STATE OF CONNECTICUT *v.* ANTHONY DYOUS
(SC 18871)

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

*Argued March 19—officially released September 28, 2012***

Richard E. Condon, Jr., assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, and *Roger Caridad*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The procedure for extending an insanity acquittee's[1] term of commitment to the psychiatric security review board (board) imposes greater burdens on individual liberty than does the civil commitment procedure applicable to civilly committed inmates, that is, mentally ill, convicted defendants who were transferred, pursuant to General Statutes §§ 17a-498 and 17a-515,[2] to a psychiatric facility while they were serving their sentences, and whom the state seeks to commit to a similar institution after their sentences end. Among other disparities between the two commitment schemes, the procedure for recommitting insanity acquittees directs the finder of fact to "[consider] that its primary concern is the protection of society"; General Statutes § 17a-593 (g); whereas the procedure for recommitting civilly committed inmates directs the finder of fact to "[consider] whether . . . a less restrictive placement is available . . . ." General Statutes § 17a-498 (c). The primary issue in this case is whether such disparities violate the equal protection clause of the United States constitution.

The defendant, Anthony Dyous, appeals[3] from the judgment of the trial court, which granted the state's petition for an order of continued commitment pursuant to § 17a-593 (c).[4] The defendant has been under the jurisdiction of the board since March, 1985, pursuant to General Statutes § 17a-582,[5] for a period not to exceed twenty-five years, following his acquittal by reason of mental disease or defect[6] of two counts of kidnapping in the first degree, two counts of threatening in the second degree, and one count of carrying a dangerous weapon. In 2009, approximately one year before the end of the defendant's twenty-five year term, the state petitioned for an order of continued commitment, arguing that the defendant remained mentally ill and that his discharge from the jurisdiction of the board would constitute a danger to himself or others. The trial court, *Swords*, *J.*, granted the state's petition and ordered that the defendant be committed to the jurisdiction of the board for an additional three years. The defendant's principal claim on appeal is that § 17a-593, which sets forth the continued commitment procedure that is applicable to insanity acquittees, violates his federal constitutional right to equal protection.[7] The defendant contends that, because § 17a-593 burdens an insanity acquittee's liberty, the statute warrants intermediate scrutiny. The statute cannot withstand this level of scrutiny, according to the defendant, because subjecting insanity acquittees to a recommitment procedure that imposes greater burdens on individual liberty than does the procedure for obtaining an order of civil commitment set forth in § 17a-498, which applies to similarly situated civilly committed inmates, does not substantially relate to the achievement of an important

governmental interest. The defendant also contends that the trial court incorrectly concluded that it lacked jurisdiction over his claim that he was denied his federal constitutional right to due process of law in that his original plea of not guilty by reason of insanity was not knowing, intelligent and voluntary because neither he nor his attorneys had known, when he entered his plea, that his period of commitment could be continued beyond the twenty-five year maximum term. With respect to the defendant's first claim, we do not decide whether § 17a-593 warrants intermediate scrutiny, nor do we decide whether insanity acquittees whom the state seeks to recommit after the expiration of their terms of commitment are similarly situated to civilly committed inmates. We do not decide these issues because we agree with the state that § 17a-593 would withstand intermediate scrutiny if such scrutiny were warranted.[8] We also conclude that the trial court correctly determined that it lacked jurisdiction over the defendant's claim that his original plea of not guilty by reason of insanity was not knowing, intelligent and voluntary. Accordingly, we affirm the trial court's judgment granting the state's petition for an order of continued commitment.

At the outset, we recount the relevant facts and procedural history, beginning with a synopsis of the defendant's psychiatric history as set forth in the trial court's memorandum of decision. "Between 1977 and the time of the incident [that] resulted in his criminal commitment, the [defendant] was hospitalized three times in psychiatric facilities. Thereafter, in December, 1983, the [defendant] hijacked a bus carrying forty-seven people, including a child. He threatened the driver with a bomb and nerve gas, and stated he had been asked by God to deliver a message. During and after this incident, the [defendant] exhibited signs of delusional thinking and symptoms of psychosis. The [defendant] was arrested, found not guilty by reason of [insanity] and committed to the commissioner of mental health for a period of twenty-five years. The [defendant] was confined to the Whiting Forensic Institute [(Whiting), a maximum security psychiatric facility] for a period of time and then transferred to . . . Norwich State Hospital.

"On January 17, 1986, the [defendant] escaped from Norwich [State Hospital] with a female peer, and they traveled to South Carolina, to Texas and, finally, to Mexico. When [the defendant was] located in Mexico in September, 1986, [he] exhibited symptoms of psychosis. He was returned to Connecticut and, upon admission to Whiting, was found to be grossly psychotic and experiencing auditory and visual hallucinations as well as grandiose and persecutory delusions. While at Whiting, he was . . . involved in a violent incident [that resulted in his own injuries, as well as injuries to staff members] and other patients.

"In 1989, based on his clinical stability, the [defendant] was transferred to Norwich [State Hospital]. From [1990 through 1992], he was granted a series of temporary leaves [that] were terminated when he rendered a positive drug screen for cocaine. After a [period of] time, temporary leaves were reinstated, and, in July, 1995, he was granted a conditional leave. In June, 1996, the [defendant] began to exhibit symptoms of psychosis and admitted that he had stopped taking his antipsychotic medication. He was admitted to Connecticut Valley Hospital but refused some of his medications. A few days later, he escaped from [that] hospital, and, several days thereafter, he was found . . . [and] returned to Whiting. At that time, he was exhibiting psychotic and paranoid symptoms, as well as delusional thinking. He became violent and was placed in four point restraints for six hours.

"During the next several years, the [defendant] remained at Whiting and was involved in a series of assaults. From 1996 [through] 2005, the [defendant's] behavior at Whiting was characterized by chronic refusal to take medication, irritability, mood lability, grandiosity, paranoid ideation, rule breaking, physical altercations with peers and refusal to engage meaningfully in treatment.

"In 2005, there was a reduction in the [defendant's] aggression, an improvement in his participation in treatment and increased cooperation with his treatment team. Based on [these improvements], in mid-2006, the [defendant] was transferred to Dutcher [Hall of Connecticut Valley Hospital], a less secure [area] on the hospital campus. Treatment records after the transfer show that the [defendant exhibited] episodic irritability, mood instability, grandiosity, paranoid ideation and [that] he refused to take his medication, claiming [that] he could control his behavior. Ultimately, the treatment team convinced him to take . . . mood stabilizing medication, but [he then] changed his mind and refused. A treatment impasse ensued, and the [defendant] was transferred to another unit. In the new unit, his psychiatrist noted mood lability and ongoing conflicts with peers. After working closely with the [defendant], the psychiatrist was able to convince him to take the mood stabilizing medication, Trileptal. Even after starting Trileptal, however, the [defendant] had another altercation with a peer and was again transferred. In December, 2009, he was transferred to yet another unit following problems with another patient."

