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NORCOTT, J., dissenting in part, with whom Zarella, J., joins. I disagree with the conclusion of part I of the majority's opinion, namely, that there was insufficient evidence to sustain the conviction of the defendant, Calvin Bennett, of intentional murder as an accessory in violation of General Statutes §§ 53a-8 (a)[1] and 53a-54a (a).[2] In my view, the majority simply substitutes its view about whether the state had proven, beyond a reasonable doubt, the defendant's intent to cause the death of the victim, James Caffrey, for that of the panel of experienced trial judges, *Cremins*, *Crawford* and *Schuman*, *Js.* (trial court), who served as fact finders in this case.[3] Accordingly, I respectfully dissent from part I of the majority's opinion.[4]

I begin by noting my agreement with the historical facts, unanimously found by the trial court, and the general legal principles that the majority states; I will restate them only where necessary. My disagreement, then, lies with the majority's application of those principles to the facts in the present case. In my view, the majority's analysis contravenes the "well established" governing standard of review, namely, that: "In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, [w]here a group of facts are relied upon for proof of an element of the crime it is their cumulative impact that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard. It is only where a single fact is essential to proof of an element, however, such as identification by means of fingerprint evidence, that such evidence must support the inference of that fact beyond a reasonable doubt. . . .

"As we have often noted, however, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 65–66, 43 A.3d 629 (2012).

As noted by the majority, in order to convict the defendant of intentional murder as an accessory under §§ 53a-8 (a) and 53a-54a (a), the state had to prove beyond a reasonable doubt that the defendant intended the death of the victim to result from his actions in assisting Tamarius Maner, the principal offender who actually fired the fatal shot, with the home invasion of which he was convicted. See, e.g., *State* v. *Martinez*, 278 Conn. 598, 615–16, 900 A.2d 485 (2006); *State* v. *Robertson*, 254 Conn. 739, 783–84, 760 A.2d 82 (2000). Indeed, it is well settled that the "specific intent to kill is an essential element of the crime of murder. To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 66–67. Finally, and most significantly, "[i]ntent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one." (Internal quotation marks omitted.) *State* v. *Robertson*, supra, 784.

I acknowledge the relative sparsity of the facts surrounding the actual killing of the victim prior to the completion of the home invasion and theft. This was, no doubt, by design of the defendant and Maner, who surprised the victim by ringing his doorbell and invading his home in the midnight hours when potential witnesses were likely to be absent or sleeping. Nevertheless, I conclude that there is sufficient circumstantial

evidence of the defendant's intent, drawn from his conduct before and after the victim's death, to sustain the trial court's conclusion that he intended the victim's death to result during the home invasion and was not merely acting as a passive observer or tag-along. See, e.g., *State* v. *Foster*, 202 Conn. 520, 531, 522 A.2d 277 (1987) ("[m]ere presence as an inactive companion, passive acquiescence, or the doing of innocent acts which may in fact aid [the principal] must be distinguished from the criminal intent and community of unlawful purpose shared by one who knowingly and wilfully assists the perpetrator of the offense in the acts which prepare for, facilitate or consummate it" [internal quotation marks omitted]).

First, the defendant accompanied Maner to the victim's door while he himself was armed with a loaded gun. In my view, the trial court reasonably could have deemed the fact that the defendant's gun was loaded to be probative of his intent to kill—at least conditionally to effect the planned theft—despite the fact that there is no evidence that he fired that gun during the home invasion.[5] See *United States* v. *Fekete*, 535 F.3d 471, 481 (6th Cir. 2008) (evidence that defendant's gun is loaded is highly probative evidence of "conditional intent to cause death or serious bodily harm" required for conviction under federal carjacking statute); *People* v. *Spiezio*, 191 Ill. App. 3d 1067, 1074, 548 N.E.2d 561 (1989) ("there was sufficient circumstantial evidence of intent to kill to support the jury's verdict [convicting defendant of attempted murder] where defendant pointed a loaded gun at the police officer from close range, while yelling, 'fuck you coppers' "), appeal denied, 131 Ill. 2d 565, 553 N.E.2d 401 (1990); *Specht* v. *State*, 838 N.E.2d 1081, 1095 (Ind. App. 2005) (defendant's plan to use weapon to rob convenience store and fact that he traveled with accomplice to store with two loaded guns was sufficient evidence of specific intent to kill to sustain attempted murder conviction as accessory); *Commonwealth* v. *Lewis*, 81 Mass. App. 119, 121–22, 960 N.E.2d 324 (defendant's act of pointing loaded gun at police officer was evidence of his intent to kill for purpose of offense of assault with intent to murder, despite fact that gun was not yet ready to be fired), review granted, 461 Mass. 1110, 964 N.E.2d 985 (2012).[6]

