a purely evidentiary claim that is not reviewable under the second prong of *State* v. *Golding*, supra, 213 Conn. 239–40. The state also contends that the *Malave* instruction did not deprive the defendant of his right to have counsel present a closing argument. We agree with the state and conclude that the defendant's claim under *Malave* is unreviewable, and also that the instruction did not deprive him of his constitutional right to a closing argument.

The record reveals the following additional relevant facts and procedural history. During his closing argument, in attacking the credibility of both Tyrell and Pascual, the defendant responded to the state's discussion of a postmurder telephone call from the defendant to Pascual demanding to know the status of the snowmobile that was to be payment,[94] by referring to Tyrell's testimony that the defendant lacked a cell phone and then noting the "testimony from . . . Pascual that he called or [the defendant] called him." The defendant

questioned the veracity of Pascual's testimony to this effect, stating: "Now, of course you can call from a landline. But if . . . you want to take that at face value, there's nothing I can do about that.

"But, you see, in determining whether or not the state has borne its burden of proof, it's incumbent upon all of us to be conscientious about that. In other words, is this same proof reliable if that were your son? Would you rely on it if he were your son? Is this the kind of proof you could say, that's good proof even though it's my son?

"What sometimes you would like to see is some corroboration. [Pascual] says he called me; you want to see some [tele]phone records. All right. Let's see where the calls originated. Let's see where the calls were going. You heard at the beginning when you were selected as jurors, you may hear from Verizon Wireless. No [tele]-phone records, no Verizon Wireless. It may not prove an ultimate point, but at least it's evidence."

After the defendant concluded his summation, the state objected to this argument and requested curative instructions,[95] noting specifically its objection to the defendant's "commenting on the state not calling a witness from Verizon Wireless. What he's basically asked the jury to do is draw an adverse inference in violation of what case law is now with respect to a missing witness rule or commenting on [a] failure to call a witness. And I think that is absolutely improper to do especially without asking permission of the court.

"The . . . Supreme Court has effectively gotten rid of the missing witness rule. And, therefore, I don't think it was proper for counsel to comment on that. And I'd ask the court to instruct the jury to disregard . . . ."

Considering the state's objection, the trial court noted, and the state agreed, that "it is proper for the defense to argue based on evidence or lack of evidence," and that "to the extent [defense] counsel is asking the jury to consider the lack of corroborative evidence on a point, I think that's appropriate. To the extent that there was a specific reference to a witness not being called, that may cross the line on the cases." Both parties then assented to the trial court's proposed curative instruction.

Ultimately, the trial court charged the jury: "In his closing argument, as I recollect, [defense counsel] commented on the failure of the state to call a certain witness from Verizon Wireless. You may consider the evidence or the lack of evidence presented when you evaluate the case, but you may draw no adverse inference from the state's failure to call a certain witness from Verizon Wireless. In any event, all of these matters are matters for you to evaluate in finding the facts." The defendant did not take any exceptions directed to this point in the charge.

We note at the outset that, in *State* v. *Malave*, supra, 250 Conn. 722, this court abandoned the missing witness rule of *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598 (1960), in criminal cases,[96] but emphasized that it did "not prohibit counsel from making appropriate comment, in closing arguments, about the absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case. . . . So long as counsel does not directly exhort the jury to draw an adverse inference by virtue of the witness' absence, the argument does not fall within the *Secondino* rule, and our holding . . . does not forbid it. . . . Fairness, however, dictates that a party who intends to comment on the opposing party's failure to call a certain witness must so notify the court and the opposing party in advance of closing arguments. Advance notice of such comment is necessary because comment on the opposing party's failure to call a particular witness would be improper if that witness were unavailable due to death, disappearance or otherwise. That notice will ensure that an opposing party is afforded a fair opportunity to challenge the propriety of the missing witness comment in light of the particular circumstances and factual record of the case. Of course, the trial court retains wide latitude to permit or preclude such a comment, and may, in its discretion, allow a party to adduce additional evidence relative to the missing witness issue." (Citations omitted.) *State* v. *Malave*, supra, 739–40.

Even assuming, without deciding, that the defendant did not waive this unpreserved claim, we nevertheless conclude that the defendant's contention that the trial court's instruction violated *Malave* by precluding the jury from naturally drawing an adverse inference, on its own, is unreviewable under the second prong of *State* v. *Golding*, supra, 213 Conn. 239–40. It is well settled that claims alleging violations of the *Malave* rules regarding missing witness arguments do not implicate constitutional rights and, therefore, are not subject to *Golding* review. See, e.g., *State* v. *Johnson*, supra, 286 Conn. 452; *State* v. *West*, supra, 274 Conn. 657–58. Thus, we conclude that the defendant's unpreserved claim under *Malave* is unreviewable on appeal.

We next turn to the defendant's claim that the curative instruction abridged his constitutional right to present a summation in a criminal jury trial. We reach this claim under *State* v. *Golding*, supra, 213 Conn. 239–40, because again, assuming, without deciding, that it was not waived, the record is adequate for review and it is of constitutional dimension. Indeed, it "can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only

then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . .

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

"This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." (Citation omitted.) *Herring* v. *New York*, supra, 422 U.S. 862; see also id., 863–65 (invalidating statute that authorized judges presiding over criminal bench trials to deny defendants right to summation because closing argument is significant component of sixth amendment right to effective assistance of counsel).

Indeed, the "right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, *but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence*. This is particularly so when . . . the prohibited argument bears directly on the defendant's theory of the defense." (Emphasis added.) *State* v. *Arline*, supra, 223 Conn. 64; see also id. ("[t]o deprive defense counsel of any opportunity to argue the motive or bias of the state's chief witness, where the linchpin of the defense was attacking the credibility of that witness, deprived the defendant of the full and fair participation of his counsel in the adversary process").

In the present case, we conclude that the trial court's curative instruction did not deprive the defendant of his right to have counsel present a proper summation to the jury, and that *Herring* v. *New York*, supra, 422 U.S. 862, wherein the right was completely abridged, and *State* v. *Arline*, supra, 223 Conn. 64, wherein the defendant was absolutely precluded from arguing in support of his defense theory, are readily distinguish-

able.[97] Specifically, the curative instruction in the present case, although it directed the jury not to draw an adverse inference solely from the state's failure to call a witness from Verizon Wireless, did not prevent the jury from *considering* the lack of corroboration for Pascual's testimony regarding the telephone calls between him and the defendant. Indeed, on that point, the trial court expressly directed the jury to "consider the evidence or the lack of evidence presented when you evaluate the case," and reminded it that the state's failure to call witnesses from Verizon Wireless remained a "[matter] for you to evaluate in finding the facts." See *State* v. *Joyce*, 243 Conn. 282, 306, 705 A.2d 181 (1997) (trial court did not abuse discretion in arson trial by circumscribing defense counsel's emphasis in summation on third party's responsibility for fire when "[t]he defendant was permitted to testify why he believed someone else committed the crime and counsel was able to comment in final argument about the basis of the defendant's belief"), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998); cf. *State* v. *Johnson*, supra, 286 Conn. 453 (trial court's instruction to "jurors to disregard certain improper parts of arguments made by counsel during summation without first defining for jurors the proper scope of a closing argument," although "perhaps ill conceived," was not violation of "constitutional magnitude" subject to *Golding* review). Thus, we conclude that the trial court's curative instruction did not violate the defendant's sixth amendment right to have his counsel give an effective summation.

VII

DID THE TRIAL COURT IMPROPERLY REFUSE TO DISCLOSE TO THE DEFENDANT THE ENTIRE DEPARTMENT FILE PERTAINING TO HIS FAMILY?

We next address the principal and dispositive issue in this appeal, namely, the defendant's claim that the trial court, *Solomon*, *J.*, improperly refused to disclose to him the entire department file pertaining to the defendant and his family. The defendant contends that Judge Solomon's decision to review the file in camera was not appropriate under the line of cases beginning with *Davis* v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), and *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, regardless of the statutory privilege[98] afforded to the department's file under General Statutes (Rev. to 2003) § 17a-28,[99] because the inquiry in the present case pertained to the defendant's need for material exculpatory evidence as to his sentence under the eighth amendment and the due process clause of the fourteenth amendment to the United States constitution, rather than evidence pertaining to the impeachment of a witness under the sixth amendment's confrontation clause.[100] Relying on the importance of

obtaining a complete family and social history in establishing mitigation in a death penalty case, as reflected in the 2003 American Bar Association "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (February, 2003) (ABA Guidelines), and United States Supreme Court cases such as *Wiggins* v. *Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), the defendant contends that the entire department file would have provided a more complete and forthright account of the abuse in his family and household than was obtained through interviews with the defendant and his family members, and would have given the jury a broader picture of his personal development. The defendant further contends that reversal is required because: (1) harmless error analysis is inapplicable to appellate review of this claim, given the need for heightened reliability in the uniquely subjective capital sentencing determination; and (2) in the alternative, any impropriety was harmful because his experience with domestic violence was the linchpin of his mitigation case, and the trial court's ruling prevented the jury from seeing a complete picture of the defendant's family history.

In response, the state contends that the trial court properly utilized an in camera review procedure to balance the privacy interests of family members recognized by the statutory privilege against the defendant's rights, and that neither the due process clause nor the eighth amendment provides a defendant with unrestricted access to privileged materials. Emphasizing that courts have rejected claims that the eighth amendment requires that a capital defendant be afforded direct access to privileged files, the state further contends that the defendant's rights are protected by in camera review conducted pursuant to, inter alia, *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, *State* v. *Kulmac*, 230 Conn. 43, 644 A.2d 887 (1994), and *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), whereby the trial court discloses only exculpatory and material evidence relevant to the defendant's guilt and punishment. The state then contends that the ABA Guidelines cannot obligate trial courts to violate state confidentiality statutes. Finally, the state anticipates that we will find, after conducting a plenary in camera review as to the materiality of the information contained in the records, that the trial court properly determined which records from the department's file to disclose to the defendant, as the records are cumulative of the domestic violence evidence that was presented to the jury. We agree with the state that the defendant is not entitled to unfettered access to the department's records and that his procedural rights under the eighth and fourteenth amendments were protected by the trial court's in camera review of the department's files. Having performed our own in camera review, however, we also conclude that the trial court improperly failed to dis-

close certain documents from the department's file that potentially would have given the jury a broader and more comprehensive picture of the defendant's family history to consider as a mitigating factor.

A

Additional Relevant Facts and Procedural History

The record reveals the following additional facts and procedural history. After the state filed notice of its intent to seek the death penalty, and complied with the defendant's motion for notice of aggravating factors, the defendant began to develop his case in mitigation. The defendant's attorney requested, and then subpoenaed, all of the department's records with regard to the defendant's "background, character and family history," but the department indicated that it would disclose only a small portion of the file. At a hearing on the matter held on February 5, 2002, the department advised the trial court, *Solomon*, *J.*, that it had given the defendant's counsel everything that pertained "solely" to the defendant, but that, under § 17a-28, it would not disclose the entire file, citing confidentiality concerns. The department averred specifically that its file, which was kept in the name of Christina, the defendant's mother, contained Juvenile Court records that could not be disclosed without a court order, as well as sensitive information regarding Christina and the defendant's siblings. The department informed the court that, although it would disclose information about the defendant's background, from intake through treatment and disposition, it would not disclose information about the "abuser's history, excuses [and] things that don't particularly relate to the [defendant] . . . ." In response to a hypothetical question, the department then informed Judge Solomon that it would not disclose information from the file concerning "an independent incident involving a different child," such as a sibling.

The defendant argued, however, that he was entitled to information regarding independent incidents of abuse involving his siblings, even if he did not witness or know of them, because they would relate to a "mitigating factor concerning [his] character, background and history" under "the rubric of" § 53a-46a (b). The defendant argued further that the information would guide the nature of his mitigation case and also "would be pertinent to a psychiatrist evaluating [him] for mitigation purposes," although disclosure could well result in a breach of confidentiality that the consulting psychiatrist might ultimately find to be of no import to the defendant's mitigation case.

Judge Solomon then noted that the department had produced the records for an in camera review, and addressed the factors that it would consider during the balancing process encompassed in the review, including the potential value of the files' content to the defen-

dant and his psychiatrist, and specifically the import of abusive acts against the defendant's siblings that did not directly pertain to him. Judge Solomon also acknowledged the relative prematurity of the inquiry, given the fact that the state could stipulate to the occurrence of abuses claimed by the defendant to his examining psychiatrist, thus obviating a need to breach the confidentiality of the records for corroboration purposes. In response to concerns expressed by the trial court and the state[101] about providing the defendant with information regarding incidents of which he was not previously aware, the defendant acknowledged that there was a "spectrum" of information in the file, and that information about events before the defendant was born would not be "exceedingly useful." The defendant claimed, however, that information concerning abuses that the defendant did not witness, but might have later been told about by his siblings, "may be relevant" to his mitigation case. The defendant further emphasized that the examining psychiatrist would need access to the file to formulate his questioning of the defendant because the defendant might not automatically recall all incidents described in the file due to the lengthy history and volume of incidents. Finally, the defendant emphasized the import of personal background and character information to the mitigation process. At the court's request, the defendant then filed a written motion for disclosure of the department's records, prior to the court's in camera review.[102]

After completing the in camera review, Judge Solomon reconvened court on October 2, 2003. The court reported that it had received from the department an envelope containing the records that it already had provided to the defendant, as well as its entire original file contained in six folders. The trial court stated that it had reviewed the six folders and culled out all records that it thought were disclosable to the defendant, albeit with the names of the defendant's siblings redacted to preserve confidentiality, noting that there would be some duplication with the records that had been previously provided to the defendant by the department.[103] The trial court then provided the defendant with those culled records divided into individually clipped packets corresponding to the department's original folders, and marked and sealed the three other separate sets of original records as court exhibits in order to facilitate appellate review.[104] The trial court emphasized that it had been "as lenient as [it] could," given that the defendant was facing the death penalty, in order to ensure that the defendant "has the full benefit of whatever he is entitled to."[105] As noted in part I B of this opinion, Selig reviewed the disclosed portion of the department's records, which were subsequently admitted into evidence during his testimony at the penalty phase hearing as defense exhibit R.[106]

B

Governing Law

We begin by noting that it is undisputed that the issue of whether the trial court properly employed an in camera review procedure, rather than simply ordered disclosure of the department's file in its entirety to the defendant, is a question of law subject to plenary review on appeal. See, e.g., *State* v. *Kemah*, 289 Conn. 411, 421–22, 957 A.2d 852 (2008). Although the question of whether in camera review procedures are applicable when a defendant facing the death penalty seeks access to statutorily privileged records for purposes of establishing a mitigation case is one of first impression for this court, there is a large body of case law from other jurisdictions explaining the relationship of that procedure to a defendant's federal and state due process rights.

1

Constitutional Bases for In Camera Review

We begin with the leading federal case on the issue, *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, wherein the United States Supreme Court concluded that a defendant charged with sexually assaulting his daughter did not have the right to examine directly the full contents of the daughter's file, which was held by Pennsylvania's child protection agency, in order to facilitate his cross-examination of her at trial. Concluding that the court's case law under the due process clause of the fourteenth amendment "establish[es] a clear framework for review,"[107] the court cited, inter alia, *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and noted that it is "well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment."[108] *Pennsylvania* v. *Ritchie*, supra, 56–57. The court concluded, however, that the defendant was not entitled to unrestricted or unqualified access to the agency's files on remand to look for material information, because a "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through [Pennsylvania's] files. . . . Although the eye of an advocate may be helpful to a defendant in ferreting out information . . . this [c]ourt has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information." (Citations omitted.) Id., 59.

Rather, the court concluded that the parties' mutual "interest . . . in ensuring a fair trial can be protected fully by requiring that the [agency] files be submitted only to the trial court for in camera review. Although this rule denies [the defendant] the benefits of an 'advocate's eye,' we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file . . . he is free to request

it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." Id., 60; see also id. (noting that allowance of "full disclosure to defense counsel in this type of case would sacrifice unnecessarily [Pennsylvania's] compelling interest in protecting its child abuse information" with respect to promoting detection, treatment and prosecution of cases).

As both parties in the present case point out, our state has long had a well established procedure that accords with the federal due process clause as interpreted by the United States Supreme Court in *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, providing for in camera review of confidential or privileged records that a party seeks for the purpose of facilitating cross-examination. See also footnote 109 of this opinion. This procedure was first adopted on confrontation clause grounds in *State* v. *Esposito*, supra, 192 Conn. 178–80, a case that predates *Ritchie*, wherein we considered a sexual assault defendant's attempt to access for cross-examination and impeachment purposes the complainant's mental health records, the confidentiality of which are protected by General Statutes § 52-146e.[109] We subsequently expanded the application of the procedure in *Esposito* to a host of other statutorily privileged records, including those of the department subject to § 17a-28. See, e.g., *State* v. *David N.J.*, 301 Conn. 122, 137–39, 19 A.3d 646 (2011) (department records); *State* v. *George J.*, 280 Conn. 551, 599–600, 910 A.2d 931 (2006) (school records protected by General Statutes § 10-15b), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007); *State* v. *Betances*, 265 Conn. 493, 506–507, 828 A.2d 1248 (2003) (police personnel records protected by General Statutes § 1-210 [b] [2]); see also *State* v. *Kulmac*, supra, 230 Conn. 57 (seminal case concluding that "defendant's right to confrontation . . . prevents . . . confidentiality [under § 17a-28] from being unconditional").

Finally, we have expressly rejected claims that the state constitution provides greater protection than does the federal constitution and requires that defendants receive direct access to privileged files for purposes of facilitating cross-examination. In *State* v. *Harris*, 227 Conn. 751, 631 A.2d 309 (1993), after following *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, and rejecting a defendant's claim that, pursuant to the sixth amendment confrontation clause, he was entitled to direct access to a correctional officer's statutorily privileged personnel file; see *State* v. *Harris*, supra, 763–64; we further concluded that the confrontation rights afforded by article first, § 8, of the Connecticut constitution did not entitle a defendant to direct access to the statutorily

privileged files because, "[a]lthough a criminal defendant has a constitutional right to confront and cross-examine his or her accusers, this right is not absolute. . . . We have recognized that the trial court must weigh the defendant's need to examine confidential matter for the purpose of discovering impeaching material against the public policy in favor of the confidentiality of private and personal information." (Citation omitted; internal quotation marks omitted.) Id., 766. Rather, we concluded that the state constitution does not "[require] that confidential records be given directly to the defendant's counsel rather than to the trial court for in camera review. We are not convinced that the trial court is unable to detect those materials in confidential records that must be disclosed in order to afford a defendant his state due process and confrontation rights." Id., 768; see also, e.g., *State* v. *Colon*, supra, 272 Conn. 266 (rejecting request to overrule *Harris* with respect to investigative files held by chief state's attorney); *State* v. *Pratt*, 235 Conn. 595, 608–12, 669 A.2d 562 (1995) (rejecting request to overrule *Harris* with respect to witness' juvenile court psychiatric and psychological records).

2

In Camera Review as Applied in Death Penalty Cases under the Due Process Clause

As the state notes in its brief, our case law providing for pretrial in camera review of statutorily privileged records for the facilitation of cross-examination at trial is not entirely consistent with respect to whether the source of such review is rooted in the confrontation clause or more generalized due process right to a fair trial.[110] We need not, however, resolve this inconsistency in the present case because it does not present any confrontation clause concerns.[111] Rather, we note that, as a matter of federal constitutional law, the in camera review process has its origins in the federal due process clause; see *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 56–60; which we acknowledged in *State* v. *Colon*, supra, 272 Conn. 264–66, another death penalty case. In *Colon*, as in *Ritchie*, we employed the due process materiality standard set forth in *Brady* v. *Maryland*, supra, 373 U.S. 87, and engaged in a partial in camera review of material from files from the office of the chief state's attorney pertaining to its corruption investigation of police officer witnesses to determine whether that material was relevant for impeachment purposes. *State* v. *Colon*, supra, 267–69. Thus, the applicable constitutional protection is the defendant's fourteenth amendment due process right to a fair trial that effectuates his right under the eighth amendment to have the jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604, 98 S.

Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion); see *Skipper* v. *South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (describing *Lockett* as "well established" and noting "corollary rule" that "sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" [internal quotation marks omitted]); *Gardner* v. *Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (plurality opinion) (defendant denied due process of law when death sentence was imposed on basis of presentence report, confidential portions of which were not disclosed to counsel); *State* v. *Colon*, supra, 313 and n.121 (The court rejected the defendant's claim of a federal due process right to present unsworn allocution in support of mitigation and noted that "the ability of a capital defendant to make a statement to the sentencing jury that is free from cross-examination by the state far exceeds the scope of the mitigating evidence contemplated by the decision in *Lockett*. Thus, inasmuch as a capital defendant may offer any mitigating evidence during the capital sentencing hearing, it is not a violation of the eighth amendment to deny the defendant the opportunity to make an allocution to his capital sentencing jury."); *State* v. *Breton*, 264 Conn. 327, 357, 824 A.2d 778 (rejecting claim that eighth amendment and *Lockett* require application of "a less deferential standard of review to the denial of a request for a continuance to introduce additional mitigating evidence in a death penalty case than we apply to other evidentiary claims, including evidentiary claims of constitutional magnitude"), cert. denied, 540 U.S. 1055, 124 S. Ct. 819, 157 L. Ed. 2d 708 (2003); cf. *Rizzo I*, supra, 266 Conn. 227, 233–34 (describing "heightened reliability" required by eighth amendment in concluding that "the highest burden of persuasion should be imposed on the jury's weighing process," namely, proof beyond reasonable doubt).

A body of case law from the Supreme Court of Georgia is further instructive on this point. In *Burgess* v. *State*, 264 Ga. 777, 787, 450 S.E.2d 680 (1994), cert. denied, 515 U.S. 1133, 115 S. Ct. 2559, 132 L. Ed. 2d 813 (1995), a defendant facing the death penalty "subpoenaed all of [his county child welfare agency] records so as to determine whether there was evidence in mitigation of the sentence to be imposed." Because the agency's file was statutorily privileged, "the trial court conducted an in camera inspection of the entire . . . file . . . and provided only a portion of the records to [the defendant]. The remainder of the records were sealed for review by [the Georgia Supreme Court]." Id. In rejecting the defendant's claim that the trial court improperly "fail[ed] to provide him direct access to the entirety of the [agency] file"; id.; the court cited its decision in *Stripling* v. *State*, 261 Ga. 1, 6, 401 S.E.2d 500, cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991), wherein it had upheld a trial court's

decision to deny a capital defendant's request for pretrial in camera review of the parole files of his father and brother because, "in the absence of a reasonably specific request for relevant and competent information, the trial court may decline to conduct an in-camera inspection of parole files of persons other than the defendant."[112] See *Burgess* v. *State*, supra, 787 (concluding that "trial court properly conducted an in camera inspection of the file rather than providing it, in its entirety, directly to [the defendant]"). Performing its own appellate in camera review, the court then found that a "review of the sealed records which were not provided directly to [the defendant] shows the existence of certain information which might be characterized as potentially mitigating and which, therefore, should have been provided to him." Id., citing *Lockett* v. *Ohio*, supra, 438 U.S. 604. The Supreme Court of Georgia declined, however, to reverse the defendant's death sentence on this ground, concluding that the improperly undisclosed "information relates only to facts regarding [the defendant's] own personal childhood experiences and not to such matters as might otherwise be unknown to him," and emphasizing that the expert witnesses who testified on "[the defendant's] behalf were given access to the entirety of the [agency's] file. Even if [the defendant] had been given direct access to the information contained in the sealed records, he suggest[ed] no use to which the information might have been put other than as a basis for his experts' testimony for the defense. Under these circumstances, any error in failing to allow [the defendant] himself to serve as the mere personal conduit for providing potentially mitigating evidence to his experts was harmless at most."[113] *Burgess* v. *State*, supra, 787.

Similarly, in *Keen* v. *Hancock County Job & Family Services*, 581 F. Sup. 2d 893, 894–95 (N.D. Ohio 2008), the plaintiff challenged his Tennessee state court death sentence in a federal habeas corpus action filed in that state. In connection with that habeas petition, which had alleged ineffective assistance of counsel with respect to establishing his mitigation case, the plaintiff brought a civil action in Ohio federal court to enforce his subpoena of statutorily privileged records relating to his family, held by a county child welfare agency that he believed "may contain information about mitigating factors from his childhood." Id., 894. The Ohio federal District Court ordered the agency "to produce records covered by the subpoena under seal for in camera inspection." Id., 894–95. Balancing the plaintiff's "interest in securing a full and fair federal review of the constitutionality of his death sentence with Ohio's interest in familial privacy," the court relied on *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, and rejected the plaintiff's request that the records be released directly to him. *Keen* v. *Hancock County Job & Family Services*, supra, 895. Rather, the court concluded that the plaintiff

was entitled to in camera review of the records on the basis of his claims "that the records contain evidence on his childhood development, such as being diagnosed with fetal alcohol syndrome. If so, as might be shown by records of alcoholism on the part of [the plaintiff's] mother, even in the absence of any records directly relating to him, such records may contain some pertinent material favorable to a plea in mitigation." Id., 896. Thus, the court ordered the agency to "produce all records responsive to the subpoena for in camera inspection to determine, first, whether there are any records of the circumstances of his childhood that might bear on mitigation at a capital sentencing proceeding. If so, [the court] will then determine whether the confidentiality considerations underlying [the Ohio statute] outweigh the reasons for releasing the records to his habeas counsel." Id. We conclude that this body of case law makes clear that in camera review is sufficient to protect a death penalty defendant's right to use statutorily privileged records to establish his case in mitigation.

3

The Import of the ABA Guidelines to In Camera Review of Privileged Records

We next turn to the standards that should guide a trial court performing an in camera review of statutorily privileged records that a death penalty defendant seeks for purposes of establishing a case in mitigation. As the defendant points out, the United States Supreme Court has made clear the relevance of a defendant's troubled or violent family background as a mitigating factor that is of particular importance with a younger defendant, such as the defendant in the present case. See, e.g., *Wiggins* v. *Smith*, supra, 539 U.S. 524; *Eddings* v. *Oklahoma*, 455 U.S. 104, 115–16, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); see also *Foust* v. *Houk*, 655 F.3d 524, 535 (6th Cir. 2011) ("There is no question that a reasonable attorney would believe records of [the petitioner's] childhood to be relevant to a defense about the conditions of [the petitioner's] childhood. This conclusion is amplified by the relative recency of [the petitioner's] childhood, given that [he] was only twenty-four when he committed the crimes."). Consistent with the observation of the defendant in the present case that the "constitutional relevance of domestic violence is so clear that counsel in a capital case is ineffective if he fails to investigate his client's background, character and history to discover such family violence and abuse,"[114] the ABA Guidelines, which the United States Supreme Court long has regarded as " 'guides to determining what is reasonable in the defense' " of capital cases; *Wiggins* v. *Smith*, supra, 524, quoting *Strickland* v. *Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); direct counsel to "consider . . . [e]xpert and lay witnesses along with supporting

documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s) . . . or otherwise support a sentence less than death . . . ." A.B.A. Guidelines, supra, guideline 10.11 (F) (2), p. 104. Further, the commentary to guideline 10.11 (F) notes that "an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning," meaning that "construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception and to the present." Id., guideline 10.11, commentary, p. 108.