During his twenty-five year term of commitment to the jurisdiction of the board, the defendant filed two applications for discharge, the first in 2003 and the second in 2007. The trial court dismissed both applications. In dismissing the more recent application, the trial court observed that "[t]here is little or no dispute that the [defendant] suffers from a long-standing mental

illness. In the several years prior to the commission of the underlying crimes, the [defendant] was admitted to Norwich State Hospital for two separate psychiatric admissions. Thereafter, during a September, 1986 admission to Whiting . . . the [defendant] was described as grossly psychotic and experiencing visual and auditory hallucinations. Much later, on January 31, 2007, the [defendant's] diagnosis included delusional disorder, grandiose and persecutory type, and, most recently, the [defendant] has been diagnosed with schizoaffective disorder, bipolar type." The trial court also observed that "[t]he evidence is undisputed that, if the [defendant] is released [into] the community, he would require supervision and treatment and that, without such services, he would be a danger to himself or others." The court further noted that "[t]he [defendant's] history belies his representation that he will continue to engage in supervision and treatment in the community or that he is ready to be discharged without mandatory supervision. The records are replete with evidence of substance abuse, noncompliance with treatment recommendations and repeated failures to meaningfully engage in treatment. Moreover, throughout his commitment, the [defendant] has demonstrated little insight into his illness and, instead, has sought to justify or rationalize his behavior. Additionally, despite a history of psychotic episodes, the [defendant] remains steadfast in his opposition to taking antipsychotic medication [even] [t]hough medication has been shown to ameliorate [the defendant's] symptoms . . . ." (Citation omitted; internal quotation marks omitted.) Finally, the court observed that, "even in the controlled environment of his inpatient hospitalization, the [defendant] has repeatedly demonstrated behavior [that] has put others at risk of harm."

In 2009, approximately one year before the end of the defendant's term of commitment, the state filed a petition for an order of continued commitment, arguing that the defendant remained mentally ill and that his discharge would constitute a danger to himself or others. The state's petition for an order of continued commitment led to the litigation culminating in this appeal.

The legal basis for the state's petition is § 17a-593, which sets forth the procedure by which the state may seek to extend an insanity acquittee's commitment well beyond the term initially imposed by the trial court. That statute provides that, "[i]f reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities . . . to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." General Statutes § 17a-593 (c). "The court shall forward . . . any [such] petition . . . to the board. The board

shall . . . file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report." General Statutes § 17a-593 (d). "Within ten days of receipt . . . of the board's report . . . either the state's attorney or counsel for the acquittee may file notice of intent to perform a separate examination of the acquittee. An examination conducted on behalf of the acquittee may be performed by a psychiatrist or psychologist of the acquittee's own choice . . . ." General Statutes § 17a-593 (e). "After receipt of the board's report and any separate examination reports, the court shall . . . commence a hearing on the . . . petition for continued commitment." General Statutes § 17a-593 (f). At that hearing, the state bears the burden of proving "by clear and convincing evidence that the acquittee is currently mentally ill and dangerous to himself or herself or others or gravely disabled";[9] *State* v. *Metz*, 230 Conn. 400, 425, 645 A.2d 965 (1994); a burden identical to that borne by an applicant for an order of civil commitment.[10] Unlike the finder of fact at a civil commitment hearing, however, the court at a continued commitment hearing must "[consider] that its primary concern is the protection of society . . . ." General Statutes § 17a-593 (g).

After the state filed its petition for an order of continued commitment, the board held two hearings to review the defendant's status and to assist it in preparing its report to the trial court, pursuant to § 17a-593 (d). In the course of these proceedings, the board heard testimony from several people, including the defendant, the board's consulting psychiatrist, and members of the staff at Connecticut Valley Hospital. On the basis of this testimony and the defendant's administrative record, which encompassed a series of reports about the defendant that Connecticut Valley Hospital had submitted to the board over the years, the board found by "clear and convincing evidence [that the defendant] remain[ed] an individual with psychiatric disabilities to the extent that his discharge from the jurisdiction of the board would constitute a danger to himself or others" and recommended that the court commit the defendant to the jurisdiction of the board "for a period not to exceed three years."

After the board submitted its report, the defendant filed motions to dismiss the state's petition on equal protection and due process grounds. The trial court held a hearing on these motions and on the state's petition, at which the court heard testimony from the defendant, the board's consulting psychiatrist, the defendant's retained psychiatrist, and the defendant's character witness, among others. Following the hearing, the trial court granted the state's petition, finding

that the defendant remained mentally ill and "[would pose] an imminent and substantial risk of harm to himself or others if he [were] discharged from the [jurisdiction of the] board." The trial court based this finding primarily on the board's report, the defendant's testimony and the testimony of two experts, the board's consulting psychiatrist and the defendant's retained psychiatrist, both of whom the court found to be "highly credible . . . ."

Explaining its decision not to discharge the defendant, the trial court observed that, "[w]hile there is general agreement that the [defendant] has a mental illness, [the board's consulting psychiatrist and the defendant's retained psychiatrist] disagree as to whether the [defendant] poses a danger to himself or others if [he is] released . . . . [The board's consulting psychiatrist] believes that the features of the [defendant's] psychiatric illness and his history of substance abuse, noncompliance with medication, escape, mood lability, intentional refusal to follow orders and difficulties in interpersonal relationships necessitate the heightened structure and supervision afforded by a commitment to the board. Based on his long-time familiarity with the [defendant] and his extensive review of the records, it is [the] opinion [of the board's consulting psychiatrist] that, if discharged from the board, the [defendant] will withdraw from therapy and will stop taking his prescribed medication, thus putting him at substantial risk of injury to himself or others. According to [the board's consulting psychiatrist], the board's supervision and monitoring is different from that provided by the VA [medical center in West Haven, a facility at which the defendant periodically received treatment] or a community organization, and the [defendant] requires this higher level of monitoring, [otherwise] he [poses] a substantial risk of harm to himself or others. [The defendant's retained psychiatrist] does not dispute the [defendant's] need for continued therapy and medication but believes that, if the [defendant] engaged in such treatment in the community, he would not constitute a danger to himself or others, even without the supervision of the board. Significantly, [the defendant's retained psychiatrist] was not asked, nor did he offer an opinion as to, whether he believed the [defendant] would engage in such treatment if [he is] released from the [jurisdiction of the] board." The court also noted but deemed irrelevant the fact that "the state and the [defendant had] stipulated that, absent objection, [the board's consulting psychiatrist and the defendant's retained psychiatrist both] would have testified [that] the [defendant] does not currently meet the standard for involuntary civil commitment."

