STATE OF CONNECTICUT *v.* STEEVE LAFLEUR
(SC 18757)

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

*Argued November 28, 2011—officially released September 28, 2012***

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

*Melissa L. Streeto*, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *James G. Clark*, former senior assistant state's attorney, for the appellee (state).

*Opinion*

EVELEIGH, J. A jury found the defendant, Steeve LaFleur, guilty on various charges in two informations, both involving the physical assault of a female victim, which had been joined for trial pursuant to the state's motion. In the first case, regarding the victim, Larrisha Washington (Washington case), the defendant was found guilty of assault in the third degree in violation of General Statutes § 53a-61 (a),[1] a class A misdemeanor, and two separate counts of violating a protective order in violation of General Statutes § 53a-223, a class D felony, and was found not guilty of one additional count of violating a protective order. In the second case, regarding the victim, Diana Hazard (Hazard case), the defendant was found guilty of assault in the first degree in violation of General Statutes § 53a-59 (a) (1),[2] a class B felony, and violation of the conditions of release in the first degree in violation of General Statutes § 53a-222,[3] a class D felony. The defendant thereafter pleaded guilty in the second part of the information in the Hazard case to a charge of being a persistent dangerous felony offender pursuant to General Statutes (Rev. to 2007) § 53a-40.[4] After the trial court rendered judgment in accordance with the jury's verdict and the subsequent plea, the defendant appealed,[5] claiming that he is entitled to a judgment of acquittal on the charge of assault in the first degree in the Hazard case and a new trial in the Washington case. Specifically, on appeal, the defendant raises the following claims: (1) his conviction of assault in the first degree in the Hazard case must be reversed on the ground that the trial court improperly instructed the jury that "[a] fist can be a dangerous instrument" within the meaning of § 53a-59 (a) (1); (2) if he prevails on his first claim, this court should not only reverse the defendant's conviction of assault in the first degree, but also remand the matter to the trial court with direction to render a judgment of acquittal as to that charge, where the defendant claims that, because a fist is not a "dangerous instrument" under § 53a-59 (a) (1), it follows that the state presented insufficient evidence to prove beyond a reasonable doubt that he committed assault in the first degree; (3) the joinder of the Hazard and Washington cases violated the defendant's due process right to a fair trial, where, under the second factor of the joinder test set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987), the assault in the first degree charge in the Hazard case involved such brutal or shocking conduct that it inflamed the passions of the jury regarding the Washington case, and any jury instructions by the trial court were insufficient to cure the resulting prejudice; and (4) the trial court abused its discretion in admitting Hazard's entire statement regarding the assault as a prior consistent statement for rehabilitative and contextual purposes when the defendant did not introduce any portion of the state-

ment and the entire statement was not relevant contextually to the limited areas highlighted during Hazard's cross-examination. We agree with the defendant as to claims one and two but disagree as to his third claim. Accordingly, we reverse the judgment in the Hazard case and remand that case to the trial court with direction to render judgment of acquittal on all counts, including the persistent dangerous felony offender count. Additionally, we affirm the judgment of the Washington case but vacate the sentence and remand that case for resentencing. In view of our resolution of these claims, it is not necessary for us to reach the defendant's fourth claim.

The jury reasonably could have found the following facts regarding the Hazard case. Hazard met the defendant in 2007 and started dating him in June, 2008. She lived with the defendant at his third floor apartment on West Division Street in New Haven for approximately three weeks in the summer of 2008. Thereafter, she moved to a friend's apartment that was located a couple of blocks from the defendant's apartment. On August 21, 2008, between midnight and 1 a.m., Hazard was walking home from a deli located at the corner of Dixwell Avenue and Bassett Street in New Haven. While walking on Dixwell Avenue, she came upon the defendant, who asked her with a raised and stern voice if she was "going to stop dealing with him, was that it?" When Hazard replied "yes," the defendant, using his fists, began to assault Hazard. He first hit her very hard on the right side of her nose. Hazard heard her nose crack and felt pressure throughout her face. The defendant thereafter hit Hazard many times in the face, until she fell to the ground. While on the ground, the defendant kicked her in the abdomen.[6] After the defendant left, Hazard remained on the ground for approximately five minutes and then went home to go to sleep. The next day, Hazard went to a police station to report the assault and then went to the emergency room, where she was treated for a number of facial fractures, including fractures to both bones in her nose, multiple fractures of her right eye socket and sinus, and substantial swelling and bruising above and below her right eye and throughout the nasal bridge. She received inpatient treatment for five days at Yale New-Haven Hospital and then stayed at a home in Greenwich for her safety.