Indeed, the more recent "Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases" (Supplementary Guidelines), reprinted in 36 Hofstra L. Rev. 677 (2008), which were promulgated in 2008, particularly supplementary guideline 10.11 (F), provides specifically that defense team members have "the duty . . . to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and *social service records*, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death." (Emphasis added.) Id., 692. The inquiry is not confined to the defendant and his experiences, as it "has long been recognized that a competent mitigation investigation has to include the family history *going back at least three generations*, and must document genetic history, patterns, and effects of familial medical conditions." (Emphasis added.) S. O'Brien, "When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases," 36 Hofstra L. Rev. 693, 725 (2008). The breadth of the corollary records search adequate to facilitate this investigation was reflected in the process of the promulgation of the Supplementary Guidelines, where "[e]very mitigation specialist and capital defense lawyer contributing . . . stressed the importance of collecting *every document generated about the client and members of the client's family. The building blocks of a competent social history investigation are the collection of life history records and interviews of all signifi-*

cant persons in the defendant's life. As one respected mitigation specialist explained: A central feature of a competent social history is an exhaustive review of records and documents that trace the client's life and shed light on his level of functioning across time. Historical information can reveal patterns of impairments and other factors that contributed to the circumstances of the offense. *Necessary social history records include those regarding the client, his immediate family and relevant extended family members*." (Emphasis added; internal quotation marks omitted.) Id., 728.

That capital defense counsel conceivably could be constitutionally ineffective for failing to investigate the sources of family and social history in the depth described by the ABA Guidelines and Supplementary Guidelines, a fortiori, suggests that relevance of that information to the mitigation inquiry. Nothing in the ABA Guidelines or the Supplementary Guidelines, however, stands for the proposition that a defendant has a right to unfettered access to any and all privileged records that concern members of his or her family. Rather, those guidelines must be understood within the greater context of the protections afforded by the due process clause to all other aspects of the capital sentencing process, and guideline 10.11 (D) of the Supplementary Guidelines expressly acknowledge that the "manner in which information is provided to counsel is determined on a case by case basis . . . considering jurisdictional practices, discovery rules and policies." Supplementary Guidelines, supra, 36 Hofstra L. Rev. 690; see also id., guideline 4.1 (D), 680–81 (noting defense counsel's obligation to "provide mitigation specialists with knowledge of the law affecting their work, including . . . rules affecting confidentiality, disclosure, privileges and protections"). Thus, we disagree with the defendant's contention that the ABA Guidelines, which in any event are "guides" that lack the independent force of law,[115] dictate that capital defendants should receive unfettered access to the department's files. We conclude, instead, that the investigative standards of the ABA Guidelines and the Supplementary Guidelines serve as significant substantive guideposts for determining the extent to which the trial court should disclose the department's records when performing the in camera review process that is required by the due process clause.[116]

Thus, we conclude that, under the fourteenth amendment due process clause, when a defendant in a death penalty prosecution seeks privileged material for purposes of establishing his case in mitigation, the defendant first must establish a reasonable ground to believe that the privileged material contains information material to his case in mitigation. If the defendant makes this threshold showing, then the trial court is required to conduct an in camera review of the privileged material, produced under seal, to determine whether it, in fact,

contains such information. After the in camera review, the trial court must turn over to the defendant or his counsel any records that are material to his case in mitigation. If, in the opinion of the trial court, the in camera review does not disclose relevant material, then that court must reseal the record or the undisclosed portions thereof for inspection on appellate review.

4

Appellate Review of the Trial Court's In Camera Determination

Given the due process origins of the in camera review procedure under *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39, as well as the breadth of the scope of the mitigation inquiry in the death penalty context; see, e.g., *Lockett* v. *Ohio*, supra, 438 U.S. 604; we agree with the state that we should engage in plenary review of the trial court's materiality determination under *Brady* v. *Maryland*, supra, 373 U.S. 83, rather than utilizing the abuse of discretion standard that we typically apply to a trial court's in camera assessment of potential impeachment material. See, e.g., *State* v. *David N.J.*, supra, 301 Conn. 138; *State* v. *Peeler*, 271 Conn. 338, 380–81, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). This is particularly so given that *Brady* itself arose in the death penalty sentencing context, and the United States Supreme Court held therein that the state's failure to disclose an accomplice's confession that could have affected the jury's sentencing determination deprived the defendant of due process. See *Brady* v. *Maryland*, supra, 86–88; see also, e.g., *Commonwealth* v. *Morales*, 549 Pa. 400, 412–13, 701 A.2d 516 (1997) (*Brady* requires disclosure of statutory mitigation evidence that defendant "was under extreme mental or emotional disturbance at the time of the offense . . . or was substantially impaired from appreciating the criminality of his conduct . . . or, which reflected on his character and record . . . would qualify as evidence under *Brady* which would mitigate [the defendant's] sentence of death" [citations omitted]).

Thus, we note that, in "*Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . In *Strickler* v. *Greene*, 527 U.S. 263, [281–82] 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court identified the three essential components of a *Brady* claim, all of which must be established to warrant a new trial: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either [willfully] or inadvertently; and prejudice must have ensued. . . . Under the last

Brady prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006).

Moreover, with "respect to *Brady*'s third prong, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. . . . The United States Supreme Court also emphasized that the [relevant test under *United States* v. *Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)] is not a sufficiency of the evidence test. . . . A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. . . . Accordingly, the focus is not whether, based upon a threshold standard, the result of the trial would have been different if the evidence had been admitted. We instead concentrate on the overall fairness of the trial and whether nondisclosure of the evidence was so unfair as to undermine our confidence in the jury's verdict." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 280 Conn. 717–18.

Finally, "a trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error. . . . Because the trial judge had the opportunity, however, to observe firsthand the proceedings at trial . . . we find persuasive the Second Circuit Court of Appeal's approach of engaging in independent review, yet giving great weight to the trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial . . . ." (Citations omitted; internal quotation marks omitted.) Id., 720–22.

Utilizing the ABA Guidelines and Supplementary Guidelines as our guideposts for determining the materiality of the records contained in the file, we have performed an independent in camera review of the department's records.[117] Comparing our review with defense trial exhibit R as disclosed to the defendant and reprinted in the appendices to his brief, we conclude that the trial court improperly[118] failed to disclose

numerous entries and records that, if made available to the defendant, his counsel and supporting experts during their mitigation investigation, could well have shed additional light on the significant dysfunction and violence that systemically plagued the defendant's entire family.[119] Cf. *Burgess* v. *State*, supra, 264 Ga. 787 (nondisclosure of child welfare agency file was harmless error because defendant's expert witnesses had independent access to entire file for use in formulating their evaluation and testimony). For example, we found that the records included: (1) multiple sexual molestations and attempted molestations of G by male friends of Christina; (2) indications of sexual improprieties between the siblings as recently as 1992; (3) a letter from D expressing her anxieties about her parentage and biological father; (4) evidence of police and school reports of beatings of G and D by Christina and Hagarty during the 1980s and early 1990s; (5) reports of neglectful behavior toward the defendant's brothers, S and C, such as their wandering away from home unsupervised on the streets of Winchester at the ages of two and one-half, and six years old, respectively; and (6) Christina's throwing a knife at S when he was nine years old. We cannot state that, had these facts, and others in the nondisclosed department records, been properly presented to the jury as part of a comprehensive family history, they would not have swayed the case in mitigation by painting an even more harrowing picture of the defendant's family life, especially in light of the failure of anyone from the defendant's immediate family to testify on his behalf at the penalty hearing.[120] At the very least, they may well have provided the defendant's counsel and expert witnesses with additional leads to pursue in developing his mitigation case. This is particularly so given that the jury's lengthy deliberations, over five days with reports of deadlock, indicate that the jury found this to be a very close case as to the appropriate sentence. See, e.g., *State* v. *David N.J.*, supra, 301 Conn. 154; *State* v. *Tomas D.*, 296 Conn. 476, 517, 995 A.2d 583 (2010). Inasmuch as the effect of the nondisclosure of these records has undermined our confidence in the jury's verdict, we conclude that a new penalty phase trial is required,[121] to be conducted following a new in camera review of the department's records in accordance with the broader standards of materiality described herein.

VIII

WAS THE JURY'S SENTENCING VERDICT ARBITRARY, NOT SUPPORTED BY SUFFICIENT EVIDENCE OR OTHERWISE A PRODUCT OF "PASSION, PREJUDICE OR OTHER ARBITRARY FACTOR?"

Although our conclusion in part VII of this opinion requires that the defendant receive a new penalty phase hearing, we nevertheless address the defendant's claims

seeking review of the factual basis for his death sentence under § 53a-46b (b)[122] because "a finding that the evidence was insufficient to impose a sentence of death would preclude the imposition of the death penalty on retrial." *State* v. *Courchesne*, supra, 296 Conn. 777 n.102. The defendant contends that we should vacate the sentence of death and direct judgment imposing a life sentence because: (1) there was insufficient evidence of the pecuniary gain aggravating factor; (2) the jury could not reasonably have found that the sole aggravating factor that was proven by the state, namely, that the murder was committed for pecuniary gain, outweighed the mitigating factors that the defendant proved, such as his efforts to be a good citizen and family member despite a history of horrific childhood abuse; and (3) the death sentence was arbitrary as shown by the fact that Pascual and Tyrell, who were equally culpable in this case, were not sentenced to death. In response, the state contends that: (1) it established the pecuniary gain aggravating factor with sufficient evidence; (2) the jury reasonably could have determined that the aggravating factor outweighed the mitigating factors; and (3) the sentences received by Pascual and Tyrell are not an apt basis for comparison because they were the consequence of plea bargaining, which is a constitutionally distinct procedure. Noting at the outset that it is undisputed that the defendant's posttrial motions; see footnote 53 of this opinion; preserved these factual claims for appellate review, we agree with the state and conclude that the jury's sentencing verdict was supported by sufficient evidence and was not unreasonable in its weighing of aggravating and mitigating factors.

A

Was There Sufficient Evidence to Support Proof of the Sole Aggravating Factor?

We begin with the defendant's claim that the state did not introduce sufficient evidence to support the aggravating factor set forth by § 53a-46a (i) (6), namely, that the murder was committed for pecuniary gain. "In reviewing a claim that the evidence fail[ed] to support the finding of an aggravating factor specified in § 53a-46a (i)] . . . we subject that finding to the same independent and scrupulous examination of the entire record that we employ in our review of constitutional fact-finding, such as the voluntariness of a confession . . . or the seizure of a defendant. . . . In such circumstances, we are required to determine whether the factual findings are supported by substantial evidence. . . .

"Even with the heightened appellate scrutiny appropriate for a death penalty case, the defendant's challenge to the sufficiency of the evidence of aggravating circumstances must be reviewed, in the final analysis, [first] by considering the evidence presented at the

defendant's penalty [phase] hearing in the light most favorable to sustaining the facts impliedly found by the jury. . . . Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established [the existence of the aggravating factor] beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"Furthermore, [i]n viewing evidence [that] could yield contrary inferences, the jury is not barred from drawing those inferences consistent with [the existence of the aggravating factor] and is not required to draw only those inferences consistent with [its nonexistence]. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"[Finally], [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts [that] establishes [the existence of an aggravating factor] in a case involving substantial circumstantial evidence. . . . Indeed, direct evidence of the defendant's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 777–78.

We disagree with the defendant's argument that Pascual's "uncorroborated story" during the guilt phase—which the state moved to incorporate as evidence to support its case in aggravation during the penalty phase, namely, that Pascual and the defendant agreed to kill the victim in exchange for the snowmobile—was insufficient evidence to establish the existence of the pecuniary gain aggravating factor under § 53a-46a (i) (6). Inasmuch as Pascual's testimony during the guilt phase constitutes record evidence that supports the jury's finding of the aggravating factor, the true crux of the defendant's claim on this point is his argument that "this aggravating factor merely repeats an element of the capital offense that the jury found at the guilt phase without consideration of a death sentence." This merely restates as a factual matter the state constitutional claim that we address and reject in part IX of this opinion, and we decline to address it further here.

B

Could the Jury Reasonably Have Found That the Sole Aggravating Factor Outweighed the Defendant's Mitigating Evidence?

We next turn to the defendant's claim that the jury could not reasonably have found that the ample evidence he proffered in mitigation was outweighed by the "weak" aggravating factor proven by the state. As in *State* v. *Courchesne*, supra, 296 Conn. 783–84, and our more recent decision in *Rizzo II*, supra, 303 Conn. 178, we again need not reach the state's argument that, "under *Rizzo* [*I*], the weighing process in which the jury engages is effectively unreviewable,"[123] because "we conclude that, in the present case, the jury reasonably could have found beyond a reasonable doubt that the aggravating factor that the state had proven outweighed the mitigating factors alleged by the defendant." *State* v. *Courchesne*, supra, 784. In making that determination, we again follow "the same standard that we generally use in evaluating claims of evidentiary insufficiency, namely, whether the trier of fact reasonably could have concluded that the aggravating factor or factors proven by the state outweighed any claimed mitigating factor or factors." Id., 784 n.104. Finally, as in *Courchesne*, "the jury concluded that the defendant had proved by a preponderance of the evidence the existence of one or more mitigating factors, but it did not specify which factor or factors the defendant had proven. We conclude that, even if the jury had credited all of the mitigating factors advanced by the defendant, they were not so compelling that the jury was required to find that one or more of those mitigating factors outweighed the [fact that he murdered the victim for pecuniary gain]." Id., 785.

Specifically, we note the chilling quality of the evidence supporting the jury's finding of the single aggravating factor, namely, that the defendant had murdered the victim for pecuniary gain, as described in part I A of this opinion, including the negotiation of the price for the murder, the defendant's extensive planning and preparation leading up to the murder, including his casing the victim's home, his creation and testing of a homemade silencer, his recruitment of Tyrell as an accomplice, his carving of the victim's name into the bullets, the theft of money and watches from the victim's apartment and garage, and finally, the defendant's insistence after the murder that Pascual repair and deliver the snowmobile because it had snowed in Connecticut. Cf. *Rizzo II*, supra, 303 Conn. 178–80 (noting premeditation and luring of victim in holding that jury reasonably could have determined that "cruel, heinous or depraved manner" of murder under § 53a-46a [i] [4] outweighed single cumulative mitigating factor based on defendant's age, troubled childhood and positive character traits); *State* v. *Courchesne*, supra, 296 Conn. 782–83, 785–86 (same with respect to numerous mitigating factors, including drug dependency, empathy and positive work history). Thus, the jury reasonably could have found beyond a reasonable doubt, in its reasoned moral judgment, that the sole aggravating factor that the

state had proven outweighed the numerous mitigating factors alleged and proven by the defendant that are described in part I B of this opinion, including his history of having endured child abuse and neglect, substance abuse, diagnosis with dysthymic disorder, family mental illness, good citizenship through productive employment, compassion for Hagarty's mother, and assisting the Winsted police during his teen years.

Moreover, as the state argued to the jury during the penalty phase hearing, the relative culpability of Pascual and Tyrell, who received life sentences, is not an apt basis for comparison for purposes of strengthening the defendant's mitigation case because their sentences were the product of the procedurally distinct plea bargaining process, and the jury lacked information regarding their life backgrounds that would inform a reasoned comparative determination. See, e.g., *People* v. *Caballero*, 179 Ill. 2d 205, 217–18, 688 N.E.2d 658 (1997) (In a capital case, the court held that "[a] sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial. . . . Further, dispositional concessions are properly granted to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would thereby be served." [Citation omitted.]). Given the evidence that supports the various components of the jury's inquiry and the level of certitude required during the weighing process, we cannot, having engaged in the sentence review process required by § 53a-46b (b), conclude that the jury's ultimate conclusion was unreasonable, or that the sentence was the product of passion, prejudice or other arbitrary factor.[124]

IX

DOES THE FACT THAT THE SOLE AGGRAVATING FACTOR FOUND BY THE JURY IS IDENTICAL TO AN ELEMENT OF THE UNDERLYING CAPITAL CRIME VIOLATE THE CONNECTICUT CONSTITUTION?

Because it is likely to arise on remand and guidance may be helpful to both the trial court and the parties; see, e.g., *State* v. *Gonzalez*, 302 Conn. 287, 312, 25 A.3d 648 (2011); we next address the defendant's claim that it violates article first, §§ 8, 9, 10 and 20, of the Connecticut constitution[125] for the sole aggravating factor found by the jury in the present case, namely, murder committed for pecuniary gain, to duplicate an element of the underlying crime of capital felony by murder for hire. Acknowledging that this claim is precluded as a matter of federal constitutional law by *Lowenfield* v. *Phelps*, supra, 484 U.S. 231, the defendant nevertheless contends that the state constitution provides greater protection than does the federal constitution by mandating an additional stage of narrowing the defendant's eligibility for the death sentence at both the guilt and penalty

phases. In response, the state argues that: (1) we should decline to review this claim because the defendant has failed to provide an adequate independent state constitutional analysis under *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992); and (2) the sister state decisions cited by the defendant are unpersuasive because they involve capital murder statutes and death penalty procedural schemes that are more broadly worded than §§ 53a-54b and 53a-46a, and none actually hold that their state constitutions provide greater protections than does the federal constitution. Reaching the merits of the defendant's state constitutional claims,[126] we follow *Lowenfield* and conclude that it does not offend the Connecticut constitution for the sole aggravating factor to be identical to an element of the underlying capital felony of murder for hire under § 53a-54b (2).

"[I]t is settled constitutional doctrine that, independently of federal constitutional requirements, our due process clauses, because they prohibit cruel and unusual punishment, impose constitutional limits on the imposition of the death penalty. . . . Specifically, our due process clauses require, as a constitutional minimum, that a death penalty statute . . . must channel the discretion of the sentencing judge or jury so as to assure that the death penalty is being imposed consistently and reliably . . . .

"It further is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . In some instances, we have found greater protections for citizens of Connecticut in our own constitution than those provided by the federal constitution, and we have acknowledged that [o]ur state constitutional inquiry may proceed independently from the decisions of the United States Supreme Court upholding the constitutionality of the death penalty." (Citations omitted; internal quotation marks omitted.) *Rizzo II*, supra, 303 Conn. 135–36.

The state accurately observes that the defendant does not cite *State* v. *Geisler*, supra, 222 Conn. 672, or outline his state constitutional analysis seeking greater protection using that decision's well known factors, namely, "(1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies." (Internal quotation marks omitted.) *Rizzo II*, supra, 303 Conn. 136. Nevertheless, we reach the merits of his claims because the content of this portion of his brief functionally addresses in detail the subject matter

of most of the factors, which *Geisler* and other cases indicate are appropriate for an independent state constitutional analysis, namely, case law from Connecticut, as well as the federal and sister state courts, along with the relevant public policies that underscore the capital sentencing scheme. Further, it is clear from *Lowenfield* v. *Phelps*, supra, 484 U.S. 231, that the defendant has no choice but to seek greater procedural protection under the state constitution.[127] Cf. *State* v. *Randolph*, 284 Conn. 328, 375 n.12, 933 A.2d 1158 (2007) (describing well established rule that this court deems abandoned state constitutional claims that lack independent briefing and analysis); *State* v. *Nash*, 278 Conn. 620, 623 n.4, 899 A.2d 1 (2006) (declining to reach state constitutional issue because of defendant's failure to "provide an adequate independent legal analysis of the basis of this claim" given that he "has not recognized, nor has he applied the six *Geisler* factors"). Moreover, with respect to the other factors, namely, the constitutional text and history, it is by now well established that those two factors do not support capital defendants seeking greater procedural protections under the state constitution and, accordingly, we need not consider them further in our analysis. See, e.g., *Rizzo II*, supra, 137; *Rizzo I*, supra, 266 Conn. 212–13; *State* v. *Ross*, 230 Conn. 183, 249–50, 646 A.2d 1318 (1994) (*Ross I*), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); see also *State* v. *Webb*, 238 Conn. 389, 406, 680 A.2d 147 (1996) ("[w]e further affirm that a sentence of death must be imposed, if at all, within the constitutional constraints articulated in those opinions and the federal precedents upon which those constraints are based").

Thus, we note that, with respect to Connecticut precedent, the fourth *Geisler* factor, in *Ross I*, supra, 230 Conn. 183, wherein a panel of this court considered for the first time since *Gregg* v. *Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the constitutionality of the death penalty under our state constitution, both facially and procedurally, the court stated that to "say that imposition of the death penalty is not cruel and unusual punishment in all circumstances is not to say, however, that the death penalty can be imposed without any constitutional constraints." *Ross I*, supra, 251. Relying on *State* v. *Lamme*, 216 Conn. 172, 184, 579 A.2d 484 (1990), the court "observed that federal constitutional precedents [may] appropriately illuminate open textured provisions in our own organic document and that reasoned adoption of such precedents in no way compromises our obligation independently to construe the provisions of our state constitution"; *Ross I*, supra, 251–52; and held "that the due process clauses of our state constitution incorporate the principles underlying a constitutionally permissible death penalty statute that the United States Supreme Court has articulated in cases such as *California* v. *Brown*, [479 U.S. 538, 541,

107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)], *Eddings* v. *Oklahoma*, supra, 455 U.S. 110–12, and *Lockett* v. *Ohio*, supra, 438 U.S. 602–605. These principles require, as a constitutional minimum, that a death penalty statute, on the one hand, must channel the discretion of the sentencing judge or jury so as to assure that the death penalty is being imposed consistently and reliably and, on the other hand, must permit the sentencing judge or jury to consider, as a mitigating factor, any aspect of the individual defendant's character or record as well as the circumstances of the particular offense." *Ross I*, supra, 252.

This court has repeatedly followed this basic analysis and rejected state constitutional claims seeking greater procedural protections in capital sentencing than are required under the federal constitution. See *Rizzo II*, supra, 303 Conn. 145 (rejecting claim "that our state constitution requires a more restrictive limiting construction of § 53a-46a [i] [4] that would exclude murderers who, with callousness and indifference, impose upon their victims physical or psychological pain, suffering or torture beyond that necessary to the underlying killing"); *Rizzo I*, supra, 266 Conn. 223–24 ("[O]ur state constitution does not require that the jury, in deciding the balance between the aggravating factors and the mitigating factors, determine that that balance be anything other than is described by the terms, 'greater than,' 'weightier than,' 'more compelling than,' or 'more significant than,' in any degree or amount. The balance constitutionally need not be described as 'substantially more than,' or as 'beyond a reasonable doubt.' "); *Ross I*, supra, 230 Conn. 253–54 (following federal cases and rejecting state constitutional procedural challenges to General Statutes [Rev. to 1983] § 53a-46a because "statute enables a jury, with appropriate instructions, to make this awesome decision in a manner that is appropriately wide-angled and open-textured," and assigning burden of proving mitigation to defendant is consistent with due process given his greater right of access to that information and fact that he already has been convicted of capital felony); see also *State* v. *Colon*, supra, 272 Conn. 327 (no state constitutional right of allocution in death sentencing proceeding); *State* v. *Ross*, 269 Conn. 213, 258, 849 A.2d 648 (2004) (*Ross II*) (no state constitutional right to question venirepersons during jury selection about specific mitigating factors); *State* v. *Webb*, 252 Conn. 128, 147, 750 A.2d 448 ("[b]ecause we conclude that lethal injection is constitutional under the federal constitution, we similarly conclude that the method is constitutional under our state constitution"), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). Accordingly, this *Geisler* factor does not support the defendant's claim.

Thus, we now turn to the first *Geisler* factor, relevant federal case law, namely, the United States Supreme

Court's decision in *Lowenfield* v. *Phelps*, supra, 484 U.S. 231, which the defendant acknowledges forecloses a federal constitutional challenge to the duplication between the elements of the underlying capital felony and the sole aggravating factor. In *Lowenfield*, the petitioner claimed that the "sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime of which he was convicted," and that "this overlap left the jury at the sentencing phase free merely to repeat one of its findings in the guilt phase, and thus not to narrow further in the sentencing phase the class of death-eligible murderers."[128] Id., 241. The Supreme Court rejected this claim as "rest[ing] on a mistaken premise as to the necessary role of aggravating circumstances." Id., 244. This is because, to "pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the [petitioner] compared to others found guilty of murder.' " Id., quoting *Zant* v. *Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

The court went on to conclude that "the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase."[129] *Lowenfield* v. *Phelps*, supra, 484 U.S. 246. The court emphasized that, "[h]ere, the 'narrowing function' was performed by the jury at the guilt phase when it found [the] defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.' The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." Id. Indeed, as the defendant in the present case candidly acknowledges, the holding in *Lowenfield* has been applied to uphold the federal constitutionality of utilizing pecuniary gain as both an aggravating factor and an element of the underlying capital crime. See, e.g., *Marshall* v. *Hendricks*, 307 F.3d 36, 82–83 (3d Cir. 2002), cert. denied, 538 U.S. 911, 123 S. Ct. 1492, 155 L. Ed. 2d 234 (2003); *Grandison* v. *State*, 341 Md. 175, 197–98, 670 A.2d 398 (1995), cert. denied, 519 U.S. 1027, 117 S. Ct. 581, 136 L. Ed. 2d 512 (1996); *State* v. *Marshall*, 123 N.J. 1, 137–38, 586 A.2d 85 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); *State* v. *Austin*, 87 S.W.3d 447, 483–85 (Tenn. 2002), cert. denied, 538 U.S. 1001, 123 S. Ct. 1899,

155 L. Ed. 2d 829 (2003).

With respect to the decisions of our sister states, the fifth *Geisler* factor, the defendant's claim finds no support in that factor, as he has not cited, and our independent research has not revealed, any decision rejecting *Lowenfield* as a matter of state constitutional law. Indeed, the courts of Idaho, Maryland, Mississippi and Ohio have followed *Lowenfield* in addressing duplication claims raised under their state constitutions.[130] See *State* v. *Wood*, 132 Idaho 88, 101–103, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999); *Grandison* v. *State*, supra, 341 Md. 196–98; *Ballenger* v. *State*, 667 So. 2d 1242, 1260–61 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996); *State* v. *Henderson*, 39 Ohio St. 3d 24, 28–29, 528 N.E.2d 1237 (1988), cert. denied, 489 U.S. 1072, 109 S. Ct. 1357, 103 L. Ed. 2d 824 (1989); cf. *Jackson* v. *State*, 330 Ark. 126, 133, 954 S.W.2d 894 (1997) (considering claim under eighth amendment and declining defendant's request to follow *Collins* v. *Lockhart*, 754 F.2d 258 [8th Cir. 1985], which *Lowenfield* had rendered no longer good law).

Moreover, the cases that the defendant cites from North Carolina, Tennessee and Wyoming, as well as a later case on point from Nevada, are inapposite, because none expressly rejects the underlying reasoning of *Lowenfield* as a matter of state constitutional law, and all concern the distinct question of whether it is permissible to use the underlying felony as the sole aggravating factor when felony murder is the capital offense under broadly worded first degree murder statutes. See *McConnell* v. *State*, 120 Nev. 1043, 1069, 102 P.3d 606 (2004); *State* v. *Cherry*, 298 N.C. 86, 112–13, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980); *State* v. *Middlebrooks*, 840 S.W.2d 317, 346–47 (Tenn. 1992), cert. dismissed, 510 U.S. 124, 114 S. Ct. 651, 126 L. Ed. 2d 555 (1993); *Engberg* v. *Meyer*, 820 P.2d 70, 90–91 (Wyo. 1991). Indeed, in *Engberg* and *Middlebrooks*, the Wyoming and Tennessee courts distinguished the treatment in *Lowenfield* of the Louisiana multi-level homicide and death penalty statutory scheme, as providing the required narrowing as a definitional matter in the guilt phase, from both of those states' broadly worded first degree murder statutes rendering felony murder a capital offense without any further narrowing at that stage.[131] See *State* v. *Middlebrooks*, supra, 346 ("It is clear that Tennessee has a broad definition of murder and has not narrowed in the definitional stage. Accordingly, *Lowenfield* is inapposite and provides no rationale for constitutionality under the Tennessee [c]onstitution."); id., 346–47 (noting that "felony murder continues to be a death-eligible offense," but finding of different aggravating circumstance is "necessary to support death as a penalty for that crime");[132] *Engberg* v. *Meyer*, supra, 90–91 (distinguishing *Lowenfield* because

Wyoming statutes do not provide for narrowing at guilt stage and "[w]hen an element of felony murder is itself listed as an aggravating circumstance, the requirement . . . that at least one 'aggravating circumstance' be found for a death sentence becomes meaningless");[133] see also *McConnell* v. *State*, supra, 1069 ("although the felony aggravator . . . can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers"). Thus, we agree with the state that this body of sister state case law is inapposite and that this *Geisler* factor does not support the defendant's claim.[134]

Finally, as to the sixth *Geisler* factor, public policy considerations, the defendant does not advance any arguments beyond positing that " 'too much' narrowing" is not unconstitutional, and that there is a need to "distinguish those hired murderers who deserve the death penalty from those who do not." The statutory scheme, however, provides hired murderers with the means to prove that they do not deserve the death penalty through the mitigation process. Furthermore, mandating additional narrowing with respect to this aggravating factor would run counter to the expressed public policy of the state, given that "the legislature considered murder for hire to be the single most heinous capital offense," which "is consistent with [its] decision to make murder for hire both a capital felony and an aggravating factor so that, in combination with any other capital felony or aggravating factor, commission of that offense would subject the defendant to the possibility of receiving the death penalty." *State* v. *Sostre*, supra, 261 Conn. 133. Inasmuch as none of the *Geisler* factors support the defendant's claim in this case, we conclude that it does not violate the Connecticut constitution for the pecuniary gain mitigating factor of § 53a-46a (i) (6) to duplicate an element of capital felony by murder for hire under § 53a-54b (2).