To reconcile the conflicting testimony of the board's consulting psychiatrist and the defendant's retained psychiatrist on the issue of whether the defendant should be recommitted, the trial court looked elsewhere

in the record, mainly to the board's report and to the defendant's own testimony. As the trial court noted, "[t]he [defendant] testified that the therapy [that] he has received at the VA [medical center] has been helpful to him and that, if discharged . . . he will continue to engage in it. As to the need for medication, he believes [that] medication is helpful to get someone through a psychotic episode or a crisis but is otherwise not needed. Recently, when [the defendant was] asked by [the board's consulting psychiatrist] whether . . . Trileptal was benefitting him, [he] 'smiled and said that "it's helping me to appear that I am cooperating with treatment, that I am going along with the treatment team." ' The [defendant] freely admits that he does not allow periodic blood draws to monitor the effect of his present medication on his liver and kidneys. Although he recognizes that this refusal may jeopardize his health, he 'does not comply because he has a choice not to.' . . . [T]he [defendant] summarized his attitude by stating, 'my choices are limited. When I do have the power to exercise my choices, I do it. Maybe you can say [that] it is to spite the fact that I have lost my ability to make my own choices.' "

The trial court concluded that "[t]he [defendant's] own words, along with his well documented history, make it abundantly clear to the court that the [defendant] has, at best, limited insight into his illness, that he does not believe he needs to take medication despite its proven effectiveness and that he will not take prescribed medication without extensive persuasion. . . . [H]is history reveals at least three prior psychotic episodes, substantial substance abuse, repeated refusals to comply with treatment recommendations, repeated instances of rule breaking and repeated instances of assaultive behavior. The court, therefore, finds not credible the [defendant's] representation that, if discharged from the [jurisdiction of the] board, he will voluntarily remain in treatment. The court further believes that, if discharged . . . the [defendant] will not continue [taking] his prescribed medication. Based on the entire record, the court finds, by clear and convincing evidence, that the [defendant] poses an imminent and substantial risk of harm to himself or others if he is discharged . . . ." Finally, although "[n]o evidence was adduced at the hearing as to the necessary period of any continued commitment," the trial court followed the board's recommendation and committed the defendant to the jurisdiction of the board for an additional three years.

In addition to granting the state's petition for an order of continued commitment, the trial court denied both of the defendant's motions to dismiss. The defendant's first motion to dismiss rested on facial and as-applied equal protection challenges to § 17a-593, the statute that sets forth the continued commitment procedure applicable to insanity acquittees. In support of his facial

challenge, the defendant identified features of the continued commitment procedure that impose unique burdens on individual liberty, features with no counterpart in the civil commitment process. Such features include the special role of the board and the statutory provision that directs the court at a continued commitment hearing to "[consider] that its primary concern is the protection of society . . . ." General Statutes § 17a-593 (g). In support of his as-applied challenge, the defendant emphasized in his posttrial memorandum that the state, at his continued commitment hearing, had agreed to stipulate that, absent objection, the board's consulting psychiatrist and the defendant's retained psychiatrist both would have testified that the defendant did not meet the standard for involuntary civil commitment.

In view of the foregoing liberty infringing differences between the recommitment procedure to which the defendant was subjected, set forth in § 17a-593, and the recommitment procedure applicable to civilly committed inmates, the defendant argued that the court should subject § 17a-593 to intermediate scrutiny. He asserted that the statute could not withstand intermediate scrutiny because the state would not be able to meet its burden of demonstrating that subjecting insanity acquittees who have reached the end of their maximum terms of commitment to a recommitment procedure that imposes greater burdens on individual liberty than does the recommitment procedure applicable to similarly situated civilly committed inmates substantially relates to the achievement of an important governmental interest.

The trial court rejected both of the defendant's equal protection challenges to § 17a-593. In rejecting the defendant's facial challenge, the trial court relied on *State* v. *Lindo*, 110 Conn. App. 418, 955 A.2d 576, cert. denied, 289 Conn. 948, 960 A.2d 1038 (2008), in which the Appellate Court had considered an insanity acquittee's claim that § 17a-593 (c) should be subjected to intermediate scrutiny and had summarily concluded that, "[b]ecause § 17a-593 (c) neither affects a suspect group nor implicates a fundamental right for the purposes of the federal equal protection clause, [the provision] must be analyzed under rational basis review." Id., 425. In rejecting the defendant's as-applied challenge, the trial court reasoned that "the [defendant had been] accorded all of the procedures required by both statute and case law. Indeed, the [defendant] makes no claim that those procedures were not followed. Moreover, he has adduced no other evidence that the application of § 17a-593 (c) to him has [caused him to be treated] . . . differently [from] any other [insanity] acquittee [who has been] found to be mentally ill and a danger to himself or others."

The trial court also denied the defendant's supplemental motion to dismiss. In support of that motion,

the defendant claimed that he had been deprived of his federal constitutional right to due process of law because his original plea of not guilty by reason of insanity was not knowing, intelligent and voluntary, in that neither he nor his attorneys had known, when he entered his plea, that the resultant commitment could be continued beyond the twenty-five year maximum term. The trial court concluded that it lacked jurisdiction to consider this claim. The court compared an insanity acquittee's term of commitment to a convicted defendant's term of imprisonment and reasoned by analogy on the basis of "a series of [criminal] cases over the [previous] twenty-two years, [in which this court] has repeatedly held that, in the absence of a legislative or constitutional grant of continuing jurisdiction, the trial court loses jurisdiction to modify its judgment once the defendant enters into his commitment to the commissioner of correction."

On appeal, the defendant does not challenge the trial court's determination that the state met its burden, under § 17a-593, of establishing by clear and convincing evidence that he is currently mentally ill and dangerous to himself or others. The defendant instead renews his constitutional claims, placing preponderant weight on his claim that § 17a-593, both on its face and as applied to him, violates his federal constitutional right to equal protection. We now address these claims.

Whether the trial court properly rejected the defendant's equal protection claims is a question of law over which our review is plenary. See, e.g., *State* v. *Long*, 268 Conn. 508, 530, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004) (*Long I*). "[T]he concept of equal protection [under the federal constitution] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [challenger is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157–58, 957 A.2d 407 (2008). "Entities are situated similarly in all relevant aspects if a prudent person, looking objectively

at the incidents, would [deem] them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." (Internal quotation marks omitted.) *Kelo* v. *New London*, 268 Conn. 1, 104 n.98, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

The defendant asserts that he and other insanity acquittees who face the prospect of continued commitment are similarly situated to civilly committed inmates. Both groups have been proven beyond a reasonable doubt to have engaged in criminal conduct, both are currently mentally ill, both require treatment, and both present a potential danger to society, yet civilly committed inmates are subject to the statutory scheme governing civil commitment set forth in § 17a-498 et seq., whereas insanity acquittees who have reached the end of their terms of commitment are subject to the wholly separate statutory scheme including § 17a-593 (c) and related provisions. Although we acknowledge that there is some persuasive force to the state's contention that the two groups actually are not similarly situated—only insanity acquittees necessarily were mentally ill at the time of their prior criminal conduct, for example, and only insanity acquittees were proven to have engaged in such conduct *because* they were mentally ill—we assume, *arguendo*, that the two groups are similarly situated and that § 17a-593 accordingly may be analyzed under the equal protection clause.[11]

When a court analyzes a law under the equal protection clause, it must employ a particular standard of review. The most deferential standard is rational basis review, which applies "in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights . . . ." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 158. Rational basis review demands only that the challenged classification be rationally related to a legitimate government interest. E.g., *Ramos* v. *Vernon*, 353 F.3d 171, 175 (2d Cir. 2003). A party challenging a law under rational basis review bears the burden of proving that the law's class-based distinctions are wholly irrational. E.g., id.

The least deferential standard of review is strict scrutiny, which applies both to laws that discriminate on the basis of a person's membership in a suspect class and to laws that burden a person's exercise of a fundamental right. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 159. Under strict scrutiny, the state bears the burden of demonstrating that

the challenged discriminatory means are necessary to the achievement of a compelling state interest. E.g., id.