The defendant's intent to kill is further demonstrated by his actions after entering the victim's apartment. Specifically, the defendant did not flee immediately or obtain help for the victim once Maner had shot him, rather, he chose to enter the apartment, put his loaded gun to the head of Samantha Bright, the victim's pregnant girlfriend, and demand that he be led to the victim's money and drugs.[7] Based on these actions, the trial court reasonably could have found that the defendant was not surprised by the acts of his accomplice during the home invasion.[8] Indeed, it is well settled that a

lack of concern with the welfare of a victim and a corresponding failure to obtain medical assistance, can be considered circumstantial evidence of a defendant's intent to kill. See, e.g., *State* v. *Otto*, supra, 305 Conn. 71–72 (concluding that "defendant did not call, or even attempt to call, for medical assistance for a wound that left the victim bleeding a significant amount" is circumstantial evidence of intent to kill); *State* v. *Turner*, 252 Conn. 714, 750, 751 A.2d 372 (2000) ("[i]t was reasonable for the jury to infer from [the defendant's] lack of concern that he intended to cause serious physical injury or kill the victim"); *State* v. *Sivri*, 231 Conn. 115, 129, 646 A.2d 169 (1994) ("the failure to summon . . . treatment is consistent with an antecedent intent to cause death"). Thus, I conclude that the trial court reasonably could have found that the defendant intended the victim's death to result from his actions in assisting Maner with the home invasion.[9]

Finally, I disagree with the majority's somewhat hyperbolic contention that, to find intent to kill on the facts in the record of this case "would obliterate a critical distinction between . . . other theories of vicarious liability [such as *Pinkerton* liability and felony murder under General Statutes § 53a-54c][10] and accessorial liability." Although the defendant—quite properly—was convicted of felony murder under § 53a-54c for his actions in this case, he could well also have been convicted of that offense had, hypothetically, he personally been unarmed going into the home invasion and fled the scene in panic after Maner shot the victim. See, e.g., *State* v. *Apodaca*, 303 Conn. 378, 393, 33 A.3d 224 (2012) (noting that § 53a-54c "reflects a legislative determination that certain crimes, such as robbery, create a foreseeable risk of death to a victim of, or bystander to, the crime and, accordingly, imposes criminal liability not only on the person who caused the death, but also on any other participant to the underlying felony"). In this case, the defendant's additional actions—namely, bringing a loaded gun to the home invasion, remaining in the apartment after the shooting and completing the burglary, not by searching through possessions, furniture or closets to find the victim's money and drugs, but rather, by holding a loaded gun to the head of a pregnant woman—reasonably supports a conclusion that he was not some petty thief who found himself in the wrong place at the wrong time with the wrong person. Thus, I conclude that there was sufficient circumstantial evidence of the defendant's intent to kill to sustain his intentional murder conviction under an accessory theory of liability.

Because I would affirm the defendant's conviction for intentional murder as an accessory in violation of §§ 53a-8 and 53a-54a, I respectfully dissent from part I of the majority opinion.

[1] General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, com-

mands, 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."

[2] General Statutes § 53a-54a (a) provides: "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 or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[3] I recognize that one member of the three judge panel, *Schuman*, *J.*, dissented from the majority's conclusion that, on the historical facts unanimously found by the panel, the state had proven beyond a reasonable doubt that the defendant had the requisite intent to be convicted of accessory to intentional murder.

[4] As the majority indicates, simply directing the trial court to render a judgment of not guilty for the defendant on the charge of intentional murder under § 53a-54a does not require the reversal of the defendant's life sentence for felony murder under General Statutes § 53a-54c. See footnote 10 of the majority opinion. Consequently, the question of whether the defendant possessed the intent to cause the death of the victim in the present case is, as a practical matter, academic. See, e.g., *State* v. *Whipper*, 258 Conn. 229, 288, 780 A.2d 53 (2001) ("intentional and felony murder of a particular victim charges a single offense, committed conjunctively in two different ways" [internal quotation marks omitted]), overruled on other grounds by *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004), and *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008). Thus, I write briefly and separately only to make clear my concern with the precedential effect of the majority's decision.