X

PENALTY PHASE INSTRUCTIONAL CLAIMS

Because they, too, are likely to arise on remand, we next consider the defendant's plethora of concededly unpreserved challenges[135] to the trial court's instructions to the jury during the penalty phase hearing. Specifically, the defendant claims that the trial court improperly instructed the jury: (1) using an inadequately defined pecuniary gain aggravating factor under § 53a-46a (i) (6); (2) that premeditation was not required, and the defendant, therefore, did not have to intend to kill the victim at the time he entered into the agreement with Pascual; (3) that the defendant bore the burden of proving, as a mitigating factor, "lingering doubt" about whether he had actually shot the victim; (4) that the jury was not required to consider the cumulative effect of all the mitigating evidence; (5) that the

jury was to consider only "unique" mitigating factors; (6) when that court failed, sua sponte, to instruct on the statutory mitigating factor of "minor involvement" under § 53a-46a (h) (3); and (7) when that court charged the jury during the guilt phase not to permit the issue of the defendant's penalty to influence its decision, given that the pecuniary gain aggravating factor duplicated an element of the underlying crime of capital felony.

Before turning to each of the defendant's specific instructional claims, we note the well established standard by which we engage in plenary review of claims of instructional impropriety, which we explained in detail in part VI of this opinion. See, e.g., *State* v. *Flores*, supra, 301 Conn. 93; *State* v. *Collins*, supra, 299 Conn. 599.

A

Did the Trial Court Define the Pecuniary Gain Aggravating Factor Adequately?

The defendant first claims that the trial court improperly defined the pecuniary gain aggravating factor for the jury by reading to them only the plain language of § 53a-46a (i) (6), without the gloss articulated in *State* v. *Sostre*, supra, 261 Conn. 111, which limited this aggravating factor to murders for hire and excluded other murders committed for profit motives, such as robberies or a burglary effectuated in order to commit larceny. The defendant contends that this omission left the jury free to believe that the aggravating factor was satisfied merely by stealing from the victim, or committing the murder with only a unilateral expectation of payment, thus relieving the state of its burden of proving the aggravating factor beyond a reasonable doubt. In response, the state contends, inter alia, that the trial court's instructions properly conveyed the hiring and contract requirements of this aggravating factor by explaining its element of "consideration." We conclude that the trial court's instructions did not mislead the jury, although we recommend that it include the hiring gloss from *Sostre* in its charge on remand.

The record reveals the following additional relevant facts and procedural history. The trial court instructed the jury: "In this case, one aggravant is claimed. The state . . . has claimed one aggravating factor as follows: that the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value. The words 'in expectation of the receipt' are used in their ordinary, everyday sense. 'Anything of pecuniary value' means anything in the form of money, property, or anything else having economic value, benefit, or advantage.

"The word 'consideration' as used in the phrase 'as consideration for the receipt' means the inducements to a contract, the cause, motive, price, or impelling

influence which induces a contracting party to enter into a contract." After explaining the concept of reasonable doubt, the trial court stated that "the aggravating factor that the state claims to be applicable in this case requires the state to prove beyond a reasonable doubt that the defendant committed the offense as consider-[ation] for the receipt of or in expectation of the receipt of anything of pecuniary value," instructed the jury as to the significance of circumstantial evidence in making this determination and reminded it that "this aggravant requires the state to prove beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt of anything of pecuniary value or in expectation of the receipt of anything of pecuniary value. If you unanimously conclude that the defendant committed the offense as consideration for or in expectation of anything of pecuniary value, then this aggravant has been proven.

"And that should have been 'expectation of the receipt of anything of pecuniary value' . . . 'then the aggravant has been proven.' "[136]

In *State* v. *Sostre*, supra, 261 Conn. 111, 115–16, we considered whether the pecuniary gain aggravating factor set forth in § 53a-46a (i) (6) is applicable to capital felonies committed in the course of robberies, and specifically to a case wherein the defendant had fatally shot a police officer while in the course of fleeing from an apartment that he had just robbed, with stolen safe keys and guns. In rejecting the state's claim that the plain language of § 53a-46a (i) (6) applies to a capital felony committed in the course of a robbery, we noted that the "words 'consideration,' 'receipt' and 'expectation' invoke transactional concepts central to contract murder and invite the question whether the statute was intended to target capital felonies involving the taking of property by force." Id., 122. After consulting the legislative history and examining the remainder of the statutory context, we concluded that "§ 53a-46a (i) (6) does not apply to a capital felony committed in the course of a robbery"; id., 142; and emphasized that the aggravating factor was meant to apply to murder for hire situations, given that "the legislature considered murder for hire to be the single most heinous capital offense." Id., 133. But see id., 120 n.15 ("[w]e express no opinion in this case, however, as to whether the statute applies to murders to obtain insurance proceeds or the like").

Although it would have been preferable for the trial court's instructions in the present case to have included the gloss from *Sostre* explaining the limited applicability of § 53a-46a (i) (6), and we anticipate that the instructions given during the penalty phase hearing held on remand will do so, that omission did not mislead the jury at this first penalty phase hearing. The instructions as given referred repeatedly to contractual considera-

tions and did not at any time invite the jury to find the aggravating factor proven by any other conduct. Moreover, as the state points out, robbery or other theft was not a significant issue in the penalty phase of this case because the parties' closing arguments focused the jury's attention on the central matter of the contractual aspects of whether a murder for hire agreement existed. Specifically, the defendant did not contest the existence of the agreement during his penalty phase summations,[137] and the state's only mention of the defendant's theft of the victim's cash and gun made clear that it was a matter collateral to the murder for hire.[138] Inasmuch as the factual issues in the case, as framed by the parties' closing arguments; see, e.g., *State* v. *Lemoine*, 233 Conn. 502, 515–16, 659 A.2d 1194 (1995); did not present any other potential for pecuniary gain beyond murder for hire for the jury to consider, it is readily apparent that the trial court's instructions did not mislead the jury regarding the pecuniary gain aggravating factor.

B

Did the Trial Court Improperly Instruct the Jury That There Is No Time or Premeditation Requirement Attendant to the Defendant's "Expectation of the Receipt of Anything of Pecuniary Value?"

The defendant next claims that the trial court improperly instructed the jury that there is no time or premeditation element attendant to the pecuniary gain aggravating factor. Relying on *State* v. *McGann*, supra, 199 Conn. 163, and *State* v. *Hope*, supra, 203 Conn. 420, the defendant contends that this instruction had the effect of lowering the state's burden of proof by relieving it of the obligation to prove that the intent to kill the victim and the expectation of payment existed continuously from the inception of the agreement until the murder was accomplished, because premeditation is an implicit element in murder for hire. In response, the state contends that there is no temporal component beyond that the expectation or agreement must be formed prior to the murder, and exist at the time of the murder. We agree with the state and conclude that the trial court properly instructed the jury that the only temporal elements it need consider for purposes of the pecuniary gain aggravating factor under § 53a-46a (i) (6) are whether the expectation of compensation was created before the murder and existed at the time of the murder.

By way of relevant factual background, we note that the trial court instructed the jury in relevant part: "One crucial question here is whether the facts and circumstances in this case form a basis for a sound inference as to the defendant's expectations at the time he committed the capital felony. What inferences you choose to draw or not draw from the evidence is solely up to you.

* * *

"Neither intent nor expectation require premeditation. Although the state must prove expectation beyond a reasonable doubt where it is an element of a claimed aggravant, *there is no requirement concerning the amount of time necessary for a person to formulate the expectation that something will occur*." (Emphasis added.) For the remainder of the pecuniary gain instruction in context, see footnote 136 of this opinion and the accompanying text.

The defendant does not cite, and we do not see, any statutory language in § 53a-46a (i) (6) imposing additional temporal or premeditation requirements beyond that the expectation of compensation must be created before the murder and exist at the time of the murder. Moreover, nothing in *State* v. *McGann*, supra, 199 Conn. 176–78, or *State* v. *Hope*, supra, 203 Conn. 423–24—which, for purposes of liability for the underlying crime of capital felony under § 53a-54b (2), require proof of a hiring relationship in addition to the commission of a murder for pecuniary gain; see also part II of this opinion—imposes such a requirement with regard to the underlying offense.[139] Accordingly, we conclude that this instruction was legally correct and did not mislead the jury.

C

Did the Trial Court Improperly Instruct the Jury That the Defendant Bore the Burden of Proving the Mitigating Factor of "Lingering Doubt?"

The defendant next claims that the trial court improperly instructed the jury that the defendant, who could have been convicted of capital felony as either a principal or an accessory, had the burden of proving "lingering doubt" about whether he had shot the victim. Emphasizing the persuasive importance of this mitigating factor, the defendant argues that, in providing a supplemental instruction, the trial court should have instructed the jury more specifically that: (1) "each juror who found the defendant guilty as a principal may consider as a mitigating factor residual or lingering doubt as to whether the defendant was the actual shooter in determining the appropriate punishment"; and (2) "each juror who had found the defendant guilty as an accessory had already found factually proven this mitigating factor, i.e., that the defendant was not the actual shooter." The defendant contends that the trial court's more generalized instruction imposed an unnecessary burden on him with respect to jurors who already had found him guilty as an accessory, thus keeping them from giving effect to the mitigating evidence. In response, the state argues that the instruction is consistent with § 53a-46a (c) and *State* v. *Daniels*, 207 Conn. 374, 542 A.2d 306 (1988), which place the burden of proving any mitigating factor on the defendant. We

agree with the state and conclude that the trial court's supplemental instruction properly allocated the burden of proof as to the mitigating factor of lingering doubt.

The record reveals the following additional relevant facts and procedural history. The defendant claimed "lingering doubt about who committed the shooting" as a nonstatutory mitigating factor pursuant to § 53a-46a (d). See footnote 36 of this opinion. After the close of evidence in the penalty phase hearing, both the prosecutor and defense counsel discussed this topic in their rebuttal and surrebuttal summations.[140] In charging the jury, after explaining the state's obligation to prove the aggravating factor beyond a reasonable doubt as a threshold matter, the trial court explained that the "defendant bears the burden of proving the existence of any mitigating factor by a preponderance of the evidence. . . .

"This means that you take all the evidence that has been offered on this issue by both the defendant and the state and weigh it and balance it. If the better and weightier evidence inclines in the defendant's favor, then he has sustained his burden of proving the existence of a mitigating factor or factors by a preponderance of the evidence. You may consider any information relevant to any mitigating factor regardless of whether it was presented by either the state or the defendant. The defendant must convince you by the evidence presented that it is more likely than not that such a factor exists and that it may reasonably be considered to be mitigating in nature in the light of all the facts and circumstances of the case." After defining the term mitigating factor for the jury,[141] the trial court again emphasized that mitigating factors must be established by a preponderance of the evidence—whether claimed by the defendant or gleaned from the record by the jury—and noted several more times that the defendant has the burden of proving the existence of a mitigating factor by a preponderance of the evidence. The trial court then reviewed for the jury the list of mitigating factors proffered by the defendant, including that of lingering doubt, before proceeding to explain the weighing process. Deliberations commenced later that day.

Several days into deliberations,[142] the jury sent the trial court a note requesting more specific explanations of mitigating factors, including both the defendant's burden of proof and the definition of the concept. The trial court informed the parties that it was unclear what the jury sought, and then brought the jury back, read it the text of § 53a-46a (d), and asked it to return with a "more specific and detailed note . . . being very precise as to what the nature of your question or concern is." In response, the jury returned a short time later with a note advising the court that, "with respect to mitigating factor number [twenty-four], we are trying

to determine if we consider this to be a viable mitigating factor. Our understanding is that a factor is mitigating if by a preponderance of the evidence it is proven and believed to be more likely true than not true. If the factor has neither been proven to be true or proven not to be true, does the law dictate that it is a mitigating factor or should it be dismissed as a mitigating factor?" The trial court released the jury for the day and met with counsel in chambers to fashion a response to the jury's question.

The following day, after working out a supplemental instruction with counsel and noting on the record that counsel did not object to the proposed language, the trial court instructed the jury: "If one or more of you has a lingering doubt about who committed the shooting, and that lingering doubt has been proven to one or more of you by the defendant by a preponderance of the evidence, then you would move on to the second step to determine if this lingering doubt is mitigating in nature considering all the facts and circumstances of the case. If both steps are proven, then the mitigating factor must be considered in the weighing stage. If, however, you unanimously find that the defendant has failed to prove either or both of the steps, you may not consider mitigating factor number twenty-four in the weighing stage."[143]

In *State* v. *Daniels*, supra, 207 Conn. 381–82, this court considered questions of first impression pertaining to the construction of General Statutes (Rev. to 1983) § 53a-46a, which at that time was a nonweighing statute.[144] See *Rizzo I*, supra, 266 Conn. 180–82. In *Daniels*, the court was required to address statutory silence with respect to the burdens of proof borne by the state and the defendant regarding aggravation and mitigation, respectively. See *State* v. *Daniels*, supra, 384. Noting the majority of authority on point and the "highly significant consequences of erroneous factual determinations in capital cases"; id.; the court first concluded that "an aggravating factor must be established by the state beyond a reasonable doubt." Id. Addressing the silence as to the defendant's burden of proof with respect to mitigation, the court concluded further that "[a]nalogous principles of criminal law persuade us that this statutory lacuna should be filled by requiring the defendant to establish the existence of a mitigating factor by a preponderance of the evidence."[145] Id., 385. Even after the death penalty statute was amended to become a weighing statute in 1995; see footnote 144 of this opinion; the defendant has retained the burden to prove mitigation by a preponderance of the evidence. See, e.g., *Rizzo II*, supra, 303 Conn. 173–74; *State* v. *Courchesne*, supra, 296 Conn. 782–84; *State* v. *Colon*, supra, 272 Conn. 356–58; *Rizzo I*, supra, 239–40.

As the defendant notes in his brief, there is ample academic literature demonstrating that lingering or

"residual doubt" as to the defendant's guilt, or even as to his precise role in the commission of the underlying capital felony, is a powerful mitigating factor of great significance to many jurors. See, e.g., S. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?," 98 Colum. L. Rev. 1538, 1563 (1998) ("[T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt."); W. Bowers et al., "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making," 83 Cornell L. Rev. 1476, 1534–36, 1535 n.107 (1998) (finding lingering doubt to be "the strongest influence in support of a final life punishment vote" and noting that lingering doubt in study "incorporates both cases of mistaken identity and those in which the defendant was implicated in the killing but not as the triggerman"); cf. *State* v. *Webb*, supra, 238 Conn. 467–68 (The court rejected the defendant's claim that the requirement that the same jury determine both guilt and punishment violates the defendant's right to an impartial sentencing jury, and noted that "the defendant may derive a benefit that would not be available to him if separate juries were to determine guilt and penalty. Although the guilt phase jury has voted to convict the defendant, in some cases individual jurors may retain residual doubts concerning the defendant's guilt. . . . In fact, the defendant recognized such a possibility in this case when he claimed as a mitigating factor 'lingering doubts' concerning whether he had kidnapped the victim." [Citation omitted.]). Neither the parties' briefs nor our independent research has, however, identified any authority that stands for the proposition that lingering doubt is constitutionally distinct from any other mitigating factor for purposes of the allocation and standard of proof.[146] Thus, we conclude that the trial court properly instructed the jury that the defendant was required to prove by a preponderance of the evidence the existence of any lingering doubt regarding who committed the shooting, and also whether any such lingering doubt was mitigating in nature given the facts and circumstances of the case.[147]

D

Did the Trial Court Improperly Instruct the Jury That It Was Not Required to Consider the Cumulative Effect of All the Mitigating Evidence?

The defendant next claims that the trial court improperly instructed the jury that it was "not required to accumulate facts in this matter," thereby impermissibly constraining it from giving full effect to mitigating factor number twenty-five, which asked the jury to consider the "cumulative or combined effect of all the mitigating evidence . . . ." The defendant contends that this

instruction violated our decision in *State* v. *Reynolds*, supra, 264 Conn. 1, which requires that juries be permitted to consider the cumulative weight of all mitigating evidence. In response, the state argues that the trial court properly instructed the jury that *it was permitted, but not required*, to cumulate the evidence to find a mitigating factor, and that the challenged instruction, viewed as a whole, complies with the constitutional standard articulated in *Reynolds*. We agree with the state and conclude that the trial court's instruction properly instructed the jury with respect to its consideration of mitigating factor number twenty-five.

The record reveals the following additional relevant facts and procedural history. As mitigating factor number twenty-five, the defendant claimed the "cumulative or combined effect of all of the mitigating evidence concerning [the defendant's] character, background or history or the nature and circumstances of the offense which [the jury] find[s] in fairness and mercy is mitigating and constitutes a basis for a sentence of life imprisonment without the possibility of release." The trial court apprised the jury of this mitigating factor, and instructed: "If a fact standing alone does not in your opinion amount to a mitigating factor, you also have the discretion to connect or link several distinct facts and decide that all together they are a mitigating factor.

"So if, for example, you find that a factor was proven by a preponderance of the evidence but you do not believe in your discretion that this fact alone is mitigating as defined, you can combine it with another fact you have found proven by the evidence and join them together to determine that a mitigating factor exists. In other words . . . you can combine mitigating factors to come up with a new mitigating factor or factors.

"This is just one method of evaluating facts offered in mitigation in fairness and mercy to determine whether a mitigating factor exists. *You are not required to accumulate facts in this matter, but you are permitted to* based on your consideration of all the evidence presented and of all the facts and circumstances of the case." (Emphasis added.)

As the state points out, our decision in *State* v. *Reynolds*, supra, 264 Conn. 1, is dispositive of this instructional claim. In that case, we agreed with the defendant that the trial court had "improperly rejected his request to include, in his written list of proposed mitigating factors submitted to the jury, a mitigating factor predicated upon the cumulative effect of all of the evidence adduced by the defendant in support of his claim of mitigation."[148] Id., 138–39. In determining, however, that the trial court's failure to submit to the jury a separate cumulative effect mitigating factor was harmless error, we noted that the jury was presumed to have followed the trial court's instruction that " '[it] *may consider* the cumulative impact of some or all of the evidence offered

in mitigation as constituting the equivalent of a mitigating factor.' This instruction properly apprised the jury that it was to consider the cumulative effect of the mitigating evidence as it would any other mitigating factor." (Emphasis added.) Id., 141. We further rejected the defendant's claim that this "instruction was inadequate because its language was permissive rather than mandatory," and that he was entitled to an instruction "requiring" the jury to "consider the cumulative effect of the mitigating evidence." Id., 141 n.124. We determined that the trial court properly had "informed the jury that it was to treat the 'cumulative impact' of the mitigating evidence as it would have treated any other claimed mitigating factor. In other words, the instruction did not advise the jury to decide whether to consider the cumulative effect of the mitigating evidence but, rather, directed the jury to determine whether it considered the cumulative effect of the evidence to be sufficiently mitigating so as to constitute a mitigating factor." Id. Comparing the trial court's instructions in the present case to the charge upheld in *Reynolds*—a decision that the defendant does not challenge as wrongly decided—we conclude that the trial court properly instructed the jury that it was not required to cumulate the facts, but rather had the option to do so as it would any other mitigating factor.

E

Did the Trial Court's Instructions Improperly Limit the Jury's Consideration of Mitigating Factors to Those That Are "Unique?"

The defendant next contends that the trial court's jury instructions improperly limited the jury's consideration of mitigating factors to those that are "unique" to the nature of the crime or who the defendant is. The defendant claims that this instruction was inconsistent with the plain language of § 53a-46a (d) and violated well established case law, including *Tennard* v. *Dretke*, supra, 542 U.S. 274, which broadly defines the scope of constitutionally relevant mitigating evidence. In response, the state contends that the use of the word unique, in the complete context of the trial court's instructions, properly implements the eighth amendment's requirement of individualized sentencing in capital cases. We agree with the state and conclude that the trial court's instructions were a proper statement of the law of mitigation.

The record reveals the following relevant facts and procedural history. The trial court instructed the jury that a mitigating factor "is offered for the purpose of making sure that the defendant is punished fairly and appropriately with proper consideration *for any unique factors concerning the nature of the crime or who the defendant is*." (Emphasis added.) To see this language in context of the entire relevant portion of the charge, see footnote 141 of this opinion.

Viewing the defendant's claim in the context of the entire charge as we must, we conclude that it lacks merit to the point that it borders on frivolous. The trial court's instruction referring to "unique factors concerning the nature of the crime or who the defendant is," was nothing more than a proper explanation to the jury that its capital sentencing decision is a reasoned moral judgment that is highly individualized in nature. See, e.g., *Rizzo I*, supra, 266 Conn. 300–301; *State* v. *Reynolds*, supra, 264 Conn. 121–22. Read in context, this instruction was not inconsistent with the definition of mitigating factors under § 53a-46a (d), and did not in any way preclude the jury from considering relevant mitigating evidence. Cf. *Tennard* v. *Dretke*, supra, 542 U.S. 283, 285–86 (jury instruction defining mitigating factor as " 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own' " with nexus to crime was improperly restrictive given breadth of what constitutes constitutionally relevant mitigating evidence). Accordingly, we conclude that the trial court properly described mitigating evidence as "unique factors concerning the nature of the crime or who the defendant is."

F

Did the Trial Court Improperly Fail to Instruct the Jury, Sua Sponte, to Consider the Statutory Mitigating Factor of Minor Involvement under § 53a-46a (h) (3)?

The defendant next contends that, given the possibility that he was convicted of capital felony as an accessory, the trial court improperly failed to instruct the jury, sua sponte, regarding the statutory mitigating factor of minor involvement under § 53a-46a (h) (3). Relying on, inter alia, *State* v. *Solek*, supra, 242 Conn. 409, the defendant argues that, despite his failure to claim minor involvement as a mitigating factor, the trial court's omission improperly failed to give effect to the "mandatory plain language" of § 53a-46a (h) (3), which precludes the imposition of the death penalty on an accessory whose involvement in the capital felony was minor. The defendant further contends that this omission unconstitutionally kept the jury from considering his minor involvement as an accessory in the capital offense in violation of *Lockett* v. *Ohio*, supra, 438 U.S. 586. Alternatively, the defendant asks us to exercise our supervisory powers to require trial courts to charge juries on each factually supported mitigating factor in the absence of a waiver by the defendant. In response, the state contends that: (1) the defendant induced and therefore waived any error in this vein by affirmatively declining to raise any statutory mitigating factors; (2) *Solek* does not require that juries be instructed on the minor involvement statutory mitigating factor in all cases wherein the defendant was or may have been convicted as an accessory, and the trial court's failure

to so instruct the jury in the present case did not deprive the jury of the opportunity to consider any minor involvement as a nonstatutory mitigating factor; and (3) requiring such instructions sua sponte would inappropriately intrude on matters of the defendant's trial strategy. We agree with the state and conclude that the trial court did not have an obligation, sua sponte, to instruct on the minor involvement statutory mitigating factor under § 53a-46a (h) (3).[149]

In determining whether the trial court has the obligation to instruct, sua sponte, on all statutory mitigating factors that are supported by the evidence, we consider the role of mitigating factors in our capital sentencing scheme, under which "the state has the burden at the penalty phase of a capital felony trial to establish the existence of an aggravating factor, specified in § 53a-46a (i) . . . by proof beyond a reasonable doubt. . . . The defendant has the burden to establish the existence of a mitigating factor by a preponderance of the evidence. . . . In this regard, the statutory scheme sets out two types of mitigating factors: (1) statutory mitigating factors, as defined in § 53a-46a (h), which, if found, preclude the imposition of the death penalty under any circumstances; and (2) nonstatutory mitigating factors, as defined in § 53a-46a (d)." (Citations omitted.) *Rizzo I*, supra, 266 Conn. 180. Under our weighing statutory scheme, "the burdens of persuasion regarding proof of the existence of aggravating and mitigating factors remain the same. The state must still establish the existence of an aggravating factor by proof beyond a reasonable doubt, and the defendant must still establish the existence of a mitigating factor by a preponderance of the evidence. Furthermore, the role of a statutory mitigating factor remains the same: proof of its existence will preclude the imposition of the death penalty and mandate a sentence of life imprisonment without the possibility of release. . . .

"Under the 1995 amended scheme, however, the role of the nonstatutory mitigating factors has changed. . . . [T]he jury must return 'a special verdict setting forth . . . whether any aggravating factor or factors outweigh any [nonstatutory] mitigating factor or factors,' and . . . if the 'mitigating factors . . . are outweighed by . . . [the] aggravating factors . . . the court shall sentence the defendant to death.' . . . Thus, under these provisions, the jury must weigh the aggravating factors proven against the nonstatutory mitigating factors proven, and if the aggravating factors outweigh the mitigating factors, the court must impose the death sentence." (Citations omitted.) Id., 181–82.

We agree with the state's argument that a statutory mitigating factor is procedurally akin to an affirmative defense in the penalty phase context because, if the jury finds that one exists, then it must impose a life sentence. Indeed, we previously have found statutory

mitigating factors akin to affirmative defenses for purposes of establishing the burden and standard of proof. See, e.g., *State* v. *Daniels*, supra, 207 Conn. 384; see also the discussion in footnote 145 of this opinion. Thus, we find instructive our conclusion in *State* v. *Ebron*, 292 Conn. 656, 691–92, 975 A.2d 17 (2009), overruled on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011), that "trial courts do not have a duty to charge the jury, sua sponte, on defenses, affirmative or nonaffirmative in nature, that are not requested by the defendant." In so concluding, we followed *State* v. *Preyer*, 198 Conn. 190, 502 A.2d 858 (1985), which rejected a "sweeping claim . . . that a trial court always has an independent obligation, as a matter of law, to charge on any theory of defense for which there is a foundation in the evidence";[150] id., 196; and noted that, "[a]lthough justification defenses differ from affirmative defenses in that the state, and not the defendant, bears the burden of disproving a justification defense such as self-defense beyond a reasonable doubt, and are of constitutional dimension because they negate an element of the crime charged . . . the assertion and proof of the justification defense nevertheless remains the defendant's responsibility in the first instance."[151] (Citations omitted.) *State* v. *Ebron*, supra, 695. Indeed, it is "inconsistent with . . . the defendant's right [under the sixth amendment] to control the conduct of his own defense . . . to require the trial court to determine, without assistance from the parties, the defenses about which the jury should be instructed, particularly as it is the responsibility of the parties to help the court in fashioning an appropriate charge." (Citation omitted; internal quotation marks omitted.) Id., 696.