Lying between the extremes of strict scrutiny and rational basis review is intermediate scrutiny, which typically applies to discriminatory classifications based on gender or illegitimacy. E.g., id., 160. Intermediate scrutiny also sometimes applies to laws that affect "an important, though not constitutional, right." (Internal quotation marks omitted.) Id.; accord *United States* v. *Coleman*, 166 F.3d 428, 431 (2d Cir.), cert. denied, 526 U.S. 1138, 119 S. Ct. 1794, 143 L. Ed. 2d 1021 (1999); cf. *Plyler* v. *Doe*, 457 U.S. 202, 223–24, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (applying, without labeling it as such, heightened scrutiny to law that implicated right to education). Under intermediate scrutiny, the state bears the burden of establishing that the challenged discriminatory means are substantially related to an important governmental interest. E.g., *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 160; see also *Craig* v. *Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). "The [United States] Supreme Court has explained that [t]he purpose of requiring [proof of] that close relationship is to [ensure] that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions. [*Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 725–26, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982)]." (Internal quotation marks omitted.) *Ramos* v. *Vernon*, supra, 353 F.3d 183–84.

The defendant contends that intermediate scrutiny is the appropriate standard of review in the present case because recommitting an insanity acquittee effects a "massive curtailment of [the acquittee's] liberty."[12] *Humphrey* v. *Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972). The defendant relies most heavily on two decisions of the Second Circuit Court of Appeals, whose decisions we "generally give special consideration" when "applying federal law in those instances [in which] the United States Supreme Court has not spoken . . . ." *Schnabel* v. *Tyler*, 230 Conn. 735, 743, 646 A.2d 152 (1994); see *State* v. *Smith*, 275 Conn. 205, 235 n.15, 881 A.2d 160 (2005) ("[d]ecisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive" [internal quotation marks omitted]). In both of the Second Circuit decisions on which the defendant relies, namely, *Francis S.* v. *Stone*, 221 F.3d 100 (2d Cir. 2000), and *Ernst J.* v. *Stone*, 452 F.3d 186 (2d Cir. 2006), the court applied intermediate scrutiny to a New York statute that permitted a criminal defendant who had pleaded not responsible by reason of insanity and had been released subject to an "order of conditions" to be "recommitted" involuntarily to a secure psychiatric facility upon a finding by a preponderance of the evidence that he had developed a "dangerous mental disorder"; (internal quotation

marks omitted) *Ernst J.* v. *Stone*, supra, 187; rather than by clear and convincing evidence, which is normally required for involuntary civil commitment. See *Francis S.* v. *Stone*, supra, 101.

Explaining why New York's more restrictive recommitment procedure for insanity acquittees warranted intermediate scrutiny, the court in *Francis S.* noted that "[t]he [United States] Supreme Court has [concluded] that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington* v. *Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Although a person previously adjudicated to be mentally ill might not be entitled, when challenging recommitment while subject to an order of conditions, to all of the same protections available to a person initially committed as mentally ill, the [c]ourt has made it clear that substantial protection is due a person notwithstanding a diagnosis of mental illness. Thus, in *Baxstrom* v. *Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966), a prisoner administratively determined to be mentally ill and confined to a prison hospital, whose sentence was about to expire, was . . . denied equal protection of the laws when he was subjected to civil commitment under a special procedure applicable to prisoners, rather than the procedures used for civil commitment of all other persons. See [id., 110]. Similarly, in *Humphrey* v. *Cady*, [supra, 405 U.S. 504], the [c]ourt found a substantial equal protection claim [when] a state applied a commitment renewal, extending beyond the period of an allowable sentence, to a defendant initially sentenced to a sex deviate facility, rather than the procedures normally used for civil commitment. See [id., 510–11]. Moreover, in *Jones* v. *United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), the [c]ourt, in upholding the brief, [fifty day] commitment following a verdict of not guilty by reason of insanity . . . emphasized the [g]overnment's important interest in automatic commitment . . . and the reasonableness of the inference of mental illness, at least for [fifty] days, continuing from the [not guilty by reason of insanity] verdict . . . . [See id., 366]. Although *Jones* surely did not subject the statutory scheme to strict scrutiny, there is no indication that only a rational relationship test was applied. Some form of intermediate level scrutiny appears to have been used." (Internal quotation marks omitted.) *Francis S.* v. *Stone*, supra, 221 F.3d 111–12; see also *Ernst J.* v. *Stone*, supra, 200 (reaffirming *Francis S.* and holding that "the Appellate Division [of the New York Supreme Court] correctly applied an intermediate level of scrutiny when evaluating [a] petitioner's [equal protection challenge to the disparate treatment of insanity acquittees]").

In addition to relying on the foregoing decisions from the Second Circuit, which do weigh in favor of subjecting § 17a-593 to intermediate scrutiny, the defendant

also relies on instructive decisions from several other jurisdictions.[13] Although we are inclined to agree with the defendant that the balance of persuasive authority favors applying intermediate scrutiny to § 17a-593, we need not determine the appropriate standard of review in this case because we conclude that the statute withstands even intermediate scrutiny.[14]

Before explaining why § 17a-593 withstands intermediate scrutiny, we review the key disparities between the system applicable to insanity acquittees and the system applicable to civilly committed inmates. These disparities cause the system applicable to insanity acquittees to tilt more strongly toward confinement. In the most general terms, the system applicable to insanity acquittees, which is administered by the board and the Superior Court, operates such that its primary purpose is to protect the public, whereas the system applicable to civilly committed inmates, which is administered by mental health facilities and the Probate Court, operates such that a paramount concern is to protect a defendant's liberty.

This difference in fundamental purpose yields specific disparities in standards, procedures and treatment conditions. Foremost among them is the fact that the legal standard for recommitting an insanity acquittee to the jurisdiction of the board is generally interpreted and applied more conservatively than is the legal standard for recommitting a civilly committed inmate, even though the two standards nominally are identical. This disparity is on display in the present case, the parties having stipulated at the defendant's recommitment hearing that, absent objection, the board's consulting psychiatrist and the defendant's retained psychiatrist both would have testified that the defendant did not meet the standard for involuntary civil commitment.

Perhaps the most obvious reason why divergent outcomes of this sort are possible is that the legislature has imposed different mandates on the two commitment systems. As we explained in *State* v. *Long*, 301 Conn. 216, 19 A.3d 1242, cert. denied, U.S. , 132 S. Ct. 827, 181 L. Ed. 2d 535 (2011) (*Long II*), "[f]or acquittees, the legislature has directed the board, in making decisions regarding conditional release, and the Superior Court, in making decisions regarding discharge, to consider that its primary concern is the protection of society . . . . General Statutes §§ 17a-584 (a) and 17a-593 (g). In civil commitment proceedings, however, the legislature has directed physicians providing opinions to the Probate Court to consider whether or not less restrictive placement is recommended and available; General Statutes § 17a-498 (c); and similarly has required the Probate Court to consider whether or not a less restrictive placement is available . . . . General Statutes § 17a-498 (c)." (Internal quotation marks omitted.) *State* v. *Long*, supra, 301 Conn. 234 n.18. Because

the two commitment systems follow different statutory directives, it is more or less inevitable that these systems sometimes will yield divergent outcomes.