[5] Indeed, the majority acknowledges that the defendant's conversations with Maner before the home invasion, and the fact that "the men each carried loaded guns to the scene" are evidence of "a concerted purpose and preparation to do more than merely brandish a weapon if necessary" to accomplish the intended theft. The majority, however, proceeds to discount the importance of these facts by observing that "some courts have indicated that pointing a loaded gun at the victim, *in and of itself*, is not sufficient to establish an intent to kill." (Emphasis in original.) See footnote 9 of the majority opinion. First, I note that, because there is other evidence in this record of the defendant's intent; see footnotes 7 and 8 of this dissenting opinion and accompanying text; it is not necessary for us to determine whether the defendant's use of a loaded handgun, including the use of that weapon to threaten Samantha Bright, the victim's pregnant girlfriend, is *by itself* circumstantial evidence of intent to kill.

Second, the authorities cited by the majority in support of the proposition that "pointing a loaded gun at the victim, in and of itself, is not sufficient to establish an intent to kill," namely, *Merritt* v. *Commonwealth*, 164 Va. 653, 657–58, 180 S.E. 395 (1935), *State* v. *Smith*, 499 So. 2d 340, 342 (La. App. 1986), and *State* v. *Eley*, 77 Ohio St. 3d 174, 180, 672 N.E.2d 640 (1996), cert. denied, 521 U.S. 1124, 117 S. Ct. 2522, 138 L. Ed. 2d 1023 (1997), are inapposite. See footnote 9 of the majority opinion. Although the majority accurately quotes *Merritt* as stating, "[e]ven if the jury had believed that the accused pointed a loaded gun at [the victim], they would not have been justified in finding him guilty of an attempted murder, unless they believed that at the time he pointed the pistol he had formed the purpose, the intent, to murder, and the act was done in furtherance of that specific intent"; *Merritt* v. *Commonwealth*, supra, 657–58; that decision is legally and historically inapposite. *Merritt* was not a sufficiency of the evidence case, but rather, involved the analysis of the state's pleadings and turned on the state's failure to allege, in an attempted murder case, that the defendant had the requisite specific intent to kill when he pointed a loaded gun at the victim. See id., 658. Further, this observation in *Merritt* also strikes me as an artifact of a bygone era perhaps more cavalier with respect to guns. Declining to consider the act of pointing a loaded gun at a person as at least some circumstantial evidence of the actor's intent to kill simply is, in my view, inconsistent with contemporary standards of decent conduct. Compare *Hairston* v. *State*, 54 Miss. 689, 694 (1877) ("we have found no case of a conviction of assault with intent to kill or murder, upon proof only of the

levelling of a gun or pistol"), with *Myers* v. *Clearman*, 125 Iowa 461, 463–64, 101 N.W. 193 (1904) (considering whether gun was loaded and drawing distinction between aiming revolver with intent to inflict great bodily harm and aiming revolver with intent only to frighten).

The decision of the Court of Appeals for the Fourth Circuit of Louisiana in *Smith* and the decision of the Ohio Supreme Court in *Eley* are similarly distinguishable or not supportive of the majority's position. See *State* v. *Smith*, supra, 499 So. 2d 342 (Upholding the defendant's armed robbery sentence despite the trial judge's misstatement that the charge " 'involves an attempted murder,' " while noting that the "[d]efendant was not charged with attempted murder, and the element of specific intent to kill the victim was not present. However, [the] defendant pointed a loaded gun at the victim's head while demanding his money and was clearly prepared to kill him."); *State* v. *Eley*, supra, 77 Ohio St. 3d 180 (defendant's act of bringing gun to convenience store robbery and using it, despite claimed intent only to shoot clerk in shoulder, constituted sufficient evidence of "purposefulness" to sustain aggravated murder conviction).

[6] Courts, including this court, that have been confronted with cases in which the defendant discharged a firearm in the course of committing an offense have made similar observations with respect to the import of the act of bringing a loaded gun in discerning the defendant's intent to kill. See *State* v. *Otto*, supra, 305 Conn. 71 ("[T]he jury could also infer that, before using the gun, the defendant either had it in his possession or had retrieved it from the locked gun safe in his truck in which, the jury was also told, he also stored ammunition for that gun. We have held that transporting a deadly weapon to the location where that weapon ultimately is used supports an inference of an intent to kill."); *State* v. *Johnson*, 616 N.W.2d 720, 726–27 (Minn. 2000) (sufficient evidence of premeditation to commit first degree murder when defendant "and his two companions set out in a vehicle with a loaded gun with the admitted intent of 'jacking' or robbing someone," and defendant laughed after shooting one robbery victim, "which is inconsistent with having acted on a 'rash impulse' that arguably should lead to quick regret"); *Mouton* v. *State*, 923 S.W.2d 219, 223 (Tex. App. 1996) ("The record reflects that appellant retrieved his stepfather's gun to aid him in stealing a vehicle. Appellant knew that the gun was loaded. If he actually intended to use the gun merely to scare his victim, as he testified, he could have removed the bullets. Because appellant failed to remove the bullets and used a gun he knew to be loaded, the jury could reasonably infer an intent to kill.").