The jury reasonably could have found the following facts regarding the Washington case. Washington and the defendant had been involved in a five year relationship and had one child. Shortly before July 24, 2008, Washington learned that the defendant had impregnated another woman. Washington telephoned the defendant at one point to confront him and threaten to take their child to Virginia. On July 24, at approximately 6:30 p.m., the defendant telephoned Washington and asked her to bring their daughter to see him at his apartment. When Washington and her daughter arrived

in the vicinity of the defendant's apartment, Washington was admittedly angry, and she and the defendant exchanged words on Dixwell Avenue. The defendant punched Washington in the right side of her face. Subsequently, Washington went to the police station and reported that the defendant had punched her in the right side of her face; a police officer noticed a bump on the right side of her face. Additional facts will be set forth as necessary.

In the Hazard case, the trial court instructed the jury that the state had charged the defendant with assault in the first degree and had alleged that, acting with the intent to cause serious physical injury, the defendant fractured several of Hazard's facial bones by punching her repeatedly with his fists, which, under the circumstances in which they were used, as alleged by the state, constituted a dangerous instrument. The court then paraphrased the statutory definition of assault in the first degree under § 53a-59 (a) (1), stating, "[a] person is guilty of assault in the first degree when, with intent to cause serious physical injury to another person, he causes such injury to such person by means of a dangerous instrument." The court's specific instructions on "dangerous instrument" were as follows: " 'Dangerous instrument' is defined by statute[7] as 'any instrument, article, or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury.' It is important to note that the article need not be inherently dangerous. All that is required is that the article was capable of causing death or serious physical injury under the circumstances in which it was used. Any article or substance, without limitation and even though harmless under normal use, may be found by you to be a dangerous instrument if, under the circumstances of its use or threatened or attempted use, it is readily capable of producing serious physical injury. A fist can be a dangerous instrument if you find that, under the circumstances of its use, it is readily capable of producing serious physical injury or death."

I

The defendant claims that the trial court denied him his due process right to a properly instructed jury on the essential elements of assault in the first degree under § 53a-59 (a) (1). Specifically, he contends that the court improperly expanded the scope of liability under that section by instructing the jury that "[a] fist can be a dangerous instrument . . . ." The defendant claims that, due to this error, the jury improperly convicted the defendant of assault in the first degree on the basis of its erroneous belief that a fist could qualify as a dangerous instrument.

Both parties recognize that the question of whether a fist is a dangerous instrument under General Statutes § 53a-3 (7) is a matter of first impression in this state.

The state urges us to follow the Appellate Court and interpret the word "instrument" in § 53a-3 (7)[8] broadly as "a means whereby something is achieved, performed, or furthered." (Internal quotation marks omitted.) *State* v. *McColl*, 74 Conn. App. 545, 554, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003), quoting Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). The defendant, however, propounds a narrower definition that is limited to tools and implements that are external to, and separate and apart from, the perpetrator's body.[9] We agree with the defendant.

We begin by setting forth the applicable standard of review. Both sides agree that, with respect to the charge of assault in the first degree, the defendant never raised his claim of instructional error or the specific claim of evidentiary insufficiency that we address in part II of this opinion at trial. Consequently, the defendant requests review of these claims under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[10] The state concedes that both claims are entitled to *Golding* review because the record is adequate for review and both claims are of constitutional dimension. We agree.