Another reason why the legal standard for commitment is interpreted and applied more conservatively in the system applicable to insanity acquittees is that the two systems differ in their basic procedural structure. Most prominently, the system applicable to acquittees accords a central role to the board, an entity with no civil counterpart. See *State* v. *Harris*, 277 Conn. 378, 384–85, 890 A.2d 559 (2006). The board is an administrative body consisting of a psychiatrist, a psychologist, a probation expert, a layperson, an attorney who is a member of the state bar, and a layperson with experience in victim advocacy. General Statutes § 17a-581 (b). The purpose of this administrative body is "to manage, monitor and review the status of each acquittee to ensure the protection of the general public." *State* v. *Long*, supra, 268 Conn. 520; see also General Statutes § 17a-584; 28 S. Proc., Pt. 15, 1985 Sess., pp. 4912–13, remarks of Senator Richard Johnston. That being its purpose, "the board has general and specific familiarity with all acquittees beginning with their initial commitment . . . ." *State* v. *Long*, supra, 268 Conn. 536.

Among its myriad functions, the board plays an influential part in the process of recommitment. As we noted previously, after the state files a petition for an order of continued commitment, the board is statutorily required to submit a report to the court setting forth the board's findings and conclusions as to whether discharge is warranted. General Statutes § 17a-593 (d). In light of the board's composition and its extensive familiarity with the individuals whom it manages and monitors, it is not surprising that the Superior Court, in deciding whether to grant the state's petition for continued commitment, would accord the board's report a measure of deference. Such deference is exemplified in the present case by virtue of the fact that, even though the state presented no evidence at the continued commitment hearing as to the appropriate period of continued commitment, the court simply followed the board's recommendation and committed the defendant for an additional three years. In general, the effect of such deference is only heightened by the fact that an acquittee ordinarily has no right to cross-examine the authors of the board's report; see *State* v. *Harris*, supra, 277 Conn. 392–94; whereas a civilly committed inmate has a statutory right to cross-examine the court-appointed physicians who sign the certificates of commitment and generate the statutorily mandated reports addressing, inter alia, "whether or not the [prospective committee] is dangerous to himself or herself or others . . . ." General Statutes § 17a-498 (c).

The combined result of the foregoing substantive and procedural disparities is that the continued commit-

ment procedure applicable to insanity acquittees places a thumb on the scale in favor of protecting society and consequently tilts more strongly toward confinement than does the procedure applicable to civilly committed inmates, a procedure that effectively places a thumb on the scale in favor of protecting individual liberty. This fundamental disparity overshadows the other disparities of which the defendant complains, such as (1) the fact that the board employs a relatively protracted discharge process that can result in unconditional release only upon an order of the Superior Court; see General Statutes §§ 17a-592 and 17a-593; whereas civil committees may be discharged by a psychiatric hospital without any judicial intervention; see General Statutes §§ 17a-502 (f) and 17a-516; and (2) the fact that insanity acquittees are committed under more restrictive conditions, as exemplified by the program of conditional release; see General Statutes § 17a-588; a form of mandatory outpatient treatment with no civil counterpart. Although the board's comparatively restrictive procedures for discharge and treatment undoubtedly impose greater burdens on liberty than do their civil counterparts, we ignore these disparities for purposes of our equal protection analysis because the board's comparatively restrictive procedure for depriving an acquittee of his more basic freedom from confinement imposes a burden on liberty that is greater still. We proceed on the assumption that, if the equal protection clause will tolerate a law that makes it easier for the state to subject the members of one group to unwanted periods of confinement—as well as to the stigmatizing consequences and potential exposure to invasive, compulsory medical and psychiatric treatment of involuntary commitment; see, e.g., *Vitek* v. *Jones*, 445 U.S. 480, 492, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980)—then the equal protection clause will also tolerate a law that makes it easier for the state to prevent the members of that group from obtaining early release from such confinement and to subject the members of that group to unwanted outpatient treatment. Accordingly, we do not examine the various restrictions that the system imposes on insanity acquittees once they have been recommitted. We focus instead on the fact that the system applicable to insanity acquittees renders their recommitment easier for the state to obtain in the first place. If that fundamental disparity withstands intermediate scrutiny, so must the lesser disparities that accompany it.

It is undisputed that the continued commitment procedure that is applicable to insanity acquittees serves the important governmental interests of protecting society and affording acquittees proper psychiatric treatment. At issue is whether subjecting no one but acquittees to a recommitment procedure that operates in a way that its primary concern is to protect society—and that consequently tilts more strongly in favor of commitment than its civil counterpart—substantially

relates to the achievement of either of the aforementioned governmental interests. Although the state bears the burden of establishing that such a relationship exists; see, e.g., *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 160; "the [state] is not obliged to prove a precise fit between the nature of the problem and the legislative remedy . . . ." *Hutchins* v. *District of Columbia*, 188 F.3d 531, 543 (D.C. Cir. 1999). Nor does the state need to "produce evidence to a scientific certainty of a substantial relationship . . . . [S]ee, e.g., *Ginsberg* v. *New York*, 390 U.S. 629, 642–43, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) . . . . [I]n judging the closeness of the relationship between the means chosen . . . and the government's interest, three interrelated concepts must be considered: the factual premises which prompted the legislative enactment, the logical connection between the remedy and those factual premises, and the breadth of the remedy chosen." (Citation omitted; internal quotation marks omitted.) *Ramos* v. *Vernon*, supra, 353 F.3d 183–84; see also *Hutchins* v. *District of Columbia*, supra, 542.

We reject the defendant's claim that § 17a-593 is unconstitutional as applied to him because we agree with the state that subjecting the defendant to a recommitment procedure that tilts more strongly in favor of commitment than does its civil counterpart substantially relates to the achievement of the important governmental interest of protecting society.[15] We ground our conclusion in the analytical framework set forth by the Second Circuit Court of Appeals in *Ramos* v. *Vernon*, supra, 353 F.3d 184, a framework that, as we previously mentioned, consists of three interrelated concepts: the factual premise undergirding the challenged classification, that factual premise's logical connection to the legislative remedy, and the legislative remedy's breadth or scope.

The factual premise undergirding § 17a-593 is that the defendant's prospective release raises a special concern for public safety. This concern arises because of two key facts: first, the defendant suffers from a long-standing mental illness that has persisted despite years of intensive treatment; and, second, the defendant previously was adjudicated to have committed a crime—indeed, a dangerous crime—as a result of his mental illness. That the defendant suffers from a long-standing mental illness is not seriously in dispute. See *State* v. *Dyous*, Superior Court, judicial district of Windham, Docket No. WWM-CR-83-47790-T (March 19, 2010) ("the evidence that the [defendant] has a mental illness is uncontroverted"); *State* v. *Dyous*, Superior Court, judicial district of Windham, Docket No. WWM-CR-83-47790-T (September 22, 2008) ("[t]here is little or no dispute that the [defendant] suffers from a long-standing mental illness"). Nor is there any dispute that the defendant, as an insanity acquittee, is someone who previously was adjudicated to have committed a crime

as a result of his mental illness. See *Jones* v. *United States*, supra, 463 U.S. 363 ("[a] verdict of not guilty by reason of insanity establishes two facts: [i] the defendant committed an act that constitutes a criminal offense, and [ii] he committed the act *because* of mental illness" [emphasis added]). Moreover, we fairly may presume that the defendant's adjudication of not guilty by reason of insanity was highly reliable, as that adjudication occurred at the defendant's behest. See id., 367 ("[S]ince [the commitment as an acquittee] . . . follows only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior . . . ." [Emphasis in original; internal quotation marks omitted.]).