Moreover, we disagree with the defendant's arguments that failing to require the trial court to, sua sponte, instruct on the statutory mitigating factor of § 53a-46a (h) (3), is inconsistent with *State* v. *Solek*, supra, 242 Conn. 409, and unconstitutionally keeps the jury from considering his minor involvement as an accessory in the capital offense in violation of *Lockett* v. *Ohio*, supra, 438 U.S. 586. First, the defendant takes language from *Solek* wholly out of context, namely, that "if the defendant is convicted of capital felony [as an accessory] and the state seeks the death penalty, the trial court will have to fashion a jury instruction, pursuant to § 53a-46a, that will allow the penalty phase jury to determine whether the defendant's participation in the capital felony was so minor as to constitute a mitigating factor that precludes the imposition of the death penalty." *State* v. *Solek*, supra, 432. This court was not called upon in *Solek* to consider whether the trial court therein had an obligation, sua sponte, to fashion such an instruction but, rather, in reversing the trial court's pretrial decision to dismiss capital felony charges, this court *was* called upon to determine whether the trial

court's concern regarding the evidentiary basis for the defendant's death penalty eligibility was unwarranted, because "we have found no authority aside from the constitutionally required hearing in probable cause . . . that entitles a defendant to a pretrial judicial determination of ineligibility for the death penalty." (Citation omitted.) Id., 431.

Second, although a jury must be permitted to reject a death sentence on the basis of the defendant's relatively minor role in the crime;[152] see, e.g., *Lockett* v. *Ohio*, supra, 438 U.S. 608; nothing in the trial court's instructions defining mitigation in the present case precluded the jury from doing so. Indeed, the jury did in fact consider the defendant's role as an accessory in its clear consideration of mitigating factor number twenty-four.[153] Accordingly, we conclude that the trial court was not required to instruct the jury, sua sponte, as to the statutory mitigating factor of minor involvement under § 53a-46a (h) (3).

G

Did the Jury Instructions at the Guilt and Penalty Phases Collectively Reduce the Jury's Sense of Responsibility for the Imposition of the Death Penalty and Effectively Direct a State's Verdict on the Sole Claimed Aggravating Factor?

Noting that the sole claimed aggravating factor under § 53a-46a (i), murder for pecuniary gain, duplicated an element of the underlying capital felony under § 53a-54b (2); see also part IX of this opinion; the defendant next contends that the trial court's instructions in the guilt and penalty phases had the combined effect of reducing the jury's sense of responsibility for the imposition of the death penalty, and also effectively directed a verdict on the sole claimed aggravating factor of murder for pecuniary gain in violation of, inter alia, *Caldwell* v. *Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), and *Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Specifically, the defendant points to the trial court's instructions in the guilt phase of the trial, in which that court directed the jury not to allow the issue of penalty to influence its decision on the matter of guilt or innocence, and argues that particular instruction must be viewed in conjunction with the trial court's failure at the penalty phase to instruct the jury to reconsider its guilt phase finding of a hiring relationship. In response, the state contends that the trial court's instructions at the penalty phase properly reminded the jury of its full sentencing responsibilities and of its obligation to consider the *evidence* from the guilt phase, rather than its *finding* from that stage of the trial, in determining whether the state had proven the aggravating factor. We agree with the state and conclude that the trial court's instructions did not reduce the jury's sense of responsibility or direct

a verdict as to the aggravating factor.

The record reveals the following additional relevant facts and procedural history. In commencing its charge to the jury during the penalty phase, the trial court stated: "Now, ladies and gentlemen, your responsibility in . . . the penalty phase . . . of the trial is to determine under the proper legal standards, which I will be stating for you, whether certain factors have or have not been proven and then to inform the court of your findings by completing a special verdict form in which your findings will be recorded. . . .

"Now, it is my duty to advise you of the truly awesome task before you. The issues that are before you are rarely before a jury in our state because in noncapital cases it is the judge who does the sentencing. But in this case under our law, you, the jury, will decide based on your factual findings the appropriate penalty for the defendant. Now, let [me] be absolutely clear about this: It [is] your decision and your decision alone based upon your factual findings and your proper application of the law that will result in the imposition of the penalty in this case.

"Please understand that it is your determination of the factual findings that will determine which of the two possible sentences, death by lethal injection or life without the possibility of release, shall be imposed on [the defendant]. Although the court, based on your factual findings recorded in the special verdict form, will formally annunciate the penalty, the penalty is based entirely on your findings. The court has no discretion in that regard. Under our law, the jury and the jury alone is a capital sentencer. Let me put this as bluntly as I can. Your verdict and your verdict alone will determine if the defendant is sentenced to life imprisonment without the possibility of release or death. I cannot stress enough the importance of your giving careful and thorough consid[eration] to all the evidence and contemplating the responsibility facing you."[154]

After explaining the different types of evidence offered and outlining the weighing process, the trial court charged the jury to "consider all of the sworn testimony and evidence that was admitted during the guilt/nonguilt phase which was incorporated by reference into this phase. In reaching your verdict in this phase you should consider all the testimony and exhibits received into evidence no matter who offered it." The trial court next charged that in "this case one aggravant is claimed. The state . . . has claimed one aggravating factor as follows: that the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value. . . .

"Your determination of whether or not the aggravating factor exists must be based exclusively on the evidence presented. If you hold any personal belief or

opinion as to what does or should constitute an aggravating factor, you must put that belief or opinion aside and follow my instructions as to the legal definition of the aggravating factor. . . .

"The burden to prove the existence of the aggravating factor is solely on the state of Connecticut. The state must prove the existence of the aggravating factor by the highest standard of proof known in our law: by proof beyond a reasonable doubt. This is the same high standard of proof that was imposed on the state in the first phase of the trial."

After explaining the concept of reasonable doubt and the role of circumstantial evidence in determining a party's intent and expectations, as well as describing and explaining the mitigation and weighing processes required of the jury, the trial court again reminded the jury that the "responsibility for determining the existence of factors upon which the imposition of the death penalty depends under Connecticut law, as I've told you, is exclusively yours, not mine. And, indeed, the solemn obligation of deciding whether death or life imprisonment without possibility of release should be imposed is yours within the confines of the law I have described."[155]

In *Caldwell* v. *Mississippi*, supra, 472 U.S. 329, the United States Supreme Court concluded that prosecutorial argument informing a capital jury that final responsibility for the defendant's sentence lay with the state's Supreme Court rather than the jury violated the eighth amendment to the United States constitution. Under *Caldwell*, it has become "axiomatic"; *State* v. *Colon*, supra, 272 Conn. 300; that "great care must be taken by the trial court to ensure that a capital sentencing jury fully appreciates the momentous nature of its duty and, in particular, that the jury not be led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. . . . To ensure that the jury is fully aware of its determinative role in our capital sentencing process . . . [i]t is imperative . . . that the jury instructions in a capital case clearly and unequivocally explain to the jury that it is solely responsible for determining whether the defendant will receive the death penalty or, instead, a sentence of life imprisonment without the possibility of release." (Citations omitted; internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 124–25, quoting *State* v. *Breton*, 235 Conn. 206, 245–46, 249, 663 A.2d 1026 (1995); see also *State* v. *Peeler*, supra, 271 Conn. 420–21 (trial court instruction advising jury that deadlock would result in imposition of life sentence violated *Caldwell* by removing ultimate determination from jury's discretion).

Moreover, as in the guilt phase under the sixth amendment, the right to trial by jury in the penalty phase "includes, of course, as its most important element, the

right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' . . . Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the [s]tate, no matter how overwhelming the evidence." (Citation omitted.) *Sullivan* v. *Louisiana*, supra, 508 U.S. 277; see also *State* v. *Hines*, 187 Conn. 199, 209, 445 A.2d 314 (1982) (trial court may not give jury instruction that has effect of directing verdict on factual issue because "litigants have a constitutional right to have issues of fact decided by the jury and not by the court" [internal quotation marks omitted]).

Having reviewed the jury instructions, we conclude that nothing therein diminished the jury's sense of sole responsibility for determining the defendant's fate, or in any way relieved the state of its burden of proving the aggravating factor with evidence beyond a reasonable doubt. The trial court repeatedly reminded the jury, for example, that the sentencing decision was "[its] decision and [its] decision alone based upon [its] factual findings and [its] proper application of the law," and that the "responsibility for determining the existence of factors upon which the imposition of the death penalty depends under Connecticut law, as I've told you, is exclusively [the jury's], not mine." Moreover, the trial court emphasized the state's burden of proving the aggravating factor beyond a reasonable doubt and in no way intimated that the state had discharged that burden. Accordingly, we conclude that these jury instructions did not improperly direct a verdict or imply that the jury had anything but sole discretion to make the capital sentencing in the present case.

XI

MISCELLANEOUS CLAIMS

Finally, the defendant raises a variety of other unpreserved, constitutional claims that present issues of law that are likely to arise on remand.[156] Specifically, the defendant claims that, pursuant to the United States Supreme Court's recent decision in *Tennard* v. *Dretke*, supra, 542 U.S. 274: (1) § 53a-46a (d) is unconstitutional because it places the burden on the defendant to prove by a preponderance of the evidence that the proposed mitigating factors are "mitigating in nature, considering all the facts and circumstances of the case"; (2) § 53a-46a (d) is unconstitutional because it precludes jurors from considering and giving full effect to mitigating evidence unless the defendant proves that it is "mitigating in nature, considering all the facts and circumstances of the case"; (3) the "facts and circumstances" screening test is unconstitutional; and (4) this court should reconsider our rulings on numerous constitutional challenges to various aspects of the statutory scheme governing the death penalty.[157] We disagree with these claims because each is controlled by prior case

law from this court, and the defendant's requests that we overrule that case law are briefed only summarily.

A

Is § 53a-46a (d) Unconstitutional Because It Requires the Defendant to Prove by a Preponderance of the Evidence That the Proposed Mitigating Factors Are "Mitigating in Nature, Considering All the Facts and Circumstances of the Case?"

Noting that this issue was implicated in the trial court's supplemental instructions to the jury with regard to the lingering doubt mitigating factor; see part X C of this opinion; the defendant contends that § 53a-46a (d)[158] violates the federal and state due process clauses by placing the burden on the defendant to prove by a preponderance of the evidence that the proposed mitigating factors are "mitigating in nature, considering all the facts and circumstances of the case." Breaking this argument down into its component parts, in addition to challenging the allocation of the burden, the defendant also contends that the "facts and circumstances" language, which we previously upheld as constitutional in *Rizzo I*, supra, 266 Conn. 291–92, and *State* v. *Colon*, supra, 272 Conn. 374–75, restricts the jury from considering constitutionally relevant mitigating evidence, in violation of the United States Supreme Court's subsequently issued decision in *Tennard* v. *Dretke*, supra, 542 U.S. 274. We address each claim in turn.

1

Is the "Facts and Circumstances" Language of § 53a-46a (d) Unconstitutional under the United States Supreme Court's Decision in *Tennard*?

We begin with the defendant's claim that the "facts and circumstances" language of § 53a-46a (d) is unduly narrow under the Supreme Court's decision in *Tennard* v. *Dretke*, supra, 542 U.S. 274. The defendant contends that such language improperly precludes the sentencer from considering constitutionally relevant mitigating evidence, such as an abusive childhood, compassion for others or minor involvement in the offense. As a corollary claim, the defendant argues that the language in question violates *Tennard* by mandating the mitigating factor to have a "nexus" to the offense, which violates the constitutional requirement of consideration of all mitigating evidence that is relevant and factually supported. In response, the state contends that the facts and circumstances test does not impose a nexus requirement and therefore does not violate *Tennard*, which considered the constitutionality of a distinct and far more restrictive mitigation statutory scheme. Thus, the state contends that *Rizzo I* and *Colon*, both of which upheld the constitutionality of that statutory language, remain good law even after *Tennard*.[159] We agree with

the state and conclude that our decisions in *Rizzo I* and *Colon* upholding the constitutionality of the facts and circumstances language, remain good law after *Tennard*.

We begin with a review of *Rizzo I*, supra, 266 Conn. 291, wherein the defendant claimed that the "requirement that the jury, in deciding whether proposed mitigating evidence is mitigating in nature, must make its determination 'considering all the facts and circumstances of the case'; General Statutes (Rev. to 1997) § 53a-46a (d); renders the statute invalid, both facially and as applied, because subsection (d): (1) screens out mitigating evidence from the weighing process; (2) allows the jury to refuse to consider constitutionally relevant mitigating evidence in the weighing process; and (3) allows the jury to conclude incorrectly that there must be a nexus between the mitigating evidence and the offense committed by the defendant." Noting the heavy burden borne by a defendant who challenges the constitutionality of a validly enacted statute, we observed that the "United States Supreme Court has made clear that 'the fundamental respect for humanity underlying the [e]ighth [a]mendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' . . . *Woodson* v. *North Carolina*, [428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)]. Under both the eighth and fourteenth amendments, a sentencer may not 'be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' . . . *Lockett* v. *Ohio*, supra, 438 U.S. 604. A sentencer also may not 'refuse to consider, *as a matter of law*, any relevant mitigating evidence.' . . . *Eddings* v. *Oklahoma*, supra, 455 U.S. 114. '[I]t does not follow from *Lockett* and its progeny that a [s]tate is precluded from specifying *how* mitigating circumstances are to be proved.' . . . *Walton* v. *Arizona*, 497 U.S. 639, 649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), overruled in part on other grounds, *Ring* v. *Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The United States Supreme Court has 'never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence.' *Buchanan* v. *Angelone*, [522 U.S. 269, 276, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998)]. Nor has the court ever 'suggested that jury consideration of mitigating evidence must be undirected and unfocused . . . [or] concluded that [s]tates cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.' *Franklin* v. *Lynaugh*, 487 U.S. 164, 181, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988)." (Emphasis in original.) *Rizzo*

I, supra, 266 Conn. 291–92.

In *Rizzo I*, we rejected the defendant's attempt to distinguish *Cobb* and *Ross I*, both of which previously had upheld the constitutionality of § 53a-46a (d), on the ground that "both of those decisions addressed the effect of the phrase 'considering all the facts and circumstances of the case' in a nonweighing context," and we concluded that the "addition of the weighing provision does not change the nature of the jury's determination of mitigation—it merely changes what happens *after* the jury finds mitigation."[160] (Emphasis in original.) *Rizzo I*, supra, 266 Conn. 296. Rather, we stated that the phrase " 'considering all the facts and circumstances of the case' . . . merely defines the phrase 'mitigating in nature' and provides the jury with guidance making its determination of the existence of mitigation. Rather than impermissibly limiting what the sentencer may consider as mitigating circumstances, the phrase 'considering all the facts and circumstances of the case' in § 53a-46a (d) simply specifies '*how* mitigating circumstances are to be proved.' *Walton* v. *Arizona*, supra, 497 U.S. 649."[161] (Emphasis in original.) *Rizzo I*, supra, 296. We noted that "the United States Supreme Court has stated that [t]he circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our [e]ighth [a]mendment jurisprudence." (Internal quotation marks omitted.) Id., 297–98.

We further rejected the defendant's claim that § 53a-46a (d) improperly permits a jury to conclude "that it could find that a factor was mitigating in nature *only if* it had some nexus to the offense. The language of the statute, however, is not as restrictive as the defendant implies. Section 53a-46a (d) merely provides that the jury must make its determination of whether the proposed mitigating evidence is mitigating in nature *considering* all the facts and circumstances *of the case*. Nowhere does the statute require that mitigating evidence have some nexus to the offense. It merely provides that the jury consider the totality of the evidence, including the nature of the offense." (Emphasis in original.) Id., 298. We subsequently followed *Rizzo I* in rejecting a similar challenge to § 53a-46a (d) in *Colon*, wherein we concluded that the "facts and circumstances language of § 53a-46a (d) is a constitutionally permissible method of defining how mitigating circumstances are to be established in the context of our current weighing statutory scheme . . . ." *State* v. *Colon*, supra, 272 Conn. 375.

Contrary to the defendant's claims in the present case, the Supreme Court's decision in *Tennard* v. *Dretke*, supra, 542 U.S. 274, does not diminish the precedential value of *Rizzo I* and *Colon*. In *Tennard*, the Supreme Court considered the constitutionality of a

gloss adopted by the United States Court of Appeals for the Fifth Circuit on the Supreme Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), which had stated: "In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury. . . . To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own . . . *and* (2) that the criminal act was attributable to this severe permanent condition." (Emphasis added; internal quotation marks omitted.) *Tennard* v. *Dretke*, supra, 283, quoting *Tennard* v. *Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002). The Supreme Court concluded in *Tennard* that this gloss was inconsistent with *Penry* v. *Lynaugh*, supra, 319, which had held that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."

The Supreme Court held that "the Fifth Circuit's test is inconsistent" with its well established principles defining relevance in mitigation evidence.[162] *Tennard* v. *Dretke*, supra, 542 U.S. 284–85. The court noted that, "[m]ost obviously, the [Fifth Circuit's] test will screen out any positive aspect of a defendant's character, because good character traits are neither 'handicap[s]' nor typically traits to which criminal activity is 'attributable.' " Id., 285. In so concluding, the court relied on *Skipper* v. *South Carolina*, supra, 476 U.S. 5, which made clear that evidence of good character could not be excluded, including evidence of a prisoner's good conduct in jail that did not relate to his culpability for the crime that he had committed. See *Tennard* v. *Dretke*, supra, 285–86. The court concluded that the Fifth Circuit's use of the " 'uniquely severe' " and the " 'nexus' " elements was improperly restrictive, given that "gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. . . . However, to say that only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it 'might serve as "a basis for a sentence less than death"' . . . ."[163] (Citations omitted.) Id., 286–87, quoting *Skipper* v. *South Carolina*, supra, 5.

We conclude that the facts and circumstances language of § 53a-46a (d) comports with the relevance standard set forth in *Tennard*, particularly given the Supreme Court's emphasis on the permissibility of considering gravity in establishing mitigation; see *Tennard* v. *Dretke*, supra, 542 U.S. 286–87; and its rejection of

"an alteration of the rule of *Lockett* and *Eddings*" that "[i]nstead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence . . . would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Johnson* v. *Texas*, 509 U.S. 350, 372, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). Moreover, as we concluded in *Rizzo I*, supra, 266 Conn. 298–99, that same statutory language also does not establish a requirement mandating that the mitigating factor have some nexus to the crime, which similarly would run afoul of *Tennard*. Rather, the statutory language must be read in light of the constitutional relevance analysis set forth in *Tennard*. Accordingly, we conclude that *Tennard* does not require us to overrule our analysis of § 53a-46a (d) in *Rizzo I*, supra, 291–92, and *State* v. *Colon*, supra, 272 Conn. 374–75; see also *Rizzo II*, supra, 303 Conn. 159 (rejecting similar challenge without discussing *Tennard*).

2

Is It Constitutional to Allocate to the Defendant the Burden of Proving Mitigation?

Acknowledging that this court has rejected this claim under the nonweighing version of § 53a-46a (d) that existed prior to 1995; see, e.g., *State* v. *Cobb*, supra, 251 Conn. 459–60; the defendant relies on *Cooper* v. *Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996), and our analysis in *Rizzo I*, supra, 266 Conn. 171, requiring that the jury be certain beyond a reasonable doubt of its decision that the aggravating factors outweigh the mitigating factors, and contends that allocating to him the burden of proving mitigation under § 53a-46a (d) violates his eighth amendment rights. The defendant argues that this allocation improperly precludes jurors from considering that evidence during the weighing process if they are in equipoise about whether a factor is "mitigating in nature" under the "facts and circumstances of the case," regardless of whether the defendant has proven the factual bases for the mitigating factor. In response, the state relies on *State* v. *Colon*, supra, 272 Conn. 374, and contends that the 1995 addition of the weighing process to § 53a-46a does not alter the constitutionality of allocating to the defendant the burden of proving that a factor is mitigating in nature considering all the facts and circumstances of the case. The state further contends that this allocation is consistent with *Walton* v. *Arizona*, supra, 497 U.S. 639, and *Kansas* v. *Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), because it does not diminish the state's burden of proving the existence of aggravating circumstances. We agree with the state and conclude that § 53a-46a (d) constitutionally may require that the defendant prove, by a preponderance of the evidence, that the mitigating evidence is mitigating in light of the

facts and circumstances of the case.

As the defendant concedes, this court previously has followed *Walton* v. *Arizona*, supra, 497 U.S. 649,[164] and concluded that "the defendant's burden of persuasion on a nonstatutory mitigating factor, namely, by a preponderance of the evidence, extends not only to the underlying factual basis of the factor, but also to the determination that the factor is mitigating in nature." *State* v. *Cobb*, supra, 251 Conn. 458. Citing *Walton* and *Ross I*, supra, 230 Conn. 241, for the "well established" proposition that "there is no constitutional impediment to imposing the burden on a defendant to prove the existence of a mitigating factor by a preponderance of the evidence," we concluded that "there is nothing in that jurisprudence to indicate that the same burden of persuasion does not apply with regard to establishing both the underlying factual basis of a mitigating factor and its mitigating nature. Therefore, the fact that the defendant was required to establish, not only the factual basis of any claimed mitigating factor, but also that it was mitigating in nature, raises no colorable constitutional claim." *State* v. *Cobb*, supra, 459–60.

As noted previously, we concluded in *Colon* and *Rizzo I* that the adoption of the weighing process in 1995 did not alter the process by which defendants are to prove mitigation, as those are distinct steps in the statutory sentencing process under § 53a-46a. See *State* v. *Colon*, supra, 272 Conn. 374–75; *Rizzo I*, supra, 266 Conn. 296. Moreover, in *Rizzo I*, which was a weighing case, we rejected the defendant's claim that he should not bear the burden to prove mitigation, citing *Walton* and noting that "our death penalty scheme is a four-tiered system. The defendant's burden to prove the existence of mitigating factors by a preponderance of the evidence arises in the third tier, only if the state has established beyond a reasonable doubt that at least one aggravating factor exists. If the defendant meets that burden, the state then bears the burden of proving beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, which we have said is a decision that necessarily entails the determination that death is the appropriate penalty." *Rizzo I*, supra, 300. Inasmuch as our case law does not relieve the state of proving aggravation, and the defendant's reliance on *Cooper* v. *Oklahoma*, supra, 517 U.S. 348, is completely inapt,[165] we decline to disturb our long-standing precedent requiring capital defendants to prove by a preponderance of the evidence that the evidence is mitigating in nature.

B

Other Constitutional Challenges to the "Facts and Circumstances" Language of § 53a-46a (d)

The defendant raises numerous other challenges to

the language of § 53a-46a (d) requiring that the evidence be "mitigating in nature, considering all the facts and circumstances of the case," including that: (1) it creates a risk that mitigating evidence will be "put beyond the effective reach of the sentencer" in violation of *Johnson* v. *Texas*, supra, 509 U.S. 362, thus "unconstitutionally plac[ing] a thumb on death's side of the scale"; (2) it is unconstitutionally vague; and (3) it invites jurors to decline to find mitigation for improper reasons that are not reviewable on appeal. Given the defendant's failure to identify any subsequent decisions from the United States Supreme Court that conflict with our decisions in *State* v. *Colon*, supra, 272 Conn. 370 n.151, 376–77, 382–83, and *Rizzo I*, supra, 266 Conn. 299, which previously rejected identical claims, we decline to reconsider those decisions in this appeal.

C

Does § 53a-46a Unconstitutionally Create a Presumption in Favor of Death or Mandate a Death Sentence without Individualized Determinations?

The defendant next claims that § 53a-46a unconstitutionally: (1) mandates a death sentence in all cases after the state proves aggravation, if the defendant has failed to prove mitigating factors; and (2) creates a presumption in favor of the death penalty by requiring a defendant to prove mitigation after he is found eligible to receive the death penalty. Given the defendant's failure to identify any subsequent decisions from the United States Supreme Court that conflict with our decision in *State* v. *Colon*, supra, 272 Conn. 382–83, rejecting identical claims, we decline to address this claim further in this appeal.

D

Is the Death Penalty Per Se Unconstitutional under the Connecticut Constitution?

The defendant next claims that the death penalty is per se unconstitutional under the Connecticut constitution, and that we should overrule our decisions holding to the contrary. See, e.g., *State* v. *Webb*, supra, 238 Conn. 401–402; *Ross I*, supra, 230 Conn. 251–52; see also, e.g., *State* v. *Colon*, supra, 272 Conn. 382–83; *State* v. *Reynolds*, supra, 264 Conn. 236–37. In particular, the defendant relies in his reply brief on the legislature's enactment of Public Acts 2009, No. 09-107, which would have repealed the death penalty, but for being vetoed by then Governor M. Jodi Rell, as evidence that this state's contemporary standards of decency have evolved against the death penalty since this court's decisions in *Webb* and *Ross I*, thus rendering it cruel and unusual punishment. A majority of this court recently rejected a comprehensive renewed constitutional challenge, based in part on that same argument, to the death penalty in *Rizzo II*, supra, 303 Conn. 198–201; but see

id., 202–203 (*Norcott*, *J.*, dissenting);[166] and we decline to revisit those arguments in this appeal.[167]

The judgment is reversed insofar as it imposes a sentence of death and the case is remanded to the trial court for a new penalty phase hearing, following a new in camera review, according to law, of the department's files and disclosure of evidence material to the defendant's case in mitigation; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and ZARELLA, McLACHLAN, EVELEIGH and VERTEFEUILLE, Js., concurred.

[1] General Statutes § 53a-54b provides in relevant part: "A person is guilty of a capital felony who is convicted of . . . (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain . . . ."

Section 53a-54b has been amended twice since the date of the defendant's offenses in the present case. See Public Acts 2001, No. 01-84; Public Acts 2001, No. 01-151. As those amendments have no bearing on this appeal, we refer herein to the current revision of the statute.

[2] General Statutes § 53a-8 provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[3] General Statutes (Rev. to 1999) § 53a-101 (a) provides: "A person is guilty of burglary in the first degree when he enters or remains unlawfully in a building with intent to commit a crime therein and: (1) He is armed with explosives or a deadly weapon or dangerous instrument, or (2) in the course of committing the offense, he intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone."

All references to § 53a-101 (a) throughout this opinion are to the 1999 revision unless otherwise noted.

[4] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[5] General Statutes § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[6] See footnotes 29 through 31 of this opinion and the accompanying text for a full explication of the charged offenses.

[7] General Statutes (Rev. to 1999) § 53a-46a provides: "(a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section.

"(b) For the purpose of determining the sentence to be imposed when a defendant is convicted of or pleads guilty to a capital felony, the judge or judges who presided at the trial or before whom the guilty plea was entered shall conduct a separate hearing to determine the existence of any mitigating factor concerning the defendant's character, background and history, or the nature and circumstances of the crime, and any aggravating factor set forth in subsection (i). Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth in subsection (i) of this section exists or that any factor set forth in subsection (h) exists. Such hearing shall be conducted (1) before the jury which determined the defendant's guilt, or (2) before a jury impaneled for the purpose of such hearing if (A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before three judges as provided in subsection (b) of section 53a-45; or (C) if the jury which determined the defendant's guilt has been discharged by the court for good cause, or (3) before the court, on motion of the defendant and with the approval of the court and the consent of the state.

"(c) In such hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence of any mitigating or aggravating factor. Any information relevant to any mitigating factor may be presented

by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (i) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any mitigating or aggravating factor. The burden of establishing any of the aggravating factors set forth in subsection (i) shall be on the state. The burden of establishing any mitigating factor shall be on the defendant.

"(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime, pursuant to subsection (b) of this section, the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

"(e) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of any factor set forth in subsection (h), the existence of any aggravating factor or factors set forth in subsection (i) and whether any aggravating factor or factors outweigh any mitigating factor or factors found to exist pursuant to subsection (d).