The due process clause of the fourteenth amendment to the United States constitution requires that every fact necessary to constitute the crime of which the accused stands charged must by proven beyond a reasonable doubt before the accused may be convicted. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In order to ensure that every fact is proven beyond a reasonable doubt, "[i]t is, of course, constitutionally axiomatic that the jury be instructed on the essential elements of a crime charged." *State* v. *Williamson*, 206 Conn. 685, 708, 539 A.2d 561 (1988). "If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt . . . ." (Citations omitted.) *United States* v. *Clark*, 475 F.2d 240, 248 (2d Cir. 1973). We must, therefore, construe § 53a-3 (7) to determine whether it permits an alleged assailant's fist to constitute a dangerous instrument under § 53a-59 (a) (1). Statutory interpretation is a question of law over which this court exercises plenary review. *State* v. *Fernando A.*, 294 Conn. 1, 13, 981 A.2d 427 (2009).

When interpreting a statute, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 147, 989 A.2d 593 (2010).

General Statutes § 1-2z[11] directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. General Statutes § 1-2z; see also *Saunders* v. *Firtel*, 293 Conn. 515, 525, 978 A.2d 487 (2009). Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as "the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 399, 999 A.2d 682 (2010). "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 779, 961 A.2d 349 (2008). "We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 303, 21 A.3d 759 (2011).

"[W]hen the statute being construed is a criminal statute, it must be construed strictly against the state and in favor of the accused." *State* v. *Cardwell*, 246 Conn. 721, 739, 718 A.2d 954 (1998). "[C]riminal statutes [thus] are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant." (Internal quotation marks omitted.) *State* v. *Kirk R.*, 271 Conn. 499, 510, 857 A.2d 908 (2004). Rather, "penal statutes are to be construed strictly and not extended by implication to create liability which no language of the act purports to create." (Internal quotation marks omitted.) *State* v. *Woods*, 234 Conn. 301, 308, 662 A.2d 732 (1995). Further, if, after interpreting a penal provision, there remains any ambiguity regarding the legislature's intent, the rule of lenity applies. "It is a fundamental tenet of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." (Internal quotation marks omitted.) *State* v. *Hinton*, 227 Conn. 301, 317, 630 A.2d 593 (1993).

In accordance with § 1-2z, we begin our analysis with the text of the statute. Section 53a-3 (7) defines " '[d]angerous instrument,' " in relevant part, as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury,[12] and includes a 'vehicle' as that term

is defined in this section and includes a dog that has been commanded to attack . . . .'' In order for the defendant to be guilty of assault in the first degree, a class B felony, he must have intended to cause serious physical injury to Hazard and caused such injury with a dangerous instrument. See footnote 2 of this opinion. Because the only method of inflicting serious physical injury alleged by the state in the information was ''punching [Hazard] repeatedly in the face with his fists,'' it follows that, to find the defendant guilty of assault in the first degree, the jury must be able to conclude that the defendant's fists were a dangerous instrument as defined by § 53a-3 (7).

The statutory definition of dangerous instrument does not further define the essential terms therein or ''instrument,'' ''article'' or ''substance.'' In the absence of a definition of terms in the statute itself, ''[w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use.'' (Internal quotation marks omitted.) *Paul Dinto Electrical Contractors, Inc.* v. *Waterbury*, 266 Conn. 706, 725, 835 A.2d 33 (2003). Under such circumstances, ''it is appropriate to look to the common understanding of the term as expressed in a dictionary.'' (Internal quotation marks omitted.) *State* v. *Fernando A.*, supra, 294 Conn. 17.