Just as "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment"; id., 366; it also comports with common sense to conclude, as we do in the present case, that someone whose mental illness was sufficient to lead him to commit a dangerous crime, and whose mental illness demonstrably has persisted despite years of intensive treatment, is someone whose prospective release raises a special concern for public safety. That concern plainly is not present to the same degree in the case of a civilly committed inmate, a person who (1) might not have been mentally ill when he committed his crime, (2) might not suffer from a long-standing mental illness that has persisted despite years of intensive treatment, and (3) was not legally adjudicated to have committed a crime as a result of his mental illness.[16]

For the state to be justified in taking *some* account of the additional public safety concern that is raised by the prospective release of persons like the defendant, the state need not believe that insanity acquittees on the whole are substantially more dangerous than civilly committed inmates, much less need it "produce evidence to a scientific certainty" of such a difference in dangerousness. *Ramos* v. *Vernon*, supra, 353 F.3d 183. The state need only accept the commonsense conclusion that persons like the defendant still suffer from a mental illness that in the past was sufficient to lead them to commit a crime.[17] That commonsense conclusion suffices to justify the legislature's decision to subject such persons to a recommitment procedure that places *some* additional emphasis on protecting society.[18] *How much* additional emphasis the legislature may place on protecting society is another question—one that implicates the remaining two concepts that the Second Circuit Court of Appeals identified as vital to intermediate scrutiny, namely, the logical connection between the

legislative remedy and the factual premise that undergirds the challenged classification, and the scope or breadth of the legislative remedy. See id., 184.

With respect to the first of these concepts, considering that "the [state] is not obliged to prove a precise fit between the nature of the problem and the legislative remedy"; *Hutchins* v. *District of Columbia*, supra, 188 F.3d 543; we determine that there clearly is a logical connection between the special public safety concern that is raised by the prospective release of persons like the defendant and the recommitment procedure to which such persons are subject, a procedure that directs the finder of fact to "[consider] that its primary concern is the protection of society"; General Statutes § 17a-593 (g); and that accords a central role to an administrative body the purpose of which is "to manage, monitor and review the status of each [person subject to it] to ensure the protection of the general public." *State* v. *Long*, supra, 268 Conn. 520; see also General Statutes § 17a-584; 28 S. Proc., supra, pp. 4912–13, remarks of Senator Johnston.

As for the scope of the legislative remedy, we are not persuaded that the continued commitment procedure applicable to insanity acquittees imposes burdens on individual liberty greater than those warranted by the special public safety concern that is raised by the prospective release of persons like the defendant. Admittedly, that special concern is not so much greater than the concern raised by the prospective release of civilly committed inmates that the state permissibly may subject persons like the defendant to a recommitment procedure that is drastically more restrictive. The continued commitment procedure applicable to insanity acquittees, however, is not drastically more restrictive than the procedure applicable to civilly committed inmates. Both procedures afford prospective committees a full hearing in court, both require that the party seeking commitment bear the burden of proof, and both impose the same nominal standard, namely, proof "by clear and convincing evidence that the [prospective committee] is currently mentally ill and dangerous to himself or herself or others or gravely disabled."[19] *State* v. *Metz*, supra, 230 Conn. 425; cf. *United States* v. *Ecker*, 543 F.2d 178, 188 n.34 (D.C. Cir. 1976) ("equal protection requires the standards governing the release of criminal acquittees, who have been confined for a period equal to the maximum sentence authorized for their crimes, to be *substantially the same* as the standards applicable to civil committees" [emphasis added]), cert. denied, 429 U.S. 1063, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977). Although we acknowledge that the procedure applicable to acquittees, because of its statutory directive and because of the central role of the board, places additional emphasis on protecting society and, as a result, tilts more strongly in favor of confinement, this further restriction on liberty is not too broad a remedy for

the special public safety concern that is raised by the prospective release of persons like the defendant.

We therefore conclude that § 17a-593 is constitutional as applied to the defendant.[20] Inevitably, the further restriction on liberty that the continued commitment procedure imposes on insanity acquittees sometimes will result in the recommitment of persons, like the defendant, who might have been released if they had been subjected to the procedure applicable to civilly committed inmates.[21] That difference in outcome does not violate the equal protection clause any more than does the difference in procedure that makes it possible.

We also reject the defendant's claim that § 17a-593 is unconstitutional on its face. Because the statute is constitutional as applied to the facts of this case, the defendant clearly cannot "establish that no set of circumstances exists under which the [statute] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Finally, we briefly address the defendant's secondary constitutional claim, namely, that he was deprived of his federal constitutional right to due process of law because his original plea of not guilty by reason of insanity was not knowing, intelligent and voluntary, in that neither he nor his attorneys knew, when he entered his plea, that the resultant commitment could be continued beyond the twenty-five year maximum term. As we previously noted, the trial court denied the defendant's second motion to dismiss, which was predicated on this alleged due process violation, upon concluding that it was without jurisdiction to entertain the motion.

Mindful that "[q]uestions regarding subject matter jurisdiction are purely legal in nature and subject to plenary review"; *State* v. *Das*, 291 Conn. 356, 361, 968 A.2d 367 (2009); we agree with the state that the trial court correctly concluded that it lacked jurisdiction to entertain the defendant's due process claim. Although it appears to be a question of first impression in Connecticut whether a trial court retains jurisdiction over a defendant's motion to vacate his plea of not guilty by reason of insanity once he has entered into his term of commitment, it is well established that a trial court lacks jurisdiction over a defendant's motion to withdraw his guilty plea after he has begun serving his sentence. See id., 368 (clarifying nonexistence of "constitutional violation exception to the trial court's lack of jurisdiction over a defendant's motion to withdraw his plea after the sentence has been executed"). We see no reason not to follow an analogous rule for purposes of the present case. In no way do we prejudice the defendant by deciding that the trial court lacks jurisdiction to vacate his plea of not guilty by reason of insanity, as the defendant may seek equivalent relief by filing a petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion ROGERS, C. J., and NORCOTT, EVELEIGH and HARPER, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

** September 28, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] An insanity acquittee is "any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." General Statutes § 17a-580 (1).

[2] Under § 17a-515, the provisions of § 17a-498, which set forth the principal components of the involuntary civil commitment procedure, are applicable to any person in the custody of the commissioner of correction.

[3] The defendant appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[4] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or mentally retarded to the extent that his discharge [from the jurisdiction of the board] at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

[5] General Statutes § 17a-582 sets forth the procedure by which a person may be committed to the jurisdiction of the board after he is found not guilty by reason of mental disease or defect.

[6] In the interest of brevity, we hereinafter refer to an acquittal by reason of mental disease or defect as an acquittal by reason of insanity and to a plea of not guilty by reason of mental disease or defect as a plea of not guilty by reason of insanity.