"(f) If the jury or, if there is no jury, the court finds that (1) none of the factors set forth in subsection (h) exist, (2) one or more of the aggravating factors set forth in subsection (i) exist and (3) (A) no mitigating factor exists or (B) one or more mitigating factors exist but are outweighed by one or more aggravating factors set forth in subsection (i), the court shall sentence the defendant to death.

"(g) If the jury or, if there is no jury, the court finds that (1) any of the factors set forth in subsection (h) exist, or (2) none of the aggravating factors set forth in subsection (i) exists, or (3) one or more of the aggravating factors set forth in subsection (i) exist and one or more mitigating factors exist, but the one or more aggravating factors set forth in subsection (i) do not outweigh the one or more mitigating factors, the court shall impose a sentence of life imprisonment without the possibility of release.

"(h) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) he was under the age of eighteen years or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (4) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person.

"(i) The aggravating factors to be considered shall be limited to the following: (1) The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or (7) the defendant committed the offense with an assault weapon, as defined in section 53-202a."

All references to § 53a-46a throughout this opinion are to the 1999 revision

unless otherwise noted.

[8] If not specifically noted, all references to the trial court herein are to Judge Lavine.

[9] The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3) and (4). See also General Statutes § 53a-46b (a) (providing for automatic review of death sentences by state Supreme Court in conjunction with direct appeal).

[10] The majority of the material at issue was generated by the "department of children and youth services, which was succeeded by the department of children and families in 1993." *State* v. *Juan L.*, 291 Conn. 556, 570 n.18, 969 A.2d 698 (2009).

[11] The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The eighth amendment is applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 635 n.19, 998 A.2d 1 (2010).

[12] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[13] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. . . ."

Article first, § 9, of the Connecticut constitution provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

[14] We note that Pascual had entered into a cooperation agreement under which he had agreed to provide assistance to the state and testify completely and truthfully both in this case and another capital felony case; see generally *State* v. *Snelgrove*, 288 Conn. 742, 749–50, 954 A.2d 165 (2008); in exchange for the state agreeing to his pleas in this case of guilty charges of murder, burglary in the first degree, larceny in the third degree, conspiracy to commit murder and stealing a firearm, and a definite sentence of no less than twenty-five years and no more than 110 years of incarceration.

[15] At the time of the victim's death, the victim owed Pascual $5500.

[16] Tyrell, who also testified at the defendant's trial, testified that he, too, had pleaded guilty to charges of conspiracy to commit murder and capital felony in exchange for the state dropping its option to seek the death penalty and his being sentenced to life imprisonment without the possibility of release.

[17] Tyrell recognized the rifle because he had stolen it several years before from a nearby house, and had given it to the defendant.

[18] We note that the testimony in the record varies with respect to whether the ammunition used to kill the victim was .222 or .223 caliber. James Stephenson, a firearms examiner with the state crime laboratory who tested the evidence recovered in the present case, testified, however, that the ammunition was .222 caliber.

[19] Investigators subsequently recovered from the defendant's apartment cartridges and bullets with the word "JOE" inscribed upon them, with markings consistent with having been fired from the rifle also found there.

[20] En route back to Marine Tech after the shooting, Tyrell stated to the defendant, "I can't believe you did that," to which the defendant replied, "[i]t could be you next." We note that this is largely consistent with Tyrell's statement to the police, although Tyrell testified on direct examination at trial that the defendant had threatened him en route to West Hartford, rather than on the return trip to Torrington.

[21] Cusano and those friends had last heard from the victim at various times on the evening of December 13; Cusano was supposed to spend that night at the victim's home, but did not go because of snowy weather conditions.

[22] A subsequent autopsy, performed by chief medical examiner Harold Wayne Carver II, determined that the victim had died as the result of a

gunshot wound to the head consistent with a high velocity rifle that uses a .223 caliber cartridge. But see footnote 18 of this opinion.

[23] Members of the West Hartford police tactical team went to Winsted and arrested Tyrell pursuant to a warrant at a later time.

[24] John Pleckaitis, a criminalist with the state crime laboratory, testified that, upon examination of the rifle, he found latent palm prints belonging to the defendant on the bottom curvature of the rifle in front of the trigger. On cross-examination, Pleckaitis testified, however, that he could not determine when exactly the defendant had left those prints on the rifle, and also that the prints would not have been left by a gloved hand.

[25] Officers also searched the defendant's automobile and found a purportedly Movado watch, a Luger handgun under the front seat, and black ski masks in the center console and atop a speaker in the trunk. The federal Bureau of Alcohol, Tobacco and Firearms subsequently identified the handgun as having been purchased by Joseph Bilodeau of Plainville, who was the deceased husband of the girlfriend of the victim's father; Bilodeau had given it to the victim.

[26] *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[27] Prior to leaving Torrington, the defendant told Gregory Brigandi, a West Hartford police detective, where the rifle was located, but denied shooting anyone.

[28] In the defendant's statement, which was later reduced to writing and verified by him for its accuracy and truthfulness, the defendant stated that he went to Marine Tech with Tyrell after Pascual paged him and told him: "I got a job for you." The defendant noted that he, Tyrell and Pascual had checked out the victim's property first, and then, upon their return to Marine Tech, Pascual informed the defendant that he wanted him to hit the victim with a bat "because [the victim] owed [Pascual] $30,000 and [the victim] was messing with [Pascual's] wife." After the group again examined the victim's premises the following day, they developed a concern that the victim had a weapon, so Tyrell brought the scoped rifle with him on Wednesday, December 13, and they went to a sporting goods store where the defendant purchased ".222 or .223" caliber bullets for the gun. But see footnote 18 of this opinion. After noting that they had test fired the gun using soda bottle silencers, the defendant stated that the group again discussed the plan, which was to hit the victim in the head with a baseball bat, and would use the gun only if the victim had a weapon, or if things otherwise "got out of hand."

The defendant then stated that, after they drove to West Hartford in Pascual's Bronco, the defendant and Tyrell entered the apartment using the keys in the mailbox, found the victim passed out on the bed in the apartment, which was full of marijuana smoke, and then heard an automobile pull up and start sounding its horn. The defendant stated that, after the automobile left, he and Tyrell resumed their positions, and just as he was about to hit the victim in the head with the bat, Tyrell shot the victim in the head instead. At that time, Pascual entered the apartment and took car titles and keys from cabinets before finding the victim's empty wallet in the victim's shorts; the defendant took $50 from atop the television, and Tyrell took a jar of change. When the victim's cell phone rang, Pascual checked to see whether it was Pascual's wife, or the victim's girlfriend, Cusano, calling.

The group then drove back to Marine Tech in Torrington, where Pascual put the gloves, soda bottles, shell casings and masks into a bag for disposal. Pascual then offered the defendant and Tyrell each a snowmobile, and offered to "see what he could do" about the defendant's credit card bill. Pascual finally told the defendant that things had worked out better with the victim's death because now the victim would "be leaving his—wife or girlfriend alone" and owed him $30,000.

[29] General Statutes § 53a-54c provides: "A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely

to result in death or serious physical injury."

[30] General Statutes § 53a-212 (a) provides: "A person is guilty of stealing a firearm when, with intent to deprive another of his firearm or to appropriate the same to himself or a third party, he wrongfully takes, obtains or withholds a firearm, as defined in subdivision (19) of section 53a-3."

[31] General Statutes (Rev. to 1999) § 53a-125b (a) provides: "A person is guilty of larceny in the sixth degree when he commits larceny as defined in section 53a-119 and the value of the property or service is two hundred fifty dollars or less."

All references in this opinion to § 53a-125b (a) will be to the 1999 revision, unless otherwise noted.

[32] General Statutes § 54-46a provides: "(a) No person charged by the state, who has not been indicted by a grand jury prior to May 26, 1983, shall be put to plea or held to trial for any crime punishable by death or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it. The accused person may knowingly and voluntarily waive such preliminary hearing to determine probable cause.

"(b) Unless waived by the accused person or extended by the court for good cause shown, such preliminary hearing shall be conducted within sixty days of the filing of the complaint or information in Superior Court. The court shall be confined to the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules. No motion to suppress or for discovery shall be allowed in connection with such hearing. The accused person shall have the right to counsel and may attend and, either individually or by counsel, participate in such hearing, present argument to the court, cross-examine witnesses against him and obtain a transcript of the proceedings at his own expense. At the close of the prosecution's case, if the court finds that, based on the evidence presented by the prosecution, probable cause exists, the accused person may make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The court shall not allow the accused person to present such evidence unless the court determines that such evidence would be sufficient to rebut the finding of probable cause.

"(c) If, from the evidence presented pursuant to subsection (b) of this section, it appears to the court that there is probable cause to believe that the accused person has committed the offense charged, the court shall so find and approve the continuance of the accused person's prosecution for that offense. A determination by the court that there is not probable cause to require the accused person to be put to trial for the offense charged shall not operate to prevent a subsequent prosecution of such accused person for the same offense."

[33] See part III of this opinion.

[34] The trial court previously had denied the defendant's motion for a judgment of acquittal.

[35] The defendant originally had claimed that the imposition of the death penalty was subject to the statutory bar of § 53a-46a (h) (3), because his abuse of substances including ecstasy and ketamine had significantly impaired his mental capacity at the time the murder was committed. At the penalty hearing, the defendant withdrew his intention to raise substance abuse as a statutory bar, and instead raised it as a nonstatutory mitigating factor under § 53a-46a (d). See footnote 36 of this opinion.

[36] As mitigating factors, the defendant claimed that: (1) he "has no prior criminal convictions"; (2) he "and his siblings were adjudicated neglected and taken from their mother [Christina Hagarty (Christina)] and her husband [the defendant's stepfather, Dan Hagarty]"; (3) he "endured many years of abuse by [Hagarty and Christina]"; (4) Christina "was convicted of charges related to the beating of [the defendant]"; (5) Hagarty "was convicted of charges related to the beating of [the defendant]"; (6) "as a child, [he] was admitted to a children's psychiatric hospital"; (7) he "lived in circumstances, as a child with [Christina and Hagarty], injurious to his well-being"; (8) "[Christina and Hagarty] failed to meet their supervisory expectations"; (9) "[Christina and Hagarty] failed to provide him with his educational and moral needs"; (10) "[Christina and Hagarty] were poor role models and could not or did not manage the affairs of the home"; (11) "[u]npredictable living arrangements and chaotic family life characterized [his] childhood and adolescence"; (12) "the [department] described some of [his] problems as 'mental health issues' "; (13) his "biological father committed suicide"; (14) Christina's "mental condition drove her to attempt suicide"; (15) his "sister, [G], attempted suicide as a result of her unstable upbringing"; (16) "[a]lthough abused by [Hagarty], [the defendant] showed compassion to Connie Hagarty, [Hagarty's] mother, who is not related to him by blood"; (17) he "has a history of dysthymia"; (18) he "used ecstasy to cope with the pain of his upbringing"; (19) he "was employed at the time of the offense";

(20) he "has a history of helping local law enforcement in Winsted"; (21) "[Pascual and Tyrell] are equally culpable and do not face the death penalty"; (22) he "has a special concern for children because of his background and has made himself available for child care and youth activities"; (23) "[a]ny factor the jury finds, whether or not enumerated, concerning [the defendant's] character, background or history, or the nature and circumstances of the crime which in fairness and mercy constitutes a basis for a sentence [of] imprisonment without the possibility of release"; (24) "[l]ingering doubt about who committed [the] shooting"; and (25) "[t]he cumulative or combined effect of all of the mitigating evidence concerning [the defendant's] character, background or history or the nature and circumstances of the offense which [the jury] find[s] in fairness and mercy is mitigating and constitutes a basis for a sentence of life imprisonment without the possibility of release."

[37] In conjunction with that evaluation, Selig met with the defendant three times, spoke with the defendant's mother, Christina Hagarty (Christina), and reviewed documentary material including the portions of the department's file that had been disclosed to the defendant; see part VII of this opinion; and interviews conducted by defense counsel with two of the defendant's sisters, Dan Hagarty, who is the defendant's stepfather, Connie Hagarty, who is Dan Hagarty's mother, and Christina. Selig also reviewed photographs, the autopsy record, and transcripts from the suppression and probable cause hearings in this case.

[38] Given the confidentiality issues addressed in part VII of this opinion, as well as this court's long-standing policy pursuant to General Statutes § 54-86e of protecting the identities of the victims of sexual abuse and the offense of risk of injury to a child; see, e.g., *State* v. *Edwards*, 299 Conn. 419, 422 n.4, 11 A.3d 116 (2011); we refer to the defendant's siblings by their initials in order to protect their privacy interests.

We note that G has a long history of psychiatric treatment and has attempted suicide on at least one occasion.

[39] Selig testified that C has a long criminal history and is functionally illiterate. J was raised primarily in a foster home and had a child who was subsequently removed from her home by the department after she returned to Connecticut from Texas, where she had been living.

[40] Christina eventually pleaded guilty to risk of injury charges arising from this incident and received a suspended sentence of imprisonment, along with five years of probation and counseling, with which she did not comply.

[41] Although a "fair amount of [Mantel's] report is blank because of the need to protect the privacy of the other children," Mantel found that the defendant was "depressed and wished he had never been born," and that his strongest attachment was to his deceased father, Eduardo, Sr., given their relationship and shared name. Mantel noted that the defendant remained "lonely and despondent," and still had an "excessive and continuing dependency on [Christina]," despite the abuse.

[42] Case testified that the defendant had dated her daughter in high school, and that she had known him for six years. After her daughter left for college, the defendant moved in with the Case family because of his own family's cramped quarters, where he "became part of [their] family" and appeared able to function in a "stable" and "nurturing" home. Case testified that the defendant was very helpful to her: he aided her in purchasing new curtains and drapes for the home when she could not afford them and also provided assistance and comfort when her dog died suddenly. The defendant also helped Case with her responsibilities as a program director for a Boy Scouts of America day camp, where he was "wonderful" with both children and adults. Additionally, Case testified that the defendant was "fiercely loyal and protective" of his family, and was concerned for Christina, given her suicidal tendencies.

[43] Robert Allensworth, the department's treatment social worker assigned to the case of the defendant's family, noted issues with Christina and Hagarty in terms of "appropriate role modeling," supervision in the home, family dynamics, as well as alcohol and substance abuse that impacted the children. He noted that Christina and Hagarty had failed to set proper limits, both for themselves and for the children in terms of respecting authority and making good decisions, and referred them to outside agencies that would provide assistance. Christina and Hagarty believed, however, that the department was overreacting and was responsible for their family's problems, and often were "obnoxious" and "verbally threatening" to Allensworth. They failed ever to make any progress in resolving their problems, and often threatened to cause Allensworth to lose his job. Allensworth stated that Christina and Hagarty were in constant conflict because their children, of varying parentage, would often be held to different standards and expectations. Allensworth observed specifically that Hagarty was more protective

and a better parent to his biological sons.

[44] Shortly before the defendant graduated high school in 1999, Christina was arrested after hitting Hagarty during a domestic dispute occasioned by his infidelity. Thereafter, she overdosed on drugs and was treated for depression at Charlotte Hungerford Hospital in Torrington. By April, 2000, Christina had left Hagarty permanently and had moved to Florida, where she found a new boyfriend, with whom she was still in a relationship at the time of the defendant's trial in this case.

[45] Judith Trout, the defendant's high school Latin teacher from his freshman year at the Gilbert School in Winsted, described him as "likeable" and "respectful," and testified that he never "gave [me] any attitude." Trout further testified that the defendant had "academic potential," but missed a lot of work and portions of school because of his babysitting responsibilities at home.

[46] Seth Case, Barbara Case's nephew and a friend of the defendant, testified that the defendant frequently used ecstasy and ketamine, or "Special K," when they went out to nightclubs in Hartford. Seth Case further testified that the ecstasy rendered the defendant "euphoric" and "real friendly," and that the Special K tended to make him "a little more tipsy than usual" when they were out together.

[47] John Hamzy, a Winchester police officer, testified that he knew the defendant as a teenager from the Winsted area. Hamzy testified that the defendant was always "very respectful" to him and often provided information that led to arrests resulting from fights and drug activity at the Winsted fireman's carnival, or allowed officers to stop fights before they even started.

With respect to other persons at issue in the present case, Hamzy testified that he had dealings with Pascual, who he knew to be a "druggie and a thief" from his work as a police officer in the Winchester area, despite the fact that Pascual had no criminal convictions arising from those activities. Finally, Hamzy testified that he was familiar with Christina and Hagarty, and that Christina had given him information that had resulted in numerous guns being taken off the streets.

[48] Selig noted that the defendant had been arrested on two separate occasions for larceny and breach of the peace, but had not been convicted or otherwise incarcerated in connection with those charges.

[49] Joseph, who as Hagarty's brother was the defendant's stepuncle, testified that, when the defendant was seventeen or eighteen years old, he babysat frequently for Joseph's two young sons. Joseph testified that the defendant was a "very good babysitter and my kids enjoyed being with him," and that the children always enjoyed seeing him on family visits. Joseph testified that he cared for the defendant a great deal, was not aware of any mental health or substance abuse problems that the defendant had, and that the defendant was very good to Joseph's and Hagarty's mother, often cooking, doing yard work and other chores for her, making her "the best I've seen [her] since my father passed away."

Lemere, Hagarty's sister, testified similarly regarding the defendant's good relationship with her mother, and his excellent relationship with her children as their frequent babysitter. She also never suspected that the defendant had any mental health or substance abuse problems.

[50] Selig described this nurturing behavior with respect to Hagarty's relatives as " 'overcompensation' " for his anger with Hagarty about his childhood abuse, rather than what might seem to be a more "rational" response of treating them badly. Selig described this reaction as consistent with the defendant's efforts to be nurturing to others in order to give other people the care and protection he did not get, which required the suppression of his "painful and dangerous emotions."

[51] In the state's rebuttal case, Brigandi, the West Hartford police detective who led the investigation in this matter, testified that, when he orally interviewed the defendant and Pascual, neither ever mentioned the victim's abuse of Cusano or her children as a motivating factor for the murder. Pascual mentioned the victim's treatment of Cusano and the children as a motivating factor in his written statement to Brigandi, but did not state that he had ever communicated such treatment to the defendant. Brigandi stated that, when he interviewed Cusano, she stated that the victim treated her and her family "very well" and had taken them to dinner and bought the children presents on the night he was murdered.

[52] During the state's comprehensive cross-examination, Selig testified that he was not board certified in the specific field of forensic psychiatry, that he charges a reduced expert witness fee to the public defenders' office and that he interviewed the defendant with an eye toward death penalty mitigation rather than treatment. Selig also acknowledged that he is opposed to the death penalty and has publicly testified to that effect, and also that he had forgotten that there is a chronic form of adjustment disorder. Selig

also admitted that, in both previous death penalty cases and the present case, he had omitted items from his expert's report, including the defendant's rendition of the crime at issue, to cast the defendant in a better light.

With respect to the present case, Selig also acknowledged that the department had concluded that the defendant's lifestyle with his family since January, 1994, was "adequate," and that the department did not object to the expiration of the order of protective custody. Finally, Selig also did not confirm the defendant's account of the crime or speak to Pascual or Tyrell, or compare the defendant's account to the police reports. Selig also acknowledged that he did not seek to confirm the veracity of the defendant's understanding that the victim had been abusive to Cusano's children, by independently speaking either to Cusano or Pascual.

Finally, on redirect examination, Selig acknowledged that he had told the defendant's counsel that, in his opinion, the defendant was not in a position to pursue a statutory bar defense to the imposition of the death penalty. See General Statutes § 53a-46a (h).

[53] The trial court denied the defendant's posttrial motions: (1) to impose a life sentence; (2) to declare the death penalty in this state unconstitutional; (3) to impose a life sentence because of the arbitrary imposition of the sentence of death in this case; and (4) for an order prohibiting the defendant's execution because of the discriminatory nature of the state's death penalty system, in light of pending postconviction litigation considering that issue. The trial court also denied the defendant's posttrial motions concerning allegedly improper jury deliberations, juror misconduct and the improper exclusion of a mitigating factor alleged by the defense.

[54] See footnote 9 of this opinion.

[55] General Statutes § 53a-46b provides: "(a) Any sentence of death imposed in accordance with the provisions of section 53a-46a shall be reviewed by the Supreme Court pursuant to its rules. In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate said sentence and remand for imposition of a sentence in accordance with subdivision (1) of section 53a-35a.

"(b) The Supreme Court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor; or (2) the evidence fails to support the finding of an aggravating factor specified in subsection (i) of section 53a-46a.

"(c) The sentence review shall be in addition to direct appeal and, if an appeal is taken, the review and appeal shall be consolidated for consideration. The court shall then render its decision on the legal errors claimed and the validity of the sentence."

[56] Even when a defendant has been convicted after a fair trial, insufficient evidence presented at a probable cause hearing requires automatic reversal of the subsequent conviction because "a valid finding of probable cause is a [personal] jurisdictional prerequisite to continuing prosecution"; (internal quotation marks omitted) *State* v. *Brown*, 279 Conn. 493, 508, 903 A.2d 169 (2006); and the "insufficiency of the evidence presented at the probable cause hearing will deprive the trial court of jurisdiction over the person of the defendant, thus rendering moot any subsequent prosecution and conviction." (Internal quotation marks omitted.) Id., 508–509.

[57] See footnote 32 of this opinion for the text of § 54-46a.

[58] "Article first, § 8 (a), of the Connecticut constitution, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: 'No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.' " *State* v. *Brown*, 279 Conn. 493, 506 n.4, 903 A.2d 169 (2006).

[59] The defendant's probable cause hearing was held jointly with those in the cases of Pascual and Tyrell. At the joint hearing, witnesses common to the three cases testified before three judges, *Solomon*, *Mulcahy* and *Ward*, *Js*., each of whom then made a separate probable cause determination for the defendant, Pascual and Tyrell, respectively. When evidence admissible against one codefendant, but not the other, was admitted, the relevant judges would exit the courtroom.

[60] "The fourth amendment to the United States constitution provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' The fourth amendment has been made applicable

to the states via the fourteenth amendment." *State* v. *Jenkins*, 298 Conn. 209, 212 n.1, 3 A.3d 806 (2010).

[61] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[62] We note that, at trial, the defendant also contended that his arrest was illegal because the West Hartford tactical team did not execute the arrest warrant during daytime hours as defined by the Federal Rules of Criminal Procedure. The trial court denied the defendant's motion to suppress the statements following his arrest, holding the federal rules inapplicable in a Connecticut criminal proceeding and finding no comparable state statute or rule of procedure. The defendant does not renew this particular claim on appeal before this court.

[63] Brigandi testified that when arrestees request attorneys, all questioning stops immediately and the arrestee is permitted to contact a public defender or private attorney.

[64] Epstein had regular access via a key to the police lockup so that he could more conveniently visit prospective clients prior to meeting them at their arraignments.

[65] In contrast to the police officers' account of the events, which the trial court credited, we note that the defendant testified that, at 5:45 a.m. on December, 22, 2000, numerous police officers entered his apartment. Some officers grabbed his sister and pinned her down, while another officer grabbed him out of bed, and Brigandi identified him. After leaving the defendant lying in the snow briefly, the officers put him in a cruiser, at which time Brigandi approached him, told him he was under arrest for murder and asked him where the gun was. The defendant testified that Brigandi did not advise him of his *Miranda* rights to remain silent, to an attorney or to refuse to answer questions. Brigandi kept asking the defendant where the gun was and said that the police would find it no matter what because they were "going to tear the apartment apart anyway." The defendant then testified that, on the way back to West Hartford from Torrington, Brigandi and Moylan asked him whether he had ever been to West Hartford and what was the best route there from Torrington.

The defendant then testified that no one had advised him of his rights at the time they arrived at the West Hartford police station; the officers then removed his handcuffs, put him in leg irons and moved him into the interview room. Thereafter, the officers sat him down and questioned him about his relationships with Pascual and Tyrell, but again did not advise him of his rights. They then confronted the defendant with written statements purportedly from Pascual and Tyrell, and Brigandi told the defendant that if he signed a written statement, Brigandi would "take the death penalty off the table." At that point, Brigandi advised the defendant of his rights and gave him the advisement form. The defendant stated that he did not initial next to the attorney rights advisement until after Brigandi had clarified for him that he would be assigned an attorney at his arraignment to be held the following Tuesday.

The defendant next testified that he told Brigandi and Moylan that he had not been sleeping well, and Moylan went to get him a soda and candy bar. The defendant then told Brigandi and Moylan his version of the events, and at some point, Moylan took his gun off and briefly placed it on the table in front of and within reach of the defendant. The officers then took the defendant into another room where he was given a typed version of his statement, which he read in part and then signed. The defendant further testified that, when he went into the office to execute the written statement, the officer typing the statement inquired about the whereabouts of his attorney and called it "bullshit," because the defendant should already have one, at which point Brigandi yelled and told the other officer to "cut the crap." The defendant then completed the statement because Brigandi forced him to, notwithstanding the rights advisement that informed him that he could stop answering questions at any time.

The defendant further testified that, when he gave his statement to the police, he was under the influence of ketamine, which is used to euthanize cats, but is also a hallucinogen for humans. He had taken ketamine around 3 or 4 a.m. in an attempt to help himself sleep. The defendant also testified that he was nervous and crying, and would burst into tears when the officers yelled at him. The defendant did not, however, tell the detectives that he had taken ketamine because he thought it would "make [him] look bad." The defendant also stated that he had previously been hospitalized for depression as a child, and had taken medication for depression until he no longer could afford to do so.

The defendant acknowledged on cross-examination that he previously had been advised of his constitutional rights in the course of two prior arrests for larceny and breach of the peace, both by the police and by the court. The defendant also testified that, after he had given his statement in the present case, Epstein attempted to see him and shouted to him not to say anything, although the officers did not let Epstein actually meet with him. Further, the defendant did not learn until after he gave his statement that Tyrell was not in custody, despite the fact that the police had produced a written statement purportedly from Tyrell.

[66] The state also contends that any impropriety in the admission of this statement is harmless error because it did not lead to the discovery of the rifle, which was found during the tactical team's protective sweep of the apartment after the defendant was taken into custody, and because equally probative evidence concerning the defendant's participation in the crime was found during a valid search of his apartment subsequent to the raid, namely, the bullets and cartridges inscribed with the victim's name. We need not address these harmless error arguments.

[67] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

[68] In *State* v. *Wilson*, supra, 183 Conn. 280, this court discussed, inter alia, *North Carolina* v. *Butler*, 441 U.S. 369, 372–73, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), and emphasized that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel"; *State* v. *Wilson*, supra, 283; and that "a waiver of the *Miranda* rights need not be by an express statement but may be inferred from the actions and words of the person interrogated. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (Internal quotation marks omitted.) *State* v. *Wilson*, supra, 284. The court emphasized that, when a defendant remains silent with respect to waiver, "before a conclusion of waiver can be supported, the state must demonstrate: (1) that the defendant understood his rights, and (2) that the defendant's course of conduct indicated that he did, in fact, waive those rights." Id., 285; see also id., 285–86 (insufficient evidence of waiver when defendant merely acknowledged understanding constitutional rights and there was no evidence of defendant's intelligence level, educational background or physical or mental condition prior to making oral statement).

[69] Thus, we find inapposite the defendant's reliance on *United States* v. *Foley*, 735 F.2d 45, 47–48 (2d Cir. 1984), cert. denied sub nom. *United States* v. *Edler*, 469 U.S. 1161, 105 S. Ct. 915, 83 L. Ed. 2d 928 (1985), and *United States* v. *Perez*, 733 F.2d 1026 (2d Cir. 1984), which criticized as potentially unethical and unlawful the "practice and policy [of] the United States Attorney's Office for the Southern District of New York, apparently alone in the federal system . . . [which] routinely has an [assistant United States attorney] interview uncounseled defendants just before they are taken before a magistrate where, pursuant to Fed. R. Crim. P. 5 (a), they will be informed of the charges against them, advised of their constitutional rights, and have counsel assigned to them if needed." (Citations omitted.) *United States* v. *Foley*, supra, 47–48. Those cases are distinguishable because the Second Circuit had before it an undisputed factual record of the policy and practice of the Southern District of New York, and the issue therein concerned interviews by prosecutors, rather than police officers. Moreover, *Foley* is particularly distinguishable because, in that case, a legal aid attorney, who likely would have been assigned to represent the defendant, specifically had asked the federal prosecutor not to speak to the defendant prior to the interview at issue. See id., 48.