There are many dictionary definitions of the term ''instrument,'' but only a few that are plausible in the context of § 53a-3 (7). An instrument may be ''a means whereby something is achieved, performed, or furthered''; ''one used by another as a means or aid . . . tool''; and ''implement . . . .'' Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Although, the term ''article'' also has many definitions, most of which are clearly inapplicable to § 53a-3 (7), the most plausible among them is: ''a member of a class of things; esp[ecially] an item of goods. . . .'' Id. Finally, ''substance'' is defined as ''physical material from which something is made or which has discrete existence''; ''matter of particular or definite chemical constitution''; and ''something (as drugs or alcoholic beverages) deemed harmful and usu[ally] subject to legal restriction. . . .'' Id.

We have observed that ''[§] 53a-3 (7) requires that the circumstances in which the instrument is used be considered to determine its potential as an instrument of death or serious physical injury, but the instrument need not actually cause death or serious physical injury. . . . [Serious physical injury] is but a definitional component of an essential element. . . . *If, however, an instrument has, in fact, caused a serious physical injury, it is considered dangerous ipso facto*. . . . Whether an instrument is dangerous and whether a physical injury is serious are questions of fact committed to the province of the jury. See, e.g., *State* v. *Almeda*,

211 Conn. 441, 450, 560 A.2d 389 (1989) (serious physical injury); *State* v. *Jones*, 173 Conn. 91, 95, 376 A.2d 1077 (1977) (dangerous instrument)." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Ovechka*, 292 Conn. 533, 541, 975 A.2d 1 (2009).

In accordance with § 1-2z, we continue our analysis by looking to the relationship of the statute to other statutes. A comparison to assault offenses of a lesser degree reveals some limitation on the meaning of the term dangerous instrument. A person is guilty of assault in the second degree, a class D felony, when, "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person . . . ." General Statutes § 53a-60 (a) (1). The sole difference between assault in the first degree under § 53a-59 (a) (1) and assault in the second degree under § 53a-60 (a) (1) is whether the accused used a dangerous instrument or deadly weapon to inflict serious physical injury. It is self-evident that, under both statutes, the intended serious physical injury must be accomplished through some means capable of causing serious physical injury under the circumstances. If every means by which serious physical injury may be caused could be a "dangerous instrument," then the mere presence of a serious physical injury would establish that a dangerous instrument caused it. Therefore, such a construction would render the apparent aggravating factor in § 53a-59 (a) (1) meaningless and superfluous and, as a result, merge the two crimes. Thus, in order to avoid an absurd and unworkable construction, it follows that at least some means capable of causing serious physical injury under the circumstances must be excluded from the category of "any instrument, article or substance" contained within the definition of " '[d]angerous instrument . . . .' " General Statutes § 53a-3 (7).

Similarly, a person is guilty of assault in the second degree under § 53a-60 (a) (2) when, "with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon[13] or a dangerous instrument other than by means of the discharge of a firearm . . . ." Thus, in crafting § 53a-60 (a) (2), the legislature relied on an aggravating factor, namely the use of a deadly weapon or a dangerous instrument, to equate a crime of lesser intent and harm, because the physical injury need not be serious in § 53a-60 (a) (2), with a crime of greater intent and injury under § 53a-60 (a) (1). If any means capable of causing serious physical injury under the circumstances is included in the definition of "dangerous instrument," however, then the use of a dangerous instrument, an explicit element of the crime under § 53a-60 (a) (2), would be implicit under § 53a-60 (a) (1). See *State* v. *Ovechka*, supra, 292 Conn. 541 ("[i]f, however, an instrument has, in fact, caused a serious physical injury, it is considered dangerous ipso facto"). Thus, a person who intended and caused physical injury

by some means *capable* under the circumstances of causing *serious* physical injury would be guilty of assault in the second degree regardless of whether the injury intended and caused by the defendant qualified as a serious physical injury. Such a broad construction of "dangerous instrument" would thus eliminate the intended distinction between levels of intent and injury in assault in the second degree under § 53a-60 (a) (1) and (2).