[7] We note that the defendant makes no claim under the state constitution.

[8] The state presented its account of why § 17a-593 withstands intermediate scrutiny in a supplemental brief on that issue, which we ordered the state to file after oral argument in this appeal. After the state filed its supplemental brief, the defendant submitted a responsive supplemental brief.

[9] Although the language of the hearing provision might seem to place the burden of proof not on the state but on the acquittee; see General Statutes § 17a-593 (f) ("[a]t the hearing, the acquittee shall have the burden of proving by a preponderance of the evidence that the acquittee is a person who should be discharged"); we construed that language, in *State* v. *Metz*, 230 Conn. 400, 420–21, 645 A.2d 965 (1994), as pertaining only to hearings on an acquittee's application for discharge, not to hearings on the state's petition for an order of continued commitment. One reason why we adopted that construction was to avoid placing § 17a-593 (f) in constitutional jeopardy. See id., 422–23. As we explained, "an indefinite allocation of the burden of proof on an insanity acquittee [would raise] significant questions of equal protection." Id., 423.

[10] General Statutes § 17a-498 (c), which sets forth the structure of a civil commitment proceeding, provides in relevant part that "[i]f . . . the [probate] court finds by clear and convincing evidence that the person complained of has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, it shall make an order for his or her commitment . . . ."

[11] The concurring justice would prefer that we not assume, for purposes of this case, that the two classes are similarly situated because, in his view, "insanity acquittees and those who are civilly committed are distinguishable on such a fundamental level that there is no reason" to do so. We do not believe, however, that the issue is nearly so clear cut in light of the important features that the two groups have in common.

We also do not share the concurring justice's belief that *Jones* v. *United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), a due process case, provides guidance with respect to this issue. The court in *Jones* merely determined that the distinctions between the two classes were sufficient to warrant differential treatment; id., 370; the very same conclusion that we reach in the present case. Moreover, in *Jones*, the court expressly observed that its due process analysis was dispositive of the equal protection claims that the petitioner had raised at an earlier stage of the proceedings, without suggesting that those claims failed to establish the threshold requirement that the classes must be similarly situated. See id., 362 n.10. Indeed, with

respect to the one equal protection argument that the petitioner did raise in *Jones*, the court addressed and rejected it on the merits, apparently assuming that the two classes are similarly situated. See id. It may be argued, therefore, that *Jones* supports the view that the two classes *are* similarly situated for equal protection purposes. We do not believe, however, that *Jones* sheds any real light on the issue.

[12] We note that the defendant does not ask us to subject § 17a-593 to strict scrutiny.

[13] Offering additional support for his contention that § 17a-593 warrants intermediate scrutiny, the defendant cites *Hickey* v. *Morris*, 722 F.2d 543, 544 (9th Cir. 1983), in which the Ninth Circuit Court of Appeals considered an equal protection challenge to Washington's procedures for the confinement and release of insanity acquittees. In discussing whether the disparity between these procedures and the procedures for civil committees triggered intermediate scrutiny, the Ninth Circuit voiced its approval of the District Court's decision to apply the sort of "heightened scrutiny" used by the United States Supreme Court in *Craig* v. *Boren*, supra, 429 U.S. 191–92, 204, 210, which invalidated an Oklahoma statute prohibiting the sale of " 'nonintoxicating' " 3.2 percent beer to males under twenty-one and females under eighteen on the ground that the statute's gender based distinction was not substantially related to the achievement of an important governmental objective. See *Hickey* v. *Morris*, supra, 546. The court in *Hickey* also characterized the United States Supreme Court as having applied "the heightened rational basis test to classifications affecting involuntary commitment" in all three of the involuntary commitment cases that theretofore had come before the court. Id.; see *Jackson* v. *Indiana*, 406 U.S. 715, 730, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) (state procedure for pretrial commitment of incompetent criminal defendants violated federal equal protection clause because it subjected them to more lenient commitment standard and more stringent release standard than standards generally applicable to all other persons not charged with offenses); *Humphrey* v. *Cady*, supra, 405 U.S. 512 (finding substantial equal protection claim when state applied commitment renewal, extending beyond period of allowable sentence, to defendant initially sentenced to sex deviate facility, rather than procedure normally used for civil commitment); *Baxstrom* v. *Herold*, supra, 383 U.S. 110–15 (prisoner administratively determined to be mentally ill and confined to prison hospital, whose sentence was about to expire, was denied equal protection when he was subjected to civil commitment under special procedure applicable to prisoners instead of procedure used for civil commitment of all other persons). Other cases on which the defendant relies that lend support to his contention that § 17a-593 warrants intermediate scrutiny include *Hydrick* v. *Hunter*, 500 F.3d 978 (9th Cir. 2007), vacated, 556 U.S. 1256, 129 S. Ct. 2431, 174 L. Ed. 2d 226 (2009), and *People* v. *McKee*, 47 Cal. 4th 1172, 223 P.3d 566, 104 Cal. Rptr. 3d 427 (2010), both of which analyze equal protection challenges to § 6600 of the California Welfare and Institutions Code and related provisions, a statutory scheme that permits the indefinite commitment of persons who are proven beyond a reasonable doubt to be sexually violent predators. See *Hydrick* v. *Hunter*, supra, 999 (upholding District Court's denial of defendants' motion to dismiss on ground that "[p]laintiffs . . . may be able to show that the differential treatment between [sexually violent predators] and other civilly committed persons violates equal protection because such treatment does not meet heightened scrutiny"); *People* v. *McKee*, supra, 1208–1209, 1211 (remanding case to trial court to determine whether "the [state], applying . . . equal protection principles . . . can demonstrate the constitutional justification for imposing on [sexually violent predators] a greater burden than is imposed on [similarly situated mentally disordered offenders] in order to obtain release from commitment").

[14] Because we do not determine the appropriate standard of review, we need not consider whether our use of rational basis review in *Long I*, in which we stated conclusorily that "§ 17a-593 (c) neither affects a suspect group nor implicates a fundamental right for . . . purposes of the federal equal protection clause" and, therefore, "must be analyzed under rational basis review"; *State* v. *Long*, supra, 268 Conn. 535; would preclude us from determining that § 17a-593 actually warrants intermediate scrutiny. For the same reason, we need not address the defendant's contention that we should overturn *Long I* or *State* v. *Lindo*, supra, 110 Conn. App. 425, in which the court rejected an insanity acquittee's contention that it should subject § 17a-593 (c) to intermediate scrutiny.

The concurring justice asserts that, even if we assume, for purposes of this case only, that heightened scrutiny is the appropriate test, we create

confusion in light of *Long I*, in which we undertook rational basis review. See *State* v. *Long*, supra, 268 Conn. 535. In *Long I*, however, the parties made no claim that heightened scrutiny was appropriate, so we had no occasion to conduct a thorough analysis of the issue. See id. It is fair to say, moreover, that the law in this area is not settled. Because we need not resolve the issue for present purposes, we prefer to leave it to another day, when its resolution may be more central to the outcome of the case.