[70] General Statutes § 54-1g (a) provides in relevant part: "Any arrested person who is not released sooner or who is charged with a family violence crime as defined in section 46b-38a or a violation of section 53a-181c, 53a-181d or 53a-181e shall be promptly presented before the superior court sitting next regularly for the geographical area where the offense is alleged to have been committed. . . ."

[71] Practice Book § 37-1 provides in relevant part: "A defendant who is not released from custody sooner shall be brought before a judicial authority no later than the first court day following arrest. . . ."

[72] General Statutes § 54-1c provides: "Any admission, confession or statement, written or oral, obtained from an accused person who has not been presented to the first session of the court, or on the day specified for arraignment under the provisions of section 54-1g, or who has not been informed of such person's rights as provided by section 54-1b or 54-64b, shall be inadmissible."

Although § 54-1c was the subject of technical amendments in 2003; see Public Acts 2003, No. 03-19, § 127; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision.

[73] We similarly disagree with the defendant's reliance on *Moran* v. *Burbine*, supra, 475 U.S. 412, for the proposition that the police behavior here was sufficiently egregious to require suppression of the defendant's statement under the due process clause. In *Moran*, the Supreme Court rejected a *Stoddard*-esque claim that police officers from Cranston, Rhode Island, had violated the fifth and fourteenth amendments of the United States constitution by deceiving a public defender who had sought to counsel the defendant in connection with pending burglary charges, by telling the attorney that they were through with the defendant for the evening, without mentioning that police officers from Providence, Rhode Island, were there to question the defendant about a murder, and further by failing to tell the defendant of the attorney's attempt to assist. See id., 423–25, 433–34. Again, the present case is distinguishable because the defendant's statement to the police was made before Epstein had tried to contact him.

[74] The state also argues that any impropriety with respect to the admission of the rifle was harmless error beyond a reasonable doubt given the testimony of Tyrell and Pascual, as well as the fact that the defendant had carved the victim's name "JOE" into cartridge casings and bullet ends that were validly found in the apartment. Because of our conclusion that the record is inadequate for review, we need not reach the state's harmless error arguments.

[75] The defendant cites trial exhibits forty-six and forty-seven and posits that the two "photographs show an inlaid wood chest about two feet square. The wall of the alcove near the butt of the gun is slanted upward following the pitch of the roof. A short vertical section of the wall is below and a small triangular section of the floor can be seen at the bottom of the wall. From these features, the chest appears to be no more than two or three feet tall. Not even a small framed contortionist with his knees to his chest could fit in the chest."

[76] "The sixth amendment to the United States constitution provides in relevant part: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed . . . .' The sixth amendment right to a jury trial is made applicable to the states through the due process clause of the fourteenth amendment." *Rizzo II*, supra, 303 Conn. 77 n.3.

See footnotes 11 and 12 of this opinion for the text of the eighth and fourteenth amendments to the United States constitution.

[77] See footnote 13 of this opinion for the text of article first, §§ 8, 9, 10 and 20, of the Connecticut constitution.

[78] "In [*Witt*] . . . the United States Supreme Court . . . considered the effect [of] a prospective juror's beliefs concerning the death penalty . . . on that individual's eligibility to serve as a juror in a capital case . . . [and] clarified the standard for determining whether a venireperson properly may be challenged for cause on the basis of his beliefs regarding the death penalty. Specifically, the court concluded that the federal constitution permits the excusal for cause of venirepersons whose opposition to capital punishment would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and the juror's oath. . . . [A]s interpreted in . . . [*Witt*], the federal constitution permits the excusal for cause of venirepersons whose opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors during either: (1) the guilt phase of the trial; or (2) the sentence phase of the trial. For a venireperson's opposition to the death penalty to be considered as

preventing or substantially impairing the performance of that individual's duties as a juror during the sentencing phase of the trial, so as to permit excusal for cause, the federal constitution does not require that the venireperson explicitly state that . . . he automatically would vote not to impose a sentence of death. Instead, the federal constitution permits the excusal for cause of venirepersons whose responses during voir dire raise serious doubt as to their ability to follow the law during the sentencing phase. . . .

"Furthermore, a trial judge's finding that a particular venire[person] was not biased and therefore was properly seated [is] a finding of fact . . . . [T]he question whether a [venireperson] is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the [venireperson's] state of mind. . . . [S]uch a finding [also] is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review . . . . [This] holding applies equally [as] well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause." (Citation omitted; internal quotation marks omitted.) *State* v. *Colon*, supra, 272 Conn. 156–58; see also *Witherspoon* v. *Illinois*, supra, 391 U.S. 522 ("a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"); id., 522 n.21 ("[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings").

[79] The state further cites *State* v. *McCarthy*, 179 Conn. 1, 425 A.2d 924 (1979), for the proposition that, pursuant to General Statutes § 53a-9, it is no defense to accessorial liability that the principal is actually an innocent agent. General Statutes § 53a-9 provides: "In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person under section 53a-8 it shall not be a defense that: (1) Such other person is not guilty of the offense in question because of lack of criminal responsibility or legal capacity or awareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or because of other factors precluding the mental state required for the commission of the offense in question; or (2) such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has been acquitted thereof, or has legal immunity from prosecution therefor; or (3) the offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity."

[80] Disputing the defendant's claim that the murder was a debt collection gone awry, the prosecutor further argued that "the defendant used it as a ruse to get . . . Tyrell involved to help [him] go through with his master plan. [Tyrell] was in effect subcontracted by the defendant to help him carry out this capital felony. And this defendant knew the whole time that [Tyrell] was going to get absolutely nothing for it, because he knew there was no debt to collect. He knew they were going there to kill somebody and that [Tyrell] was getting absolutely nothing."

[81] See part VI A of this opinion for additional discussion of the relevant jury instructions in the guilt phase of this case.

[82] In *State* v. *Hope*, supra, 203 Conn. 423–24, we concluded that James Hope, who was McGann's accomplice, "can no longer be tried on a charge of capital felony murder in light of our determination that McGann was not a hired assassin under the terms of § 53a-54b (2). It was never alleged that the defendant was himself hired for pecuniary gain. He cannot be held liable as an accessory on this charge in the absence of evidence that anyone else committed a capital felony murder." We note, however, that "*Hope* since has been interpreted to stand for the more limited principle that if, as a matter of law, the evidence was legally insufficient to show that *any* capital felony had occurred, the accessory could not be charged with it. . . . Conversely, the prosecution of an accused accessory may proceed when the evidence is factually insufficient to establish who committed the crime, but the accessory makes no claim that [the crime] was not committed . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 757 n.21, 894 A.2d 928 (2006), overruled on other grounds by *State* v. *Terwilliger*, 294 Conn. 399, 984 A.2d 721 (2009); see also *State* v. *Garner*, 270 Conn. 458, 481, 853 A.2d 478 (2004) ("we reject the defendant's argument that *Hope* stands for the principle that the

conviction of an accessory is prohibited when the principal has been acquitted in a separate trial").

[83] General Statutes (Rev. to 1995) § 53a-54b provides in relevant part: "A person is guilty of a capital felony who is convicted of any of the following . . . (7) murder committed in the course of the commission of sexual assault in the first degree . . . ."

[84] The court observed that "[t]here is no such crime as being an accessory . . . . The accessory statute merely provides alternate means by which a substantive crime may be committed. . . . This state . . . long ago adopted the rule that there is no practical significance in being labeled an accessory or a principal for the purpose of determining criminal responsibility. . . . The modern approach is to abandon completely the old common law terminology and simply provide that a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime. . . . [The] labels [of accessory and principal] are hollow . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Solek*, supra, 242 Conn. 421–22.

[85] The defendant in *Solek* had argued further that "a defendant may be held criminally responsible for the capital felony of murder committed in the course of the commission of a sexual assault in the first degree only if the defendant, with the intent to cause the death of the victim, either: (1) intentionally causes the death of the victim in the course of a sexual assault in the first degree; or (2) intentionally aids another person and the other person, in the course of that person's sexual assault of the victim, intentionally causes the death of the victim." *State* v. *Solek*, supra, 242 Conn. 422–23. This court disagreed, stating that the "legislature cannot have intended such an interpretation . . . because it would lead to bizarre results. . . . If one breaks capital felony into its constituent parts of murder and sexual assault in the first degree, the defendant's argument falls in upon itself. According to the defendant's argument, a defendant who is an accessory with respect to the murder and an accessory with respect to the sexual assault may be held criminally liable for capital felony on the basis of § 53a-8, but a defendant who is an accessory with respect to the murder, and a principal with respect to the sexual assault may not be held criminally liable for capital felony. *According to the defendant's interpretation of* [*General Statutes Rev. to 1995*] *§ 53a-54b, then, a defendant who has aided another person to commit the two substantive elements of capital felony, and thus is liable for capital felony pursuant to § 53a-8, may avoid capital felony liability by himself committing one of the substantive elements of capital felony.* Because such an interpretation of [General Statutes Rev. to 1995] § 53a-54b (7) would be bizarre and illogical, the defendant's argument must fail." (Citations omitted; emphasis altered.) Id., 423.

[86] Attempting to bolster the similarity of the present case to *State* v. *McGann*, supra, 199 Conn. 170, which the defendant contends is dispositive precedent, he argues in his reply brief that the "state treats the terms of the agreement as surplusage," emphasizing that "Pascual agreed with [the defendant] that [the defendant] would kill the victim. Pascual never agreed that Tyrell would kill the victim. Because the victim's murder was not performed according to the terms of the murder for hire agreement that Pascual had with [the defendant], it was not a murder for hire." We disagree. The key factual difference in *McGann* was that the agreement in that case was for McGann to act as a broker to procure the third party murderer's services for Burke. See id., 170–71. Put differently, Burke never originally contemplated that McGann would have a role in the victim's murder beyond that, and did not contemplate compensating McGann for those services. Id., 172–73. In contrast to *McGann*, the parties in the present case contemplated at the time of hiring the defendant's active role in killing the victim; any involvement by Tyrell, even if Tyrell actually pulled the trigger, was merely a means to that end.

[87] The trial court instructed the jury: "Under our law, a person is criminally liable for a criminal act if he directly commits it or if he is an accessory to a criminal act of another. In other words, a person is guilty of a crime either because he is the principal offender or because he is an accessory. Being an accessory is not a crime in and of itself but is only another way of committing a crime.

"Now, in this particular case in counts one, two, four, five, nine and ten, the state has charged [the defendant] as an accessory. What this means is that in each of these counts the state is pursuing alternative legal theories: that [the defendant] is guilty either because he was the principal offender or because he is guilty as an accessory under a theory of accessorial liability.

"Under a theory of accessorial liability the state does not claim the defendant himself directly committed the crimes charged; rather, the state claims

that the defendant is guilty of each of the crimes charged by virtue of being an accessory to each of the crimes charged. An accessory is a criminal participant in the crime.

"If two or more people participate in a crime, then they are equally responsible even though it was the immediate act of only one which actually brought the crime about. 'Participation' means not only actively sharing in its final commission but in doing anything to aid or assist the conduct which caused it. . . . Section 53a-8 of our law, called the 'accessory statute,' which states as follows: It states that 'a person acting with the mental state required for commission of an offense who solicits, requests, commands, importunes, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender' . . . .

"When you examine the information you will see that § 53a-8 is referred to in counts one, two, four, five, nine and ten. Now, if a person did any of these things specified in § 53a-8, he is in the eyes of the law just as guilty of the crime charged as though he had directly committed it or directly participated in its commission. Everyone is a party to a crime who actually commits it or who does some act forming part of it or who assists in its actual commission or the commission of any part of it or who directly or indirectly counsels or procures anyone to commit the crime or to do any act which is a part of it. If there's a joint criminal enterprise, each party to it is criminally responsible for all acts done in furtherance of it.

"Now, the statute does not connect various acts it specifies by the word 'and' but instead separates them by the word 'or.' The other person is an accessory to the commission of a crime if acting with the mental state required, that is, the criminal intent required by the statute for the commission of the crime, he solicits, requests, commands, importunes, or intentionally aids another person in the commission of the crime.

"To 'solicit' is to try to persuade someone to commit the crime. To 'request' is to ask. To 'command' is to order. To 'importune' is to ask repeatedly. To 'aid' is to help or assist.

"Now, in order to be an accessory to a crime the defendant must have the same criminal intent required for the crime to which he is an accessory, as I shall explain that intent to you when I discuss the elements of the individual counts, that is, he must have the intent to commit the crime charged; and whereas here the state claims he's an accessory by aiding the commission of that crime, he must have also had the intent to aid the principal perpetrator of the crime; that is, he must . . . have the intent to aid the other person or persons in their actual commission of the crime.

"Now, to be an accessory to a crime a person must be more than simply present as a companion at the commission of the crime. One must do something more than passively acquiesce in it or innocently do certain acts which in fact did aid in the commission of the offense. Unless there was a criminality of intent and unlawful purpose in common with the actual perpetrator of the crime, one is not an accomplice under the statute. But if the defendant is proven beyond a reasonable doubt to have done any of these things specified in the statute with that criminal and common intent, he is just as much of a participant in the crime as if he himself [had] committed it.

"In order to find that a person was an accessory under the statute it is not necessary to show an agreement in words or writing, but such an agreement may be inferred from . . . all the circumstances. Whether someone who is present at the commission of a crime is an accessory to it depends on the circumstances surrounding his presence and his conduct while there.

"Therefore, in listening to the balance of my instructions you should keep these rules in mind: If any person or persons committed an offense charged and [the defendant] was an accessory, as I've explained, legally it's just as if he committed the offense—he himself committed the offense as long as [the defendant] intended to aid or assist in the accomplishment of the crime, as long as he had the intent required for the commission of the crime, and as long as the principal offender had the intent required for the commission of the crime.

"Now, please note: You do not have to unanimously agree that [the defendant] acted as the principal to convict . . . nor do you have to unanimously agree that he acted as an accessory to convict on any of these counts as long as you unanimously agree that he is guilty as either the principal offender or as an accessory. So hypothetically if six of you conclude that he is guilty on one of these counts as a principal offender and six conclude

that he's guilty on that same count as an accessory, then the defendant can be convicted. But if only one of you conclude that the state has failed to prove [the defendant] is guilty as either the principal offender or an accessory, then he cannot be convicted of the charge being considered."

[88] We note that the defendant's principal brief and the state's brief were both filed prior to the issuance of our decision in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), wherein this court concluded that, for purposes of *Golding* review of unpreserved instructional claims, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." The defendant's reply brief in the present case was filed thereafter and addresses the import of *Kitchens* as applied to the reviewability of the defendant's various claims of instructional impropriety, particularly those arising from the penalty phase hearing. One such argument is that the rule of implied waiver set forth in *Kitchens* should not apply in death penalty cases. Given the posture of this case, including when the case was tried relative to the argument and decision of this appeal, as well as the fact that the state does not contend that any of the guilt phase instructional claims were waived at trial, we leave for another day the question of whether the rule set forth in *Kitchens* is applicable to capital cases.

[89] In discussions prior to the supplemental charge, the defendant made clear his position that the state had to prove that the defendant " 'agreed,' " rather than " 'understood,' " that he would kill the victim for pecuniary gain, noting that "essentially we're looking at a quasi-contractual relationship here, purportedly, in the state's case between . . . Pascual and [the defendant]. And we feel that the term 'agreed' is more contractually based than 'understood.' " The state objected to that point, and also to the supplemental charge, emphasizing its view that the original charge was adequate on that point, and that " 'agreed' " and " 'understood' " were synonymous. The trial court agreed with the state that the terms were synonymous and that "what this charge goes to is his understanding. The word 'hiring' is what relates to the agreement." The trial court then ruled, however, that it would give the requested instruction because it felt "duty bound to make sure that if the jury convicted on capital felony that they fully understand that any agreement, that it must have been understood by the defendant at the time of the hiring and before the killing that the killing would be committed for pecuniary gain." The defendant then declined to take any further exception.

[90] The defendant argues that he posited as a defense his "motivat[ion] to kill the victim because the victim abused his girlfriend and her children," and relies on *State* v. *McGann*, supra, 199 Conn. 163, for the proposition that the "jury could not convict [him] of a contract killing if his motivation changed between the time of the agreement and the killing." We disagree. First, as a factual matter, the defendant did not argue in his guilt phase summation that protecting Cusano and her children was a reason for killing the victim, focusing instead on the existence of a murder for hire arrangement and the defendant's specific role in the killing itself. Second, this court's decision in *McGann* plainly contemplates that a defendant may be held liable for capital felony, even if pecuniary motivations are not the *sole* reason for his actions. See id., 175 ("The evidence lends reasonable support to these inferences as a basis for finding the defendant to have been *partially motivated* by a desire for pecuniary gain. The court was not obligated to conclude from the evidence . . . that he was motivated solely by other considerations, such as his concern for [Burke] and her family." [Emphasis added.]).

[91] See footnotes 3 and 4 of this opinion for the text of §§ 53a-48 and 53a-101.

[92] The complete context of the jury charge on count five of the information, which charged the defendant with accessory to burglary in the first degree in violation of § 53a-101 (a) (2), was that, "to obtain a conviction on count five the state must prove beyond a reasonable doubt, first, that the defendant entered or remained in a building unlawfully; and, second, that he did so specifically intending to commit a crime in that building. But with respect to count five, the third element that the state must prove beyond a reasonable doubt pursuant to § 53a-101 (a) (2) . . . is that the defendant intentionally, knowingly or *recklessly* inflicted bodily injury on [the victim]." (Emphasis added.) The trial court then elaborated further on the definitions of the applicable mental states.

[93] As the state points out, the defendant's recitation of the relevant facts with regard to this claim is curious. Although the defendant discusses multiple cell phone calls, including the call from Pascual and the defendant to Cusano immediately after the murder, as well as calls made by Ralph Cocco, a friend of the victim, to the victim's telephone on the night of the murder, the only telephone call directly at issue in this claim is the one between Pascual and the defendant several days after the murder.

[94] In contending that the murder of the victim was for pecuniary gain, the state had argued: "The defendant was hired by [Pascual] who wanted [the victim] dead. The defendant originally asked for $5000 to undertake the job. When Pascual told the defendant, well that's too much, I don't have $5000, the defendant says, well, how about that snowmobile over there in the corner of your shop? And [Pascual] says, okay, I'll do that. And he told you that was worth $2000.

"Then [Pascual] tells you that it's at that point that he and the defendant agree that this defendant will kill [the victim] for a snowmobile, this snowmobile. And remember the additional evidence, ladies and gentlemen: You heard [Pascual] testify that on his way back from Florida several days after [the victim was] murdered he gets a call from this defendant on his cell phone. This defendant says to him, when are you coming back? We got several inches of snow on the ground. I want to know when I'm getting my snowmobile, the snowmobile that he was promised by [Pascual] as payment for killing [the victim]."

[95] The state also objected to the defendant asking the jurors to put their sons in the place of the defendant in deciding this case. The trial court agreed with the state's objection on that point, considering it to be an inappropriate appeal to the jurors' emotions, and gave a curative instruction, which is not at issue in this appeal.

[96] This court articulated the missing witness rule in *Secondino* v. *New Haven Gas Co.*, supra, 147 Conn. 675, which had held that "[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause." (Internal quotation marks omitted.) "[T]he jury charge explaining the [missing witness] rule commonly is referred to as the *Secondino* instruction or the missing witness instruction." *State* v. *Malave*, supra, 250 Conn. 724 n.2. The legislature abandoned the missing witness instruction in civil cases by adopting General Statutes § 52-216c. See id., 724 n.3.

[97] Thus, we find the defendant's reliance on *United States* v. *Miguel*, 338 F.3d 995 (9th Cir. 2003), and *Conde* v. *Henry*, 198 F.3d 734 (9th Cir. 1999), to be similarly misplaced. In both of those cases, the United States Court of Appeals for the Ninth Circuit reversed convictions because the District Court had improperly prohibited defense counsel from arguing points that were in fact supported by the evidence in the record. See *United States* v. *Miguel*, supra, 1002 ("The evidence supported the defense theory that [another individual] was the gunman. Accordingly, the court should have allowed defense counsel to argue the defense theory in closing."); *Conde* v. *Henry*, supra, 739 ("[b]y preventing [the defendant] from arguing that no robbery had occurred and that he lacked the requisite intent to rob, the trial court's order violated the defendant's fundamental right to assistance of counsel and right to present a defense"). The present case involved no such absolute prohibition on significant subject matter, and indeed, the trial court's instruction specifically encouraged the jury to consider all of the evidence or lack thereof.

[98] "The terms 'confidential' and 'privilege' can have different meanings and legal effects. . . . Our case law, however, often refers to records as both confidential and privileged when they are shielded from disclosure by statute and consent by the subject of the records or his or her representative must be obtained in order to disclose the records." (Citation omitted.) *State* v. *Kemah*, 289 Conn. 411, 417 n.7, 957 A.2d 852 (2008). For the sake of simplicity and consistency, we refer to the department's records as "privileged" in this opinion.

[99] General Statutes (Rev. to 2003) § 17a-28 provides in relevant part: "(b) Notwithstanding the provisions of section 1-210, 1-211 or 1-213, records maintained by the department shall be confidential and shall not be disclosed. Such records of any person may only be disclosed, in whole or in part, to any individual, agency, corporation or organization with the consent of the person or as provided in this section. Any unauthorized disclosure shall be punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. . . .

* * *

"(f) The commissioner or the commissioner's designee shall, upon request, promptly provide copies of records, without the consent of a person, to (1) a law enforcement agency, (2) the Chief State's Attorney, or the Chief State's Attorney's designee or a state's attorney for the judicial district in which the child resides or in which the alleged abuse or neglect occurred or the state's attorney's designee, for purposes of investigating or prosecuting an allegation of child abuse or neglect, (3) the attorney appointed to represent a child in any court in litigation affecting the best interests of the child, (4) a guardian ad litem appointed to represent a child in any court in litigation affecting the best interests of the child, (5) the Department of Public Health, which licenses any person to care for children for the purposes of determining suitability of such person for licensure, (6) any state agency which licenses such person to educate or care for children pursuant to section 10-145b or 17a-101j, (7) the Governor, when requested in writing, in the course of the Governor's official functions or the Legislative Program Review and Investigations Committee, the committee of the General Assembly on judiciary and the committee of the General Assembly having cognizance of matters involving children when requested in the course of such committees' official functions in writing, and upon a majority vote of said committee, provided no names or other identifying information shall be disclosed unless it is essential to the legislative or gubernatorial purpose, (8) a local or regional board of education, provided the records are limited to educational records created or obtained by the state or Connecticut-Unified School District #2, established pursuant to section 17a-37, and (9) a party in a custody proceeding under section 17a-112, or section 46b-129, in the Superior Court where such records concern a child who is the subject of the proceeding or the parent of such child. A disclosure under this section shall be made of any part of a record, whether or not created by the department, provided no confidential record of the Superior Court shall be disclosed other than the petition and any affidavits filed therewith in the superior court for juvenile matters, except upon an order of a judge of the Superior Court for good cause shown. The commissioner shall also disclose the name of any individual who cooperates with an investigation of a report of child abuse or neglect to such law enforcement agency or state's attorney for purposes of investigating or prosecuting an allegation of child abuse or neglect. The commissioner or the commissioner's designee shall, upon request, promptly provide copies of records, without the consent of the person, to (A) the Department of Public Health for the purpose of determining the suitability of a person to care for children in a facility licensed under sections 19a-77 to 19a-80, inclusive, 19a-82 to 19a-87, inclusive, 19a-82 to 19a-87, inclusive, and 19a-87b, and (B) the Department of Social Services for determining the suitability of a person for any payment from the department for providing child care.

* * *

"(*l*) Information disclosed from a person's record shall not be disclosed further without the written consent of the person, except if disclosed to a party or his counsel pursuant to an order of a court in which a criminal prosecution or an abuse, neglect, commitment or termination proceeding against the party is pending. A state's attorney shall disclose to the defendant or his counsel in a criminal prosecution, without the necessity of a court order, exculpatory information and material contained in such record and may disclose, without a court order, information and material contained in such record which could be the subject of a disclosure order. All written records disclosed to another individual or agency shall bear a stamp requiring confidentiality in accordance with the provisions of this section. Such material shall not be disclosed to anyone without written consent of the person or as provided by this section. A copy of the consent form specifying to whom and for what specific use the record is disclosed or a statement setting forth any other statutory authorization for disclosure and the limitations imposed thereon shall accompany such record. In cases where the disclosure is made orally, the individual disclosing the information shall inform the recipient that such information is governed by the provisions of this section.

"(m) In addition to the right of access provided in section 1-210, any person, regardless of age, his authorized representative or attorney shall have the right of access to any records made, maintained or kept on file by the department, whether or not such records are required by any law or by any rule or regulation, when those records pertain to or contain information or materials concerning the person seeking access thereto, including but not limited to records concerning investigations, reports, or

medical, psychological or psychiatric examinations of the person seeking access thereto, provided that (1) information identifying an individual who reported abuse or neglect of a person, including any tape recording of an oral report pursuant to section 17a-103, shall not be released unless, upon application to the Superior Court by such person and served on the Commissioner of Children and Families, a judge determines, after in camera inspection of relevant records and a hearing, that there is reasonable cause to believe the reporter knowingly made a false report or that other interests of justice require such release; and (2) if the commissioner determines that it would be contrary to the best interests of the person or his authorized representative or attorney to review the records, he may refuse access by issuing to such person or representative or attorney a written statement setting forth the reasons for such refusal, and advise the person, his authorized representative or attorney of the right to seek judicial relief. When any person, attorney or authorized representative, having obtained access to any record, believes there are factually inaccurate entries or materials contained therein, he shall have the unqualified right to add a statement to the record setting forth what he believes to be an accurate statement of those facts, and said statement shall become a permanent part of said record.

"(n) (1) Any person, attorney or authorized representative aggrieved by a violation of subsection (b), (f), (g), (h), (i), (j) or (*l*) of this section or of subsection (m) of this section, except subdivision (2) of said subsection (m), may seek judicial relief in the same manner as provided in section 52-146j; (2) any person, attorney or authorized representative denied access to records by the commissioner under subdivision (2) of subsection (m) of this section may petition the superior court for the venue district provided in section 46b-142 in which the person resides for an order requiring the commissioner to permit access to those records, and the court after hearing, and an in camera review of the records in question, shall issue such an order unless it determines that to permit such access would be contrary to the best interests of the person or authorized representative. . . ."

[100] We note that the defendant also cites article first, § 8, of the Connecticut constitution in support of his claims, but has failed to provide an independent analysis under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), of any claim that the state constitution provides him with greater protection than does the federal constitution. Accordingly, we deem any independent state constitutional claim abandoned and confine our analysis to the defendant's federal claims. See, e.g., *State* v. *Foreman*, supra, 288 Conn. 692 and n.5.

[101] The state did not take a position with respect to the disclosure of the department's records to the defendant other than to insist on its right to see any records that were ultimately disclosed to the defendant.

[102] Judge Solomon also noted that he would be receptive to hearing from the examining psychiatrist regarding the types of information that might be valuable to his inquiry.

[103] Although the defendant advised the trial court that he subsequently had obtained a release of confidentiality from one of his siblings, Judge Solomon declined to conduct a second in camera review because he had already spent "a tremendous amount of time" reviewing the file, and did not find that any documents that he had not disclosed "relating to any of the siblings [are] necessarily going to be relevant or helpful . . . ."