[7] The majority views this fact differently, positing that, "there is no evidence from which we can infer that he intended to follow through on that threat [to shoot Bright]. The defendant never discharged his gun, even when encountering another witness to the crime, Emilia Caffrey, while fleeing the scene." With respect to Bright, the majority's observation that there is a lack of evidence that he would have shot her had she not complied with his demands simply is inconsistent with the standard of review, which requires us to view the facts to support the findings of the trial court. Given the fact that the defendant's gun was loaded, I see no evidence to support the factual proposition that the defendant was simply using it as a scare tactic or bluff. See authorities cited in footnotes 5 and 6 of this dissenting opinion and accompanying text. With respect to the defendant's failure to shoot at the victim's mother, Emilia Caffrey, on his way out, the majority apparently infers lack of homicidal intent from this fact; I, and perhaps the trial court, make a different inference; already party to one murder, the defendant elected not to make his situation worse. Cf. *State* v. *Gary*, 273 Conn. 393, 412, 869 A.2d 1236 (2005) (rejecting defendant's claim that "the fact that he did not continue shooting until he killed [the intended victim] necessarily establishes a reasonable doubt that he had an intent to kill" because "jury reasonably could have concluded that, having just shot his friend in the head, the defendant was reluctant to fire additional gunshots at [the intended victim] as he dove into the dispersing crowd").

[8] Thus, I also disagree with the majority's conclusion that the "sum of the defendant's conduct after Maner shot [the victim]—both acts and omissions—did not provide a sufficient evidentiary basis to infer his intent to kill. Rather, the fact that the killing did not deter or delay the defendant from carrying on with the planned burglary leads to the reasonable inferences that the defendant was indifferent to [the victim's] death or even that [the victim's] death was a foreseeable consequence of the burglary." Although common sense tells us that *someone's* death is a foreseeable consequence of invading the home of a drug dealer, I view the fact that the defendant was not delayed or deterred by the victim's death from finishing the theft to support the finding of the trial court, namely, that he intended the victim's

death if necessary to carry out the burglary.

[9] In concluding that the state failed to introduce sufficient proof of the defendant's intent to kill, the majority cites numerous cases from this court and the Appellate Court applying these and other principles of circumstantial evidence to discern a defendant's intent, such as *State* v. *Allen*, 289 Conn. 550, 559–60, 958 A.2d 1214 (2008), *State* v. *Garner*, 270 Conn. 458, 476, 853 A.2d 478 (2004), and *State* v. *Turner*, supra, 252 Conn. 749–50, and observes that, in contrast, this case lacks evidence that "the defendant had engaged in some act to prepare for, aid, encourage, facilitate or consummate the murder; it was from such acts that intent reasonably was inferred." The majority posits that these cases are distinguishable because they, for example, included evidence of: (1) actual participation by the defendant in acts that would cause harm to the victim while the principal inflicted the fatal injury; (2) active assistance in the act such as identifying the victim, acting as a lookout or aiding the principal's escape; and (3) a motive to kill.

In my view, the majority's attempt to distinguish these cases is analytically flawed. First, by focusing on the presence of certain acts that constituted either the murder or the function of aiding and abetting, the majority's approach blurs the distinction between the separate act and mental state elements of the offense; the defendant's sufficiency claim in this appeal focuses solely on his mental state. Second, none of these cases contains a stated limitation on the use of types of evidence to prove intent to kill circumstantially, and I disagree with the majority's importation of such a restriction in the guise of distinguishing these decisions from the present case. Third, because "motive is not an element of the crime of murder that the state must prove beyond a reasonable doubt"; *State* v. *Otto*, supra, 305 Conn. 73–74; I would not use the apparent lack thereof—beyond the obvious of eliminating an obstacle and witness to the home invasion and theft—to limit the application of factors that have long been considered circumstantial evidence of the intent to kill. Put differently, and as reflected by the two to one decision in the trial court, I acknowledge that this is one of our closer cases vis-á-vis proof of intent to kill. Nevertheless, I would not use disagreement with the trial court's finding of fact to impose new limitations on well settled principles indicating the presence of circumstantial evidence of intent to kill.

[10] 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."