[15] The state also argues that § 17a-593's discriminatory means substantially relate to the achievement of a further important governmental interest, namely, affording insanity acquittees proper psychiatric treatment. We do not address this argument because § 17a-593's discriminatory means will survive intermediate scrutiny as long as they substantially relate to the achievement of one important governmental interest. They need not substantially relate to the achievement of more than one such interest.

[16] The appendix to the defendant's supplemental brief contains several charts that the defendant claims to have acquired from the executive director of the board, charts that, in the defendant's view, demonstrate "that [insanity acquittees facing recommitment], as well as generic acquittees, released from the [jurisdiction of the] board are less dangerous than civilly committed inmates." The defendant places particular emphasis on the last of these charts, the caption of which provides that the rate of rearrest for individuals discharged from their commitment to the board "compares favorably" to the rate of rearrest for individuals with serious mental illness released from prison under the auspices of certain transition programs. Without passing judgment on the accuracy of these charts, we note that they seem to track rearrest rates only for the undifferentiated group of *all* persons discharged from the jurisdiction of the board, not for specific subgroups, such as the subgroup of persons discharged from the jurisdiction of the board after a period of continued commitment or the subgroup of persons discharged at the end of their maximum terms of commitment. Furthermore, even if these charts indicated that persons who are discharged at the end of their maximum terms of commitment, instead of being recommitted, were rearrested with lower frequency than ex-civilly committed inmates are, that fact—far from necessarily supporting the defendant's hypothesis that insanity acquittees who have reached the end of their maximum terms of commitment are less dangerous than civilly committed inmates—would be consistent with the alternative hypothesis that the recommitment process serves its proper function of distinguishing accurately between dangerous and nondangerous acquittees. For similar reasons, even if these charts indicated that persons who are discharged after a period of continued commitment were rearrested with lower frequency than ex-civilly committed inmates, that fact would be consistent with the alternative hypothesis that such persons are rearrested with lower frequency *only because* of the treatment that they receive during their period of additional commitment.

[17] The defendant insists that, "to establish a sufficient constitutional justification for the disparate treatment in commitment procedures applicable to [insanity acquittees who have reached the end of their maximum terms of commitment] and [to civilly committed inmates], the state must prove that [the former] as a class are more dangerous than [the latter]." Although we do not insist on empirical evidence in this case, we acknowledge that the state likely would be required to offer empirical proof of a difference in dangerousness between the two groups in question if the state were seeking to justify a procedural disparity more drastic than the disparity at issue in the present case, such as the procedural disparity for which the California Supreme Court demanded empirical evidence in *People* v. *McKee*, 47 Cal. 4th 1172, 223 P.3d 566, 104 Cal. Rptr. 3d 427 (2010), a case in which the state had "impos[ed] on one group [of committees] an indefinite commitment and the burden of proving [that] they should not be committed, [whereas a similarly situated] group [of committees was] subject to short-term commitment renewable only if the [state] prove[d] periodically that continuing commitment [was] justified beyond a reasonable doubt . . . ." Id., 1203.

[18] Contesting the commonsense conclusion that persons like the defendant raise a public safety concern that is not raised to the same extent in the context of civilly committed inmates, the defendant relies on *State* v. *Metz*, supra, 230 Conn. 400, in which we stated: "After the expiration of a maximum term of confinement, it is difficult to find a constitutional justification for a categorical distinction between an insanity acquittee and an incarcerated prisoner who was transferred to a mental hospital while he was serving his criminal sentence. In each instance, the purpose of commitment is to treat the individual's mental illness and [to] protect him and society from his

potential dangerousness . . . . In each instance, furthermore, the qualitative character of the liberty deprivation is the same . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 424–25. ''These constitutional concerns lead us to construe the maximum period of commitment . . . as a reasonably identified point of demarcation beyond which the presumption of dangerousness initially accompanying an acquittee does not continue.'' Id., 425. To the extent that this portion of *Metz* stands for the proposition that it would violate equal protection to presume that an insanity acquittee remains so dangerous after the expiration of his maximum term of commitment that the state may continue to place the burden of proof at a recommitment hearing on the acquittee, our reasoning in the present case is entirely harmonious with *Metz*. As we explain more fully hereinafter, although the special public safety concern that is raised by the prospective release of persons like the defendant justifies subjecting such persons to a recommitment procedure that places *some* additional emphasis on protecting society, this special concern is not so great that it will justify treatment that is drastically more restrictive, such as allocating the burden of proof at a recommitment hearing on the acquittee. Nevertheless, to the extent that the foregoing portion of *Metz* stands for the stronger proposition that, after the expiration of a maximum term of commitment, the equal protection clause requires the state to treat an insanity acquittee exactly as it would treat a civilly committed inmate, we reject that proposition as unfounded. However preferable it may be *as a matter of policy* for the state to treat insanity acquittees, following the expiration of their maximum term of commitment, in exactly the same manner as it treats civilly committed inmates; see id., 422 (''[t]he considered view of professional commentators who have promulgated model rules for the commitment of insanity acquittees is that, after expiration of a stated term of commitment, fairness, convenience and symmetry require an insanity acquittee to be treated like others committed for mental illness''); the equal protection clause simply does not require that the state treat these two groups identically. The special public safety concern that is raised by the prospective release of a person like the defendant does not evaporate the moment such a person reaches the end of his maximum term of commitment. An acquittee's maximum term of commitment bears no necessary relation to public safety: the maximum allowable term of commitment is equal to ''the maximum sentence that could have been imposed if the acquittee had been convicted of the offense''; General Statutes § 17a-582 (e) (1) (A); and ''[t]here simply is no necessary correlation between severity of the offense and length of time necessary for recovery.'' *Jones* v. *United States*, supra, 463 U.S. 369.

[19] Furthermore, we have held that the procedure applicable to insanity acquittees and the civil commitment procedure employ substantially the same definition of ''dangerousness.'' *State* v. *Harris*, supra, 277 Conn. 388–89 (comparing definition of ''[d]anger to self or others'' as ''risk of imminent physical injury to others or self . . . includ[ing] the risk of loss or destruction of the property of others'' in § 17a-581-2 [a] [6] of the Regulations of Connecticut State Agencies with definition of ''dangerous to himself or herself or others'' as ''a substantial risk that physical harm will be inflicted by an individual upon his or her own person or upon another person'' in General Statutes § 17a-495 [b] [internal quotation marks omitted]).

[20] We agree with the defendant that the trial court compared the defendant to the wrong class of persons when it rejected his as-applied equal protection challenge on the ground that ''the [defendant] was accorded all of the procedures required by both statute and case law . . . [and] has adduced no other evidence that the application of § 17a-593 (c) to him has [caused him to be treated] . . . differently [from] any other [insanity] acquittee [that has been] found to be mentally ill and a danger to himself or others.'' For the reasons set forth in this opinion, we nevertheless uphold the trial court's determination that § 17a-593 is constitutional as applied to the defendant.

[21] We agree with the defendant that the trial court erred in deeming irrelevant the stipulation that, absent objection, the board's consulting psychiatrist and the defendant's retained psychiatrist both would have testified that the defendant did not meet the standard for involuntary civil commitment. That stipulation is highly relevant to the defendant's as-applied equal protection challenge. The trial court's error nevertheless was harmless because, even if we were to consider the stipulation, we conclude that the defendant's as-applied challenge fails.