[104] We note that there are four sets of records for consideration in this case. Court exhibit one is the complete original set of the department's records that both Judge Solomon and this court have reviewed in camera. Court exhibit two is the set of records that the department provided directly to the defendant upon his original request. Court exhibit three is the set of documents culled by Judge Solomon after in camera review of court exhibit one, but without names redacted for purposes of preserving confidentiality. Court exhibit four is the redacted version of court exhibit three, which subsequently was admitted into evidence at trial as defense exhibit R.

Judge Solomon did not review court exhibit two, preferring instead to go through the entire original file contained in court exhibit one independently and determine what it viewed as relevant for disclosure. We have conducted our appellate in camera review in an identical manner.

[105] While this appeal was pending, the defendant filed a motion asking this court to unseal the department's records. We denied the defendant's motion to unseal, "without prejudice" to his raising this matter as a claim on appeal.

[106] Judge Solomon subsequently granted the defendant's motion for rectification and authorized the consecutive numbering of the pages of defense exhibit R in order to facilitate citation to that large exhibit during the

appellate briefing and review process.

[107] A plurality of the Supreme Court first rejected the defendant's argument that the sixth amendment's confrontation clause entitled him to pretrial direct access to the records in order to facilitate cross-examination. The plurality concluded that *Davis* v. *Alaska*, supra, 415 U.S. 318–20, which had held that defense counsel could not be precluded from questioning a witness about his juvenile delinquency record despite the existence of a "state statute [that] made this information presumptively confidential," did not alter its decisions holding that "the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." (Emphasis in original.) *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 52; see also id., 54 ("the [c]onfrontation [c]lause was not violated by the withholding of the [agency] file; it only would have been impermissible for the judge to have prevented [the defendant's] lawyer from cross-examining the daughter"). But see id., 61–62, 65 (Blackmun, J., concurring) (observing that "there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness," but concurring in judgment because in camera review procedure "set out for the lower court to follow on remand is adequate to address any confrontation problem"); id., 66 (Brennan, J., dissenting) (concluding that "narrow reading of the [c]onfrontation [c]lause as applicable only to events that occur at trial . . . ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial"). The majority then declined to consider whether the sixth amendment's compulsory process clause provided an entitlement to the child welfare agency's records. Id., 55–56.

[108] The court rejected Pennsylvania's argument that "no materiality inquiry is required, because a statute renders the contents of the file privileged" and that "[r]equiring disclosure . . . would override [Pennsylvania's] compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense." *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 57. The court emphasized that the state statute did not grant the child welfare agency "the absolute authority to shield its files from all eyes"; id., 57; but, rather, provided for the disclosure of the information in "certain circumstances, including when . . . directed to do so by court order." Id., 58.

[109] In *Esposito*, we relied on the federal and state constitutional rights of confrontation and cited *Davis* v. *Alaska*, supra, 415 U.S. 316, for the proposition that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." (Internal quotation marks omitted.) *State* v. *Esposito*, supra, 192 Conn. 179. We concluded that, although "a trial court has some discretion in the matter of discovery where material is sought for impeachment purposes," if "the claimed impeaching information is privileged there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. If the consent is limited to an in camera inspection and such inspection, in the opinion of the trial judge, does not disclose relevant material then the resealed record is to be made available for inspection on appellate review. If the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal." Id., 179–80.

We determined in *Esposito*, however, that the trial court therein was not required to perform an in camera review of the records in that case because the defendant "failed to make a threshold showing that at any pertinent time [the complainant] had a mental problem which affected her testimonial capacity in any respect, let alone to a sufficient degree to warrant further

inquiry," as there was no indication "either on direct or on cross-examination to suggest that she had any problem recalling or narrating the events relating to the sexual assault." Id., 180.

[110] Compare *State* v. *Colon*, supra, 272 Conn. 264–66 (in camera review sought and partially afforded under due process materiality standard of *Brady* v. *Maryland*, supra, 373 U.S. 87, of material from privileged files of chief state's attorney pertaining to corruption investigation of police officer witnesses), with *State* v. *Peeler*, 271 Conn. 338, 383–90, 857 A.2d 808 (2004) (treating trial court's failure to disclose witness' mental health records as confrontation clause violation relevant to witness' perception and recall that was subject to constitutional harmless error analysis), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005), and *State* v. *Kulmac*, supra, 230 Conn. 59 ("[t]he disclosure of [department] records requires that the same balance be struck between the witness' statutory right to confidentiality and the defendant's right to confrontation"); see also *State* v. *Harris*, supra, 227 Conn. 764–69 (treating claims arising from trial court's in camera review of correction officer's personnel file for impeachment material as arising under both federal and state due process and confrontation clauses); *State* v. *Pratt*, supra, 235 Conn. 611 (describing protections of in camera review in more general terms with respect to defendant's "trial rights" or "constitutional rights").

As a federal matter, this inconsistency appears to result from the fact that our leading in camera review case, *State* v. *Esposito*, supra, 192 Conn. 178–80, rests on confrontation clause grounds and predates *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 39. Moreover, *Ritchie*, which is the United States Supreme Court's most recent word on the matter, is a plurality decision to the effect that it holds that the right of confrontation does not arise until trial. See *Kentucky* v. *Stincer*, 482 U.S. 730, 738 n.9, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (noting that unsettled issue of whether confrontation rights exist before trial is "not implicated in this case" because exclusion of defendant from competency hearing did not affect ability to engage in effective cross-examination at trial); *State* v. *Randolph*, 284 Conn. 328, 378 n.15, 933 A.2d 1158 (2007) (noting, but declining to resolve, other jurisdictions' "conflicting conclusions with respect to the applicability of the sixth amendment right to confrontation" at adversarial probable cause hearings, with majority concluding that "sixth amendment right to confrontation 'is basically a trial right' ").

[111] Thus, we agree with both parties that the aspects of the in camera review process requiring a witness to give a series of consents to the state, then to the trial court for in camera review, and potentially to the defendant and his counsel, along with the remedy of striking the witness' testimony for withholding those consents; see, e.g., *State* v. *Esposito*, supra, 192 Conn. 179–80; are inapposite in this context.

[112] In *Stripling* v. *State*, supra, 261 Ga. 6, the Supreme Court of Georgia followed *Pope* v. *State*, 256 Ga. 195, 345 S.E.2d 831 (1986), cert. denied, 484 U.S. 873, 108 S. Ct. 207, 98 L. Ed. 2d 159 (1987), overruled on other grounds by *Nash* v. *State*, 271 Ga. 281, 519 S.E.2d 893 (1999). In *Pope* v. *State*, supra, 212, the court considered a capital defendant's claim that the trial court had improperly "refus[ed] to order the disclosure of [his] parole file, or at least so much of it as might be mitigating," because it was statutorily classified as confidential. Although the court recognized a "number of reasons for maintaining the confidentiality of such records, including the protection of persons who have provided information adverse to the prisoner," it emphasized that "these interests do not outweigh a capital defendant's need for access to potentially mitigating evidence." Id., citing *Skipper* v. *South Carolina*, supra, 476 U.S. 7–8 (during mitigation, defendant must be permitted to proffer evidence regarding his good behavior while in prison). Thus, the Georgia court held that, if there was to be a new penalty phase proceeding on remand, "the trial court should obtain the parole file of the defendant and review it in camera. Those portions of the file, if any, which are potentially mitigating should be disclosed to the defendant." *Pope* v. *State*, supra, 212.

[113] The Georgia court was, however, not unanimous on this point, as a dissenting justice observed that the "majority forgives the improper exclusion of the mitigating evidence because the defendant had knowledge of the childhood experiences since he had lived through them, because [the defendant] did not state how he would have used the undisclosed confidential information had it been disclosed to him, and because [the defendant's] experts had access to the [agency] file. If personal experience obviates the need for disclosure of confidential material, we can disband the trial court's in camera review of confidential files since death penalty defendants generally seek their own records in search of mitigating circumstances. Second, a death penalty defendant is under no duty to explain *how* he would use mitigating evidence—since he is entitled to present any evidence of mitigat-

ing circumstances to the jury, it is not necessary that he disclose how he would use material to which he is entitled. Finally, the 'expert' who needs access to evidence in mitigation is the death penalty defendant's lawyer. Whatever access testifying experts had to the confidential files, it is not the equivalent of an attorney reviewing mitigating evidence and planning how best to present such evidence to the jury." (Emphasis in original.) *Burgess* v. *State*, supra, 264 Ga. 796 (Benham, J., concurring and dissenting).

[114] In support of his arguments concerning the importance of investigating a capital defendant's violent family background, the defendant refers to the affidavit of Melissa Lang, a mitigation specialist, which is attached to the motion that he filed during the pendency of this appeal asking this court to unseal the department's records. See footnote 105 of this opinion. Because this material is evidentiary in nature and was not part of the record before the trial court, we decline to consider it in this appeal. See, e.g., *State* v. *Ovechka*, 292 Conn. 533, 547 n.19, 975 A.2d 1 (2009).

[115] With respect to determining whether counsel has provided effective assistance, the United States Supreme Court has emphasized that "prevailing norms of practice" like the ABA Guidelines "are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* v. *Washington*, supra, 466 U.S. 688–89; see also *Bobby* v. *Van Hook*, U.S. , 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009) (per curiam) (describing ABA Guidelines "as evidence of what reasonably diligent attorneys would do," rather than "inexorable commands with which all capital defense counsel must fully comply" [internal quotation marks omitted]). Thus, the ABA Guidelines do not in and of themselves have the force of federal constitutional law with respect to counsel's obligations; "[a]s standards set by [a] private organization," they simply are guides for determining whether counsel has made " 'objectively reasonable choices' " under prevailing professional standards in defending a capital defendant. *Bobby* v. *Van Hook*, supra, 17; see also *Yarbrough* v. *Johnson*, 520 F.3d 329, 339 (4th Cir.) ("[w]hile the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness"), cert. denied, 554 U.S. 931, 128 S. Ct. 2993, 171 L. Ed. 2d 909 (2008).

[116] We acknowledge that, in determining whether counsel has rendered effective assistance, the ABA Guidelines or standards to be considered are those in effect at the time the case was tried—not later revisions that might reflect changes in the prevailing norms of capital defense practice. See *Bobby* v. *Van Hook*, U.S. , 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009) (per curiam). Because this case does not raise ineffective assistance issues, but rather, requires us to consider on direct appeal the propriety of the trial court's in camera review, we view the substantive content of the 2008 Supplementary Guidelines as persuasive authority for guiding our appellate in camera review, despite their promulgation four years after the trial of this case. Cf. *State* v. *Kitchens*, 299 Conn. 447, 454, 10 A.3d 942 (2011) (revised interpretation of kidnapping statute applicable to direct appeal because "judgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . to cases that are pending" [internal quotation marks omitted]).

[117] Many of the department's records reviewed by the trial court were illegible due to age, microfiche storage or copying issues, including those records that were disclosed after the in camera review and then admitted into evidence as defense exhibit R. In connection with his motion for rectification; see footnote 106 of this opinion; the defendant also requested that the trial court include in the record readable copies of certain documents that his appellate counsel had obtained directly from the relevant agencies and facilities. Although appellate counsel expressed concern about trial counsel having submitted illegible documents to the jury or potentially not having made efforts to investigate and obtain legible copies, the trial court, *Solomon*, *J.*, denied the motion for rectification, concluding that, for the purpose of direct appellate review, it was required to supply this court with the same record that was before the jury. This court subsequently reviewed, but declined to disturb, Judge Solomon's decision to deny that aspect of the motion for rectification. Given that legible copies of the department's records are now available, we do not anticipate this issue recurring on remand.

[118] In so concluding, we do not intimate in any way that Judge Solomon discharged his in camera review responsibilities in a manner that was anything short of appropriate or without due regard for the gravity of the nature of the present case. Although we conclude that Judge Solomon apparently applied an unduly narrow legal standard in performing his in camera review, we nevertheless acknowledge that the task of reviewing the department's files, which were voluminous, duplicative and often nearly illegible, was herculean in nature, and the record reveals that he discharged that task with great care and concern for protecting the defendant's due process rights, including through facilitating our direct appellate review. See footnotes 104 through 106 of this opinion.

[119] We note that, because of the nature of the department's record keeping process, there are numerous documents in the file that the trial court properly did not disclose, inasmuch as, for example, they describe incidents or allegations of misconduct within foster homes that did not pertain directly to any members of the defendant's family.

[120] In our view, this silence from members of the defendant's immediate family at the penalty hearing renders even more important a more comprehensive history of the dysfunction plaguing the entire family. The added detail about other immediate family members, including siblings, has the tendency to provide an inferential explanation for the absence of their testimony, which otherwise could well be viewed to the defendant's detriment "like Sherlock Holmes' inference from the silence of a dog that usually howled: it is relevant for what it does not say." *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 180, 635 A.2d 783 (1993) (*Borden*, *J.*, concurring), citing A. Doyle, Silver Blaze (1892); see *People* v. *Ochoa*, 19 Cal. 4th 353, 456, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (1998) ("A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed."), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 130 (1999); cf. J. Blume et al., "Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation," 36 Hofstra L. Rev. 1035, 1052 (2008) ("if an expert's testimony explains the significance of the facts recounted by family members, this is far more valuable than either general theories or statistical information").

[121] As the state properly notes in its brief, because we have determined that the defendant's due process rights were violated after applying the materiality standard articulated in *United States* v. *Bagley*, supra, 473 U.S. 667, we need not engage in any further harmless error review. See, e.g., *Kyles* v. *Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) ("[a]ssuming, arguendo, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict" [citations omitted; internal quotation marks omitted]).

[122] See footnote 55 of this opinion for the text of § 53a-46b.

[123] "This court previously has indicated that appellate review of a jury's determination with respect to the weighing of aggravating and mitigating factors in a specific case could be impossible in the practical sense. In [*Rizzo I*, supra, 266 Conn. 171], we interpreted § 53a-46a, our capital felony weighing statute, to require a jury to be convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. . . . In so concluding, we recognized that there is not a risk of error in such a decision in the usual sense of that term, namely, the risk of being wrong in determining the historical facts, such as who did what to whom. . . . We noted, however, that there [can] be a risk of error in a more practical sense, namely, the risk that, in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly . . . and may arrive at a decision of death that is simply wrong. . . . With that possibility in mind, we further observed that, once the jury has arrived at such a decision pursuant to proper instructions, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor . . . an observation that led us to impose on the state a heightened burden of persuasion under § 53a-46a." (Citations omitted;

internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 783–84.

[124] We decline to engage in further review of the defendant's other claims that his death sentence was disproportionate or arbitrary. First, our review of the jury's weighing determination under § 53a-46b (b) resolves those issues substantively. See *State* v. *Courchesne*, supra, 296 Conn. 786 n.105 (rejecting defendant's claim "that the imposition of the death penalty in the present case was, inter alia, arbitrary and disproportionate . . . for the same essential reasons that we conclude that the evidence was sufficient to support the imposition of the death penalty under our capital sentencing scheme"). Second, as noted by the state, engaging in an extensive comparative review would be inconsistent with our legislature's decision in 1995 to amend § 53a-46b (b) (3) and repeal the process of proportionality review, which required comparison of a defendant's death sentence to sentences meted out in similar capital felony cases. See *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 676, 700 n.7, 866 A.2d 554 (2005) (*Norcott*, *J.*, dissenting from order) (describing legislators' view that sentence review by this court under § 53a-46a [b] was adequate procedural safeguard even without proportionality review); see also *State* v. *Ross*, 269 Conn. 213, 356–63, 849 A.2d 648 (2004) (describing proportionality review process).

[125] See footnote 13 of this opinion for the text of article first, §§ 8, 9, 10 and 20, of the Connecticut constitution.

[126] As the state concedes, the defendant preserved this claim in his posttrial motion for the imposition of a life sentence.

[127] Indeed, as we recently noted, "[t]he *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party—the state or the defendant—can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. . . . Finally, not every *Geisler* factor is relevant in all cases." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding*, *Inc.* v. *Rell*, 295 Conn. 240, 271, 990 A.2d 206 (2010) (plurality opinion).

[128] In *Lowenfield*, the petitioner had been convicted of a capital offense, first degree murder, in violation of a Louisiana statute that defined first degree murder as " 'the killing of a human being . . . [w]hen the offender has a specific intent to kill or to inflict great bodily harm upon more than one person . . . .' " *Lowenfield* v. *Phelps*, supra, 484 U.S. 241–42, quoting La. Rev. Stat. Ann. § 14:30A (3) (West 1986). The sole claimed aggravating factor in that case was that " 'the offender knowingly created a risk of death or great bodily harm to more than one person.' " *Lowenfield* v. *Phelps*, supra, 243, quoting La. Code Crim. Proc. Ann. art. 905.4 (d) (West 1984).

[129] The Supreme Court noted that, "[u]nder the capital sentencing laws of most [s]tates, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. . . . By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. . . .

"In *Zant* v. *Stephens*, supra, [462 U.S. 877] we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which 'the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.' . . . We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the [c]onstitution requires.

"The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." (Citations omitted.) *Lowenfield* v. *Phelps*, supra, 484 U.S. 244–45.

[130] Other states have followed *Lowenfield* either expressly as a matter of federal law, or in rejecting broader constitutional challenges without specifying which constitution was at issue. See, e.g., *Ex parte Windsor*, 683 So. 2d 1042, 1060 (Ala. 1996), cert. denied, 520 U.S. 1171, 117 S. Ct. 1438, 137 L. Ed. 2d 545 (1997); *State* v. *West*, 176 Ariz. 432, 449, 862 P.2d 192 (1993), cert. denied, 511 U.S. 1063, 114 S. Ct. 1635, 128 L. Ed. 2d 358 (1994), overruled on other grounds by *State* v. *Rodriguez*, 192 Ariz. 58, 961 P.2d

1006 (1998); *Jackson* v. *State*, 330 Ark. 126, 133, 954 S.W.2d 894 (1997); *People* v. *D'Arcy*, 48 Cal. 4th 257, 299–300, 226 P.3d 949, 106 Cal. Rptr. 3d 459, cert. denied, U.S. , 131 S. Ct. 104, 178 L. Ed. 2d 64 (2010); *Ferguson* v. *State*, 642 A.2d 772, 780–81 (Del. 1994); *Baird* v. *State*, 604 N.E.2d 1170, 1183–84 (Ind. 1992), cert. denied, 510 U.S. 893, 114 S. Ct. 255, 126 L. Ed. 2d 208 (1993); *State* v. *Scott*, 286 Kan. 54, 109, 183 P.3d 801 (2008); *Bowling* v. *Commonwealth*, 942 S.W.2d 293, 308 (Ky.), cert. denied, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997), overruled on other grounds by *McQueen* v. *Commonwealth*, 339 S.W.3d 441 (Ky. 2011); *State* v. *Wilson*, 685 So. 2d 1063, 1071–72 (La. 1996); *State* v. *Keith*, 231 Mont. 214, 229–30, 754 P.2d 474 (1988); *State* v. *Marshall*, supra, 123 N.J. 137–38; *Jones* v. *State*, 134 P.3d 150, 154 (Okla. Crim. App. 2006); *Fearance* v. *State*, 771 S.W.2d 486, 494 (Tex. Crim. App. 1988), cert. denied, 492 U.S. 927, 109 S. Ct. 3266, 106 L. Ed. 2d 611 (1989).

[131] The Tennessee court also noted that, particularly with respect to the death penalty, "[c]ommentators have always criticized the felony murder rule for its bootstrapping effect. . . . It vaults an offense into the class of murders without the malice finding usually required, and then, still without any culpability finding, elevates what otherwise might not be a murder to first-degree murder." (Citation omitted.) *State* v. *Middlebrooks*, supra, 840 S.W.2d 344–45. The court noted that the "perverse result of the felony murder narrowing device is even more troubling because the usual class of first-degree murderers is made up largely of two groups of defendants—felony murderers and premeditated and deliberated murderers. The only defendants who are eliminated by the felony murder narrowing device are those who kill with premeditation and deliberation—i.e., in cold blood—but not during the course of a felony. A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability." Id., 345. The court then observed that attempts to "qualify . . . felony murder narrowing devices by requiring that the defendant possess a specified mens rea of recklessness or culpable negligence at either the guilt or sentencing stage"; id.; either by statute or through *Tison* v. *Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), which "now places a nationwide threshold of culpability at the reckless indifference level," are ineffective because "[a]ll felony murderers . . . potentially meet a recklessness standard; that is, one who purposely undertakes a felony that results in a death, almost always can be found reckless." *State* v. *Middlebrooks*, supra, 345; see also *Blanco* v. *State*, 706 So. 2d 7, 13 (Fla. 1997) (Anstead, J., concurring) ("when used to aggravate a felony murder, Florida's felony murder aggravator impermissibly favors, for sentencing purposes, a more culpable defendant convicted of intentional, premeditated murder over a defendant convicted of unpremeditated, felony murder"), cert. denied, 525 U.S. 837, 119 S. Ct. 96, 142 L. Ed. 2d 76 (1998).

[132] We note that, in 1995, the Tennessee legislature "amend[ed] the aggravating circumstance in Tenn. Code Ann. § 39-13-204 (i) (7) to require that the murder 'was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit' one of the enumerated felonies. This amendment narrowed the class of offenders to whom the death penalty could be applied sufficiently so as to leave no *State* v. *Middlebrooks*, [supra, 840 S.W.2d 317] problem even in cases where Tenn. Code Ann. § 39-13-204 (i) (7) was the only aggravating circumstance established and the conviction was for felony murder." *State* v. *Banks*, 271 S.W.3d 90, 152 (Tenn. 2008), cert. denied, U.S. , 129 S. Ct. 1677, 173 L. Ed. 2d 1043 (2009).

[133] In so concluding, both the Tennessee and Wyoming courts followed *State* v. *Cherry*, supra, 298 N.C. 113, despite the facts that it was decided nine years prior to *Lowenfield* and under double jeopardy principles, because those courts agreed with the North Carolina court's observation that, under a similar statutory scheme, a "defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance 'pending' for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived." See *State* v. *Middlebrooks*, supra, 840 S.W.2d 341–42; *Engberg* v. *Meyer*, supra, 820 P.2d 90; see also *State* v. *Cherry*, supra, 113 (describing "well settled" principle that "when the [s]tate, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of another felony so as to establish that the murder was murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution

of the defendant for, or a further sentence of the defendant for, commission of the underlying felony").

[134] Cf. *Hernandez* v. *State*, 194 P.3d 1235, 1239 (Nev. 2008) ("Nothing in *McConnell* prohibits per se using the same conduct to support a murder theory and an aggravating circumstance. Our reasoning in *McConnell* centered on whether felony murder performed an adequate narrowing function.").

[135] The defendant seeks review of each of these claims under *State* v. *Golding*, supra, 213 Conn. 239–40. Although the state contends that the defendant waived his right to *Golding* review of several of these claims by his conduct at trial; see also footnote 88 of this opinion; we need not consider the merits of these waiver claims, nor any attendant questions of harmless error, because we are reviewing these instructional issues solely for the purpose of providing guidance on remand, rather than as a basis for reversing the trial court's judgment pursuant to *Golding*.

[136] The complete context of the pecuniary gain element instruction, with the exception of the trial court's explanation of reasonable doubt, is as follows: "In this case, one aggravant is claimed. The state . . . has claimed one aggravating factor as follows: that the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value. The words 'in expectation of the receipt' are used in their ordinary, everyday sense. 'Anything of pecuniary value' means anything in the form of money, property, or anything else having economic value, benefit, or advantage.

"The word 'consideration' as used in the phrase 'as consideration for the receipt' means the inducements to a contract, the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.

* * *

"Now, the aggravating factor that the state claims to be applicable in this case requires the state to prove beyond a reasonable doubt that the defendant committed the offense as consider[ation] for the receipt of or in expectation of the receipt of anything of pecuniary value. Let me discuss this in further detail with you.

"Ordinarily a person's knowledge, intent, and expectations can be established only through inferences from other proven facts and circumstances. One crucial question here is whether the facts and circumstances in this case form a basis for a sound inference as to the defendant's expectations at the time he committed the capital felony. What inferences you choose to draw or not draw from the evidence is solely up to you.

"The aggravant asserted by the state makes reference to the defendant's expectations. . . . Now, expectations like intentions exist in a person's mind. A person may take the witness stand and testify as to what his or her expectation or intention was. You may believe the testimony . . . or not according to whether or not you find that it warrants belief. But expectation and intention often can only be proven by the actions and statements of the person whose act is being examined. No one can be expected to come into court and testify that he or she looked into another person's mind and saw there a certain intention or expectation.

"It is often impossible and never necessary to prove a person's intent or expectations by direct evidence. Expectations like intent may be proven by circumstantial evidence . . . . Therefore, one way in which the jury can determine what a person's intention or expectation was at any given time, aside from that person's own testimony, is first by determining what that person's conduct was including any statements he made and what the circumstances were surrounding that conduct and then from that conduct and those circumstances inferring what his expectation or intention was. In other words, a person's expectations or intentions may be inferred from his conduct.

"The inference is not a necessary one; that is, you are not required to infer intent or expectation from the defendant's conduct, but it is an inference that you may draw if you find it a reasonable and logical inference. That is up to you.

"Neither intent nor expectation require premeditation. Although the state must prove expectation beyond a reasonable doubt where it is an element of a claimed aggravant, there is no requirement concerning the amount of time necessary for a person to formulate the expectation that something will occur.

"The defendant's expectation may be proven by circumstantial evidence, as that term has been explained to you . . . . To draw such an inference is not only the privilege but also the proper function of a jury provided that the inference drawn complies with the standards of inferences as explained in connection with my previous instructions on circumstantial evidence.

"If you find that the state has proven or has not proven this aggravating factor beyond a reasonable doubt, you will have the foreperson mark the special verdict form accordingly and you will all sign the form to indicate

your unanimous agreement with the verdict. Your determination regarding the existence or nonexistence of the claimed aggravating factor must be unanimous. Therefore, you must all agree whether the state has proven or not proven beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt of or in expectation of the receipt of anything of pecuniary value.

"Now, please note that this aggravant requires the state to prove beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt of anything of pecuniary value or in expectation of the receipt of anything of pecuniary value. If you unanimously conclude that the defendant committed the offense as consideration for or in expectation of anything of pecuniary value, then this aggravant has been proven.

"And that should have been 'expectation of the receipt of anything of pecuniary value' . . . 'then the aggravant has been proven.' "

[137] We note, however, that in arguing that the defendant might have been motivated to act by Pascual's having related to him how the victim treated Cusano and her children, the defendant's attorney argued that, "if you think about this just being about a snowmobile—and one that didn't work—it just doesn't make all that much sense. But if you think [about] what would have really triggered [the defendant] to get involved, is it just a snowmobile or is it something in addition to that? Did [Pascual] pull a string that we know has a tremendous effect?" This argument, however, merely suggests a potential dual motivation, and does not actually attack the existence of the murder for hire agreement.

[138] The prosecutor argued: "After being hired in this case [the defendant] became the prime mover. It was all him. Soda bottle silencer, carving names in the bullets, and eventually carried out by shooting [the victim] once in the head. *And if that wasn't enough*, he proceeded to—apparently the snowmobile not being enough—rummaged through the victim's house while he lay dead next to him and steal items such as $200 in cash, such as a Luger pistol. The Riverview records were right about the defendant. He's very well organized in his approach to tasks." (Emphasis added.)