Indeed, applying such a broad meaning would lead to similar anomalies under our statutory scheme governing the crime of robbery, which, like our statutory scheme for assault crimes, also relies upon the use or threatened use of a "dangerous instrument" as an aggravating factor to elevate simple robberies to more severe crimes subject to more stringent penalties. All forms of robbery require a larceny by use or threatened use of force. General Statutes § 53a-133.[14] A person is guilty of robbery in the third degree, a class D felony, "when he commits robbery as defined in section 53a-133." General Statutes § 53a-136 (a). The statutory definition of robbery contained within § 53a-133 makes no reference to the use of a weapon. General Statutes § 53a-133. The display, use or threatened use of a dangerous instrument in the course of a robbery is an aggravating factor. Under General Statutes § 53a-135 (a), a person is guilty of robbery in the second degree, a class C felony, when he commits robbery and "(1) he is aided by another person actually present; or (2) in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument." Finally, under General Statutes § 53a-134 (a), a defendant is guilty of robbery in the first degree, a class B felony, when he commits robbery and he or another participant in the crime "(1) [c]auses serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a . . . firearm . . . ."

The difference between these crimes is that the perpetrator used or threatened to use an actual dangerous instrument, when committing robbery in the first degree; General Statutes § 53a-134 (a); displayed or threatened the use of what is merely represented to be a dangerous instrument, when committing robbery in the second degree; General Statutes § 53a-135 (a); but, in committing robbery in the third degree; General Statutes § 53a-136 (a); used or threatened the use of force. It is the use of the dangerous instrument that increases the penalty for the crimes. General Statutes § 53a-136 (a); see Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-

134 (West 2007), commission comment ("[s]imple [third degree] robbery is raised to robbery in the first degree on the basis of any of [the following] aggravating factors . . . being armed with a deadly weapon [i.e. a pistol] or being armed with and threatening the use of a dangerous instrument [i.e. a club]"). If any body part could constitute a dangerous instrument, because all robbery involves the use or threat of use of force, it would be impossible to commit robbery without triggering this aggravating factor, thereby collapsing the hierarchical structure that the legislature intended and rendering the third degree robbery statute meaningless. Accordingly, we must construe the language concerning "any instrument, article or substance" in the definition of " '[d]angerous weapon' " to exclude some means capable of causing serious physical injury under the circumstances.

Although the previous discussion informs us that the legislature did not intend an all encompassing term, we must ascertain with greater clarity what the pertinent term does mean. When determining the legislature's intended meaning of a statutory word, it also is appropriate to consider the surrounding words pursuant to the canon of construction noscitur a sociis.[15] *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 159, 12 A.3d 948 (2011). By using this interpretive aid, the meaning of a statutory word may be indicated, controlled or made clear by the words with which it is associated in the statute. *State* v. *Roque*, 190 Conn. 143, 152, 460 A.2d 26 (1983). Therefore, in determining the meaning of "instrument," "substance" and "article" in § 53a-3 (7), we consider the grouping of all three terms. Pursuant to our reading of the assault statutes in the previous paragraphs, we first exclude the definitions that would encompass anything and everything capable of causing serious physical injury. Such a broad definition would also render the references to "instrument," "substance" and "article" in § 53a-3 (7) meaningless and redundant, as each would be subsumed by the broad definition of the other. Thus, "instrument" may not simply be "a means whereby something is achieved, performed, or furthered . . . ." Merriam-Webster's Collegiate Dictionary, supra. Similarly, "substance" may not be any "physical material from which something is made or which has discrete existence," or "matter of particular or definite chemical constitution . . . ." Id. What remains are definitions that refer to a tangible item, something separate and apart from the human body. An instrument may be "one used by another as a means or aid . . . tool"; and is synonymous with the word "implement . . . ." Id. "[A]rticle" is "a member of a class of things; esp[ecially] an item of goods . . . ." Id. "[S]ubstance" is "something (as drugs or alcoholic beverages) deemed harmful and usu[-ally] subject to legal restriction . . . ." Id.