[139] Noting the facts of the present case, which involved several days of planning between the agreement and the execution of the murder, the defendant cites, inter alia, *United States* v. *Robertson*, 473 F.3d 1289 (10th Cir. 2007), and *King* v. *Commonwealth*, 243 Va. 353, 416 S.E.2d 669, cert. denied, 506 U.S. 957, 113 S. Ct. 417, 121 L. Ed. 2d 340 (1992), for the proposition that murder for hire contains an implicit element of premeditation. We agree with the state that this line of cases is inapposite, as these cases do not import specific temporal requirements and stand only for the distinct proposition that a proven murder for hire satisfies any separate statutory element of premeditation with regard to the underlying substantive offense. See *United States* v. *Robertson*, supra, 1294 ("An instruction on malice aforethought would have been superfluous because premeditation is implicit in the hiring of a third party to kill another human being. In other words, there is no need to instruct the jury that murder requires a finding of malice aforethought when the instructions state that the underlying crime requires a finding of one specific type of premeditation—here, the murder of another in exchange for something of pecuniary value."); *King* v. *Commonwealth*, supra, 366 ("if . . . [the victim's] killing was a murder-for-hire, the element of premeditation would have been conclusively established").

[140] The prosecutor argued: "With respect to . . . the lingering doubt about the shooting, recall back, ladies and gentlemen, to your findings and the evidence that you heard in the first phase of this trial. You heard evidence from . . . Tyrell that it was the defendant who shot [the victim] in the head. You also heard evidence from the detectives where they found those carved bullets, where they found that rifle.

"Utilize your common sense. Does it make sense that someone would carve the names on the bullets, which you heard from . . . Tyrell as to exactly what was carved and James Stephenson and also from . . . Pascual, that in fact it was this defendant carving those bullets that he would carve those bullets, make reference to that fact that, now a bullet has someone's name on it, and have those bullets and the rifle in his house after the crime and not do the shooting? It strains credulity."

In response in his surrebuttal argument, defense counsel argued: "Now, think back to what [the prosecutor] said . . . a few moments ago . . . . Well, as a judge, you can ask yourself some questions. You remember he's charged as an accessory. And he's charged as a principal. An accessory would mean in this circumstance that he didn't necessarily have to pull the trigger but he had the same intent. So if the state's so sure that [the defendant]

shot [the victim], why not just charge him as a principal rather than a principal and an accessory? And the reason is this: Because you can find him guilty under both theories. So how certain is the state? If they were that certain, they would have charged him as a principal and left it at that."

The trial court overruled the state's subsequent objection to this argument, characterizing it as a "rhetorical flourish" by the defendant.

[141] The trial court explained: "Mitigating factors are something that you are legally required to consider in deciding what the appropriate sentence should be in this case. It is important that you understand with absolute clarity what our law means by a mitigating factor.

"A mitigating factor is different from a defense to a crime. A defense to a crime would be evidence presented in the guilt/nonguilt phase that if believed would defeat a criminal charge, would result in a verdict of not guilty on that charge.

"Mitigating factors do not constitute a defense or excuse for the capital felony of which the defendant has been convicted. They are factors that fairness and mercy may be considered as tending to either extenuate or reduce the degree of the defendant's culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

"A mitigating factor becomes relevant in this process only after the defendant has already been found guilty of a capital felony. It is offered for the purpose of making sure that the defendant is punished fairly and appropriately with proper consideration for any unique factors concerning the nature of the crime or who the defendant is.

"Mitigating factors constitute an important safeguard in assuring that the punishment you mete out fits both the crime and the person who committed it. *One aspect of mitigating factors arises out of the nature or the circumstances of the crime itself.* It is a factor which in fairness or mercy may be considered as tending to extenuate or reduce the degree of the defendant's culpability or blame for the offense. 'Fairness' is to be understood in its usual sense. 'Mercy' means compassion or forbearance shown especially to an offender or to one subject to one's power.

"Another aspect of mitigating factors arises out of the defendant's character, background, or history. Therefore, it may have nothing whatsoever to do with the crime, with the capital felony or how it was committed, but it may nevertheless tell you important information about who this person is and whether, considering all the facts and circumstances of the case, he is deserving as a matter of fairness and mercy of a sentence of life imprisonment without the possibility of release rather than death.

"Evidence of any aspect of mitigating evidence must not be considered by you in any way as an attempt to provide an excuse for the capital felony of which the defendant has now been convicted. Looking at mitigating evidence as an excuse for the crimes misconstrues its proper purpose and its legitimate and in fact crucial role in assuring that your determination of whether the ultimate punishment of death must be imposed on the defendant is accurate, appropriate, and fair." (Emphasis added.)

[142] The previous day, the jury had advised the trial court that it was deadlocked. The trial court instructed the jury to continue its deliberations after taking a long lunch.

[143] Before giving this specific supplemental instruction, the trial court provided additional background, and charged the jury more generally, that "whether something constitutes a mitigating factor is entirely within your power consistent with my instructions. By the way, I also remind you . . . that if any one or more of you conclude that a mitigating factor or factors has been proven, then you must all proceed to the weighing stage." The trial court then "clarif[ied] how the law requires [the jury] to go about deciding whether a mitigating factor has been proven," and charged that jury that, "[i]n determining whether a mitigating factor exists concerning the defendant's character, background, or history, or the nature and circumstances of the crime under our law, you must undertake a two step process. You must first determine whether a particular factor concerning the defendant's character, background, or history, or the nature and circumstances of the crime has been established by a preponderance of the evidence. If you find a particular factor has been proven by a preponderance of the evidence, then you must determine secondly whether that factor is mitigating in nature considering all the facts and circumstances of the case. As I have instructed you, the defendant bears the burden of proving the existence of any mitigating factor by a preponderance of the evidence." Finally, the trial court charged the jury that, "[b]ecause the defendant bears the burden of proving a mitigating factor by a preponderance of the evidence, if you unanimously find that the defendant has failed to prove a mitigating factor, then you may not conclude that it has been proven. I repeat whether something constitutes a mitigating factor is entirely up to you jurors consistent with the law as I have explained it to you."

[144] "Under our death penalty statutory scheme, the state has the burden at the penalty phase of a capital felony trial to establish the existence of an aggravating factor, specified in § 53a-46a (i) . . . by proof beyond a reasonable doubt. *State* v. *Daniels*, [supra, 207 Conn. 394]. The defendant has the burden to establish the existence of a mitigating factor by a preponderance of the evidence. Id., 385. In this regard, the statutory scheme sets out two types of mitigating factors: (1) statutory mitigating factors, as defined in § 53a-46a (h), which, if found, preclude the imposition of the death penalty under any circumstances; and (2) nonstatutory mitigating factors, as defined in § 53a-46a (d).

"Prior to 1995, a death sentence could be imposed only if the jury found that an aggravating factor existed and that no mitigating factor existed. Thus, under the prior statutory scheme, if the jury found that a mitigating factor of either type existed, the mandatory sentence was life imprisonment without the possibility of release. General Statutes (Rev. to 1995) § 53a-46a (f); see also *State* v. *Johnson*, 253 Conn. 1, 56, 751 A.2d 298 (2000).

"In 1995, the legislature amended the statutory scheme to provide for a weighing process by the jury at the penalty phase. See Public Acts 1995, No. 95-19, § 1 . . . . Under the statutory scheme as amended in 1995, the burdens of persuasion regarding proof of the existence of aggravating and mitigating factors remain the same. The state must still establish the existence of an aggravating factor by proof beyond a reasonable doubt, and the defendant must still establish the existence of a mitigating factor by a preponderance of the evidence. Furthermore, the role of a statutory mitigating factor remains the same: proof of its existence will preclude the imposition of the death penalty and mandate a sentence of life imprisonment without the possibility of release. General Statutes (Rev. to 1997) § 53a-46a (g) and (h) . . . .

"Under the 1995 amended scheme, however, the role of the nonstatutory mitigating factors has changed. Pursuant to General Statutes (Rev. to 1997) § 53a-46a (e), the jury must return 'a special verdict setting forth . . . whether any aggravating factor or factors outweigh any [nonstatutory] mitigating factor or factors,' and, pursuant to General Statutes (Rev. to 1997) § 53a-46a (f), if the 'mitigating factors . . . are outweighed by . . . [the] aggravating factors . . . the court shall sentence the defendant to death.' . . . Thus, under these provisions, the jury must weigh the aggravating factors proven against the nonstatutory mitigating factors proven, and if the aggravating factors outweigh the mitigating factors, the court must impose the death sentence." (Citations omitted.) *Rizzo I*, supra, 266 Conn. 180–82.

[145] The court determined that the "statutory treatment of affirmative defenses provides a useful analogy because the defendant bears the burden of persuasion for affirmative defenses . . . just as he does for mitigating factors under the death penalty statute," and that the "intrinsic appeal of this analogy is strengthened by the recognition that an affirmative defense may operate in a manner closely akin to that envisaged by the death penalty statute. If a defendant who has been charged with the crime of murder succeeds in establishing, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance, he may be convicted of manslaughter but not of murder." (Citation omitted.) *State* v. *Daniels*, supra, 207 Conn. 385; see also id., 385–86 ("[s]imilarly, a defendant at a capital sentencing hearing, by establishing a mitigating factor, does not escape criminal liability altogether, but only succeeds in obtaining a more lenient sentence").

[146] It bears noting that the authorities are not altogether clear as to whether capital defendants have a constitutional right to present evidence of lingering doubt concerning the nature and degree of their involvement in the underlying capital felony. United States Supreme Court case law is, however, clear that a defendant does not have the right under the eighth and fourteenth amendments to the United States constitution to have a sentencing jury consider evidence of residual or lingering doubt about guilt of the capital crime itself offered in a mitigation case. See *Oregon* v. *Guzek*, 546 U.S. 517, 523, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006); *Franklin* v. *Lynaugh*, 487 U.S. 164, 174–75, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality opinion). Indeed, in *Oregon* v. *Guzek*, supra, 524–25, the Supreme Court relied on, inter alia, *Franklin* v. *Lynaugh*, supra, 174–75, and *Eddings* v. *Oklahoma*, supra, 455 U.S. 110, and determined that newly offered alibi evidence was not "traditional sentence-related evidence, evidence that tended to show *how*, not *whether*, the defendant committed the crime." (Emphasis in original.)

Although a defendant's role in the commission of a crime, either as a principal or accessory, seems to fit within the conception in *Guzek* of "traditional sentence-related evidence" about "*how*, not *whether*, the defendant committed the crime"; (emphasis in original) *Oregon* v. *Guzek*, supra,

546 U.S. 524; the defendant's right to present such evidence and argument still is not entirely clear. Compare *In re Hardy*, 41 Cal. 4th 977, 1032 n.17, 163 P.3d 853, 63 Cal. Rptr. 3d 845 (2007) (stating in dicta that evidence that capital defendant was merely coconspirator rather than actual murderer relates to circumstances of crime, or "how, and not whether, [the defendant] is guilty" and is distinguishable from alibi evidence considered in *Guzek*), with *England* v. *State*, 940 So. 2d 389, 405–406 (Fla. 2006) (noting capital defendant's statutory right to introduce mitigation evidence that he was accomplice, but also observing that "residual or lingering doubt of guilt is not an appropriate mitigating circumstance in the sentencing phase of a capital case," and concluding that trial court properly excluded evidence indicating codefendant was actual perpetrator as offered to prove innocence, rather than role as accomplice [internal quotation marks omitted]), cert. denied, 549 U.S. 1325, 127 S. Ct. 1916, 167 L. Ed. 2d 571 (2007). We need not, however, consider in this appeal whether the defendant has the constitutional right to introduce such evidence, as the trial court did not in any way preclude the admission of evidence or argument with respect to mitigating factor number twenty-four.

Finally, we note that we find both curious and misleading the defendant's reliance, in his reply brief, on *People* v. *Arias*, 13 Cal. 4th 92, 182–83, 913 P.2d 980, 51 Cal. Rptr. 2d 770 (1996), cert. denied, 520 U.S. 1251, 117 S. Ct. 2408, 138 L. Ed. 2d 175 (1997), as well as a proposed model jury instruction; see E. Jungman, note, "Beyond All Doubt," 91 Geo. L.J. 1065, 1088–89 (2003); in support of the proposition that "states that allow lingering doubt instructions do not impose a burden of proof." Both of these authorities are simply silent on the issue of the burden of proof, and thus are of no persuasive, or even informative, value herein.

[147] Indeed, we agree with the state's observation that, as a practical matter, any juror who had found that the state had proven beyond a reasonable doubt that the defendant was guilty of capital felony under the theory of accessory liability would, as a practical matter, have no difficulty finding lingering doubt about whether he was the actual shooter proven by a preponderance of the evidence. We further agree that, to the extent that any jurors did not deem it necessary to make a finding as to whether the defendant had been the shooter during the guilt phase, because they had determined beyond a reasonable doubt that he was a principal or an accessory, the trial court's instruction did not impose additional burdens or obstacles with respect to the defendant's burden of proving the lingering doubt mitigating factor by a preponderance of the evidence.

[148] In so concluding, we noted that a "defendant is entitled to have the capital sentencer consider individual mitigating factors as well as their combined effect. [E]ven if [specific mitigating facts] are not in themselves cause for a sentence less than death, they are still relevant to mitigation and must be weighed in conjunction with other factors to determine if all of the circumstances together warrant a lesser sentence. . . . Moreover, we have stated that, as a matter of sound judicial policy, the trial court should submit an accurate written list of each of the claimed statutory and nonstatutory mitigating factors if the defendant so requests. . . . Although a claimed mitigating factor that is based upon the cumulative effect of the evidence already adduced in support of the other mitigating factors does not require the jury to consider any new or additional evidence, it nevertheless provides an independent basis upon which the jury may conclude that a sentence of death is not warranted. Consequently, a mitigating factor founded on the cumulative weight of the evidence adduced in support of a defendant's claim of mitigation is sufficiently distinct from any other mitigating factor to warrant its inclusion as a separate factor in a written list of mitigating factors submitted to the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Reynolds*, supra, 264 Conn. 140, citing *Boyde* v. *California*, 494 U.S. 370, 377–78, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *Smith* v. *McCormick*, 914 F.2d 1153, 1168 (9th Cir. 1990).

[149] Inasmuch as we are considering these claims for the purpose of providing guidance on remand, we need not consider in detail the state's induced error arguments. See also footnote 88 of this opinion. We do, however, note that the defendant declined to request instruction on any of the statutory mitigating factors under § 53a-46a (h) and, indeed, expressly withdrew the only statutory mitigating factor claim that he had proffered at any time during the proceedings, namely, that of significantly impaired mental capacity under § 53a-46a (h) (2). Thus, the trial court, in its charge to the jury during the penalty phase, after outlining the components of the weighing process, advised the jury that it "will not be asked to consider any statutory bars" because "[n]one have been raised."

[150] In *Ebron*, wherein we concluded that the trial court was not obligated to instruct sua sponte on defense of premises pursuant to General Statutes

§ 53a-20 as a justification defense, we followed *State* v. *Preyer*, supra, 198 Conn. 190, which "rejected the defendant's contention that *Washington* v. *Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), establish[ed] an unqualified constitutional right to correct jury instructions on any defense the defendant may have . . . and rejected as distinguishable his reliance on a number of cases from other jurisdictions in which the failure of the trial court to instruct on a defense, even in the absence of a request, was held to have been erroneous. . . . We disagreed specifically with the California rule that imposes on the trial court a duty to instruct, sua sponte, on general principles of law relevant to all issues raised in evidence, including defenses . . . and on the relationship of these defenses to the elements of the charged offense." (Citations omitted; internal quotation marks omitted.) *State* v. *Ebron*, supra, 292 Conn. 693, quoting *State* v. *Preyer*, supra, 198 n.9.

[151] Citing *State* v. *Webb*, supra, 238 Conn. 475 and n.60, the defendant notes in his reply brief that trial courts have, in the past, acted sua sponte to suggest mitigating factors to juries, and that such actions are consistent with the jury's right under § 53a-46a to consider any mitigating evidence regardless of whether it is mentioned by the parties. We note that the propriety of that action was not directly at issue in *Webb*, wherein this court rejected the defendant's claim that the trial court's failure to grant his request for specific instructions enumerating the mitigating factors, an action subsequently required pursuant to our supervisory powers in *State* v. *Breton*, 235 Conn. 206, 249, 254–55, 663 A.2d 1026 (1995), violated his constitutional rights under the eighth and fourteenth amendments to the United States constitution. See *State* v. *Webb*, supra, 473–74. In concluding that the trial court's instructions did not unconstitutionally limit the jury's consideration of mitigating factors, we noted that the "jury was expressly instructed that, upon its consideration of the evidence, it could find any mitigating factor, even a factor not alleged by the defendant. In fact, the trial court suggested one such factor to the jury." Id., 475. One trial court's discretionary actions in *Webb* do not, however, mandate the constitutional rule urged by the defendant. Indeed, we further reject his invitation to utilize our supervisory powers over the administration of justice to require, as a policy matter, that trial courts charge on each factually supported statutory mitigating factor in the absence of a waiver by the defendant.

[152] The defendant accurately cites *Ross II*, supra, 269 Conn. 342–43, for the proposition that statutory mitigating factors reflect "the defendant's reduced moral culpability for committing the offense," and that the "legislature intended to recognize as mitigating, per se, only those factors that tend to reduce a defendant's moral culpability for the offense and make it unlikely that the threat of execution would serve as an effective deterrent." Indeed, we agree with the defendant that, in enacting § 53a-46a (h) (3), the legislature recognized "relatively minor" involvement as one such factor. It simply goes too far to conclude, however, that the legislature intended to take strategic determinations regarding which mitigating factors to plead and prove out of the hands of the defendant and his counsel, and to place such decisions in the hands of the trial court.

[153] We further disagree with the defendant's contention that, sua sponte, instruction was required as to the statutory mitigating factor of § 53a-46a (h) (3), because "if even one juror found the statutory mitigating factor of minor involvement of an accessory, that juror must be allowed to consider that factor in deciding the appropriate sentence." This argument inaccurately conflates statutory mitigating factors and nonstatutory mitigating factors, and does not account for their distinct roles in the sentencing determination process under § 53a-46a. Indeed, we previously have rejected a similar argument in *State* v. *Colon*, supra, 272 Conn. 353, wherein we concluded that, "[u]nder our statutory scheme, the jurors would proceed to the weighing process only if the jury unanimously had concluded that a statutory bar to the imposition of the death penalty did not exist. In other words, the jury never could be in the situation that the defendant describes, namely, one in which some jurors find the existence of a statutory bar but are not able to consider that bar in the weighing process, because the weighing process cannot even commence until a unanimous decision has been made regarding the statutory bars to the imposition of the death penalty."

[154] After explaining the jury's role as the "sole judges of the facts," the trial court further admonished the jury that its "actions during this phase of the trial in ruling on motions or objections by counsel or in comments to counsel or in any questions to witness[es] or in setting forth the law in these instructions are not to be taken by you as any indication of my personal opinion as to how you should determine the issues of fact. If you conclude

that the court . . . has expressed or intimated any opinions as to the facts, I assure you that was not intended. My goal has been and remains to ensure that the trial is fair and to explain the law to you so that you can do your job as jurors in this case."

[155] The trial court again reminded the jury of the "gravity of your task in this case. As the judge in the case, I understand that very few members of society are ever asked to make a decision with such grave implications. I understand that a unique kind of responsibility now has been placed on your shoulders. Death is a different kind of punishment. The penalty of death is qualitatively different from a sentence of imprisonment no matter [for] how many years. From the point of view of [the defendant] it is different both in its severity and clearly in its finality.

"From the point of view of society, the action of the state in taking the life of a person differs dramatically from any other state action. It is of vital importance to the defendant and the community that any decision to impose the death penalty would be based on reason rather than emotion, and that any decision to impose the death penalty be reached with only the highest level of certitude, only if you are unanimously persuaded with a degree of certitude of beyond a reasonable doubt that the aggravant outweighs the combined weight of any mitigants."

[156] With the exception of the claim addressed in part XI D of this opinion, because the defendant has failed to set forth an independent analysis claiming greater protection under the state constitution; see, e.g., *State* v. *Geisler*, supra, 222 Conn. 684–86; we confine our analysis of these claims to the federal constitution. See, e.g., *State* v. *Foreman*, supra, 288 Conn. 692 and n.5.

[157] Because we are remanding this case for a new penalty phase hearing, we need not reach the defendant's claim that all of the cumulative errors present in the trial proceedings require reversal of the death sentence.

[158] We note that, in this portion of his brief to this court, the defendant references the "current revision" of § 53a-46a (d). The defendant is referring to the substantive revisions made to § 53a-46a in 1995; see Public Acts 1995, No. 95-19; that, inter alia, added the language permitting the jury to make findings as to whether any aggravating factor outweighed any mitigating factor. Section 53a-46a (d) was last amended in 1985. See Public Acts 1985, No. 85-366. In other words, the current revision of this subsection is the same now as it was when the crimes in the present case were committed. Accordingly, we continue to reference the 1999 revision of that statute, unless otherwise indicated, but acknowledge that the defendant is referring, in the broader context of § 53a-46a, to the post-1995 version of that statute.

[159] Curiously, the defendant waits until his reply brief to acknowledge that *Rizzo I*, supra, 266 Conn. 291–92, and *State* v. *Colon*, supra, 272 Conn. 374–75, are on point decisions that would need to be overruled in order for him to prevail on his claims under *Tennard* v. *Dretke*, supra, 542 U.S. 274.

[160] We further followed *State* v. *Cobb*, supra, 251 Conn. 482–96, and rejected the defendant's claim that the facts and circumstances language imparted a weighing component that would result in the screening out of mitigating evidence, because "the more substantial the aggravating evidence, the less likely the jury will be to determine that the proposed mitigating evidence is mitigating in nature, resulting in the screening out of 'substantial, important and compelling' mitigating evidence" prior to the weighing process. *Rizzo I*, supra, 266 Conn. 292–93.

[161] In following *State* v. *Cobb*, supra, 251 Conn. 494–96, and again rejecting an "interpretation of the statute, which would allow any evidence that establishes 'something good' about the defendant to be considered a mitigating factor and therefore to be considered in the weighing process," we noted that this "supposition is inconsistent with the requirement that the defendant must not only establish the factual bases of proposed mitigating evidence, but also must show that the proposed evidence is mitigating in nature. This two step process contemplates the possibility that not all proposed mitigating evidence is mitigating in nature. The process necessarily results in some 'screening out' of proposed mitigating evidence, regardless of whether the determination that the proposed evidence is mitigating in nature is made 'considering all the facts and circumstances of the case.' " *Rizzo I*, supra, 266 Conn. 296–97.

[162] The court noted that, in adopting "the relevance standard applicable to mitigating evidence in capital cases in *McKoy* v. *North Carolina*, 494 U.S. 433, [440–41, 110 S. Ct. 1227, 108 L. Ed. 2d 369] (1990), we spoke in the most expansive terms. We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general eviden-

tiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies. . . . Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . . Thus, a [s]tate cannot bar the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." (Citations omitted; internal quotation marks omitted.) *Tennard* v. *Dretke*, supra, 542 U.S. 284–85. "Once this low threshold for relevance is met, the [e]ighth [a]mendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." Id., 285.

[163] The court further emphasized that the Fifth Circuit improperly "refused to consider the debatability of the *Penry* question on the ground that [the defendant in *Tennard*] had not adduced evidence that his crime was attributable to his low IQ," given that "impaired intellectual functioning is inherently mitigating" because " 'our society views mentally retarded offenders as categorically less culpable than the average criminal.' [*Atkins* v. *Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)]. Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the [e]ighth [a]mendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence—and thus that the *Penry* question need not even be asked—unless the defendant also establishes a nexus to the crime." *Tennard* v. *Dretke*, supra, 542 U.S. 287.

[164] In *Walton* v. *Arizona*, supra, 497 U.S. 649, the Supreme Court rejected a claim that a "statute violates the [e]ighth and [f]ourteenth [a]mendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." Noting that "it does not follow from [*Lockett* v. *Ohio*, supra, 438 U.S. 586] and its progeny that a [s]tate is precluded from specifying how mitigating circumstances are to be proved," the Supreme Court cited, inter alia, *Martin* v. *Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267, (1987), which "upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that she was acting in self-defense when she allegedly committed the murder," and concluded that, "[s]o long as a [s]tate's method of allocating the burdens of proof does not lessen the [s]tate's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton* v. *Arizona*, supra, 649–50; see also *Kansas* v. *Marsh*, supra, 548 U.S. 173 (rejecting defendant's challenge to statute requiring imposition of death sentence when aggravating circumstances and mitigating circumstances are in equipoise because, under *Walton*, "a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances").

[165] In *Cooper* v. *Oklahoma*, supra, 517 U.S. 355–56, the Supreme Court concluded that it violated the fourteenth amendment to require a criminal defendant to prove his incompetency to stand trial by clear and convincing evidence. See also *Medina* v. *California*, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (state may presume competence and require defendant to prove incompetence by preponderance of evidence). *Cooper* is not a case concerning death penalty sentencing statutes, and in any event, the present case does not in any way concern the clear and convincing evidentiary standard.

[166] We note that the author of this majority opinion has long viewed the death penalty as unconstitutional under the Connecticut constitution, and does not intend his authorship of this opinion to in any way be construed as a departure from his previous position, most recently expressed in his dissent in *Rizzo II*, supra, 303 Conn. 202 (*Norcott*, *J.*, dissenting). He is able to write this opinion because of our conclusion in part VII, requiring that the case be remanded for a new penalty phase hearing, meaning that the imposition of the death penalty will not inexorably follow as a direct result of our decision today. See *State* v. *Colon*, supra, 272 Conn. 395 (*Norcott*, *J.*, concurring) (agreeing with majority opinion, which in part rejected summary challenge to constitutionality of death penalty, which remanded case for new penalty phase hearing because jury had not properly been instructed regarding weighing process); *Rizzo I*, supra, 266 Conn. 313–14 (*Norcott*, *J.*, concurring) (joining in majority opinion requiring that jurors be instructed that aggravating factors must outweigh mitigating factors by reasonable

doubt because until death penalty is abolished or ruled unconstitutional, "I also support procedural safeguards that reflect the nature of this ultimate penalty, the need for reliability and consistency in its imposition, and the nature of the requisite jury verdict"); cf. *State* v. *Courchesne*, 262 Conn. 537, 583–84, 816 A.2d 562 (2003) (*Norcott, J.*, concurring) (joining majority opinion interpreting statutes in manner that rendered defendant eligible for death penalty because of "the procedural posture of, and narrow issue presented by, this case, under which the . . . penalty phase hearing has not yet occurred"). Thus, the author of this majority opinion "emphasize[s] that [his] previously expressed position concerning the imposition of the death penalty in Connecticut remains steadfast and unwavering." *State* v. *Courchesne*, supra, 584.

[167] On May 9, 2012, after our decision in this case had been finally approved by the en banc panel, but before the decision was ready to be officially released for publication in the Connecticut Law Journal, the defendant moved for permission to file a supplemental brief and for additional oral argument addressing the effect on his appeal of Public Acts 2012, No. 12-5 (public act), signed into law by Governor Dannel Malloy on April 25, 2012, which, inter alia, prospectively repeals the death penalty for crimes effective on the date of passage. Specifically, the defendant sought leave to address new appellate claims, inter alia, that: (1) although his crimes were committed prior to the effective date of the public act, that legislation nevertheless "represents a fundamental change in the contemporary standard of decency in Connecticut and a rejection of the penological justifications for the death penalty," rendering the death penalty now cruel and unusual punishment; (2) the public act "creates an unconstitutionally arbitrary, capricious, inconsistent and unreliable basis" for selecting death eligible defendants; (3) the defendant's death sentence is disproportionate to his crime because an identical crime would now not be death eligible; and (4) the effective date provision violates his equal protection rights. The state did not oppose the defendant's motion for additional briefing and argument. We denied the defendant's motion because, under the circumstances of this case, these constitutional issues would be more appropriately addressed in the context of postjudgment motions.