Many of our sister states have come to the same

conclusion. In *Ex parte Cobb*, 703 So. 2d 871, 877 (Ala. 1996), the Alabama Supreme Court held that body parts are not included within the definition of "dangerous instrument," noting that such a result was both the majority rule and the conclusion of better reasoned cases. When interpreting a statute very similar to the one which we consider today, the court stated that " '[a]rticle' and 'substance' are used in [the statute] to denote physical, inanimate objects or items. We conclude that by associating the word 'instrument' with these two words the legislature intended for it to refer to utensils or implements, not parts of the human body." Id., 876. Likewise, in *Roney* v. *Commonwealth*, 695 S.W.2d 863, 864 (Ky. 1985), the Kentucky Supreme Court stated that, "[i]n common usage, hands and feet are not described as substances nor are they regarded as articles." That court, interpreting a similar statutory scheme[16] as ours, applied the rule of lenity and concluded that the narrower definition of an instrument as a tool or implement, other than a part of the body, was plausible. Id. Similarly, in considering an assault charge predicated on an assailant biting a victim, our sister state of Massachusetts concluded that "parts of the human body should be removed from consideration as dangerous weapons . . . ." *Commonwealth* v. *Davis*, 10 Mass. App. 190, 193, 406 N.E.2d 417 (1980).

We previously have noted that "our Penal Code is modeled after the New York Penal Code." *State* v. *Henry*, 253 Conn. 354, 363, 752 A.2d 40 (2000). The New York Court of Appeals, in addressing the precise issue before us, stated that "[i]t is readily apparent, and the [state does] not argue to the contrary, that a part of one's body is not encompassed by the terms 'article' or 'substance' as used in the statute. . . . [Moreover] [o]ne's hands, teeth and other body parts are not, in common parlance, 'instruments.' " *People* v. *Owusu*, 93 N.Y.2d 398, 400–401, 712 N.E.2d 1228, 690 N.Y.S.2d 863 (1999). In construing the term "dangerous instrument" to exclude the perpetrator's natural body parts, the Court of Appeals explained that "[i]ncreased criminal liability arises from the use or threatened use of a dangerous instrument because the actor has upped the ante by *employing a device* to assist in the criminal endeavor . . . ." (Citation omitted; emphasis added.) Id., 405. We agree with this reasoning.

This construction is not only consistent with the approach taken in a majority of states, but also avoids an absurd or unworkable result when applied to other statutes that employ the term "dangerous weapon." Under General Statutes § 53a-18 (6) (B),[17] a teacher may use reasonable physical force upon a minor under his or her care or supervision to "obtain possession of a dangerous instrument . . . ." Obviously, it would be absurd to conclude that our legislature intended to suggest that a teacher may obtain possession of a minor's body part, even if intended to be used to inflict serious

physical injury. Rather, the statute is intended to allow a teacher to use reasonable physical force to obtain possession of some tool or implement that is external to, and separate and apart from, the minor's body that, under the circumstances, is capable of causing serious physical injury.

The state urges this court to adopt a broad definition of "instrument," namely, a means by which something is achieved, performed or furthered, but fails to demonstrate how such a definition could avoid the absurd results we previously have described. The state agrees that the only difference between assault in the first degree and assault in the second degree is that assault in the first degree requires proof of the use of a dangerous instrument. The state maintains, however, that "[i]t is neither the definition of 'dangerous instrument' nor the inclusion of body parts within that broad definition, that blurs the distinction between the . . . degrees of assault, but, rather, the plain language of the assault statutes themselves, under which the same conduct, causing the same [seriousness of] injury with the same object, might constitute either or both, first and second degree assault." We disagree. Surely the accused is not more culpable for a crime simply because the state elects to charge the defendant under one statute rather than the other, where both crimes consist of identical elements. Rather, the aggravating factor of the use of a dangerous instrument increases culpability because an actor has taken the intermediate action of arming himself and striking his victim with something capable of causing serious physical injury under the circumstances. If we were to accept the state's position, a person who caused serious physical injury could *always* be charged with first degree assault, because the broad definition of instrument would make the second degree assault charge superfluous. In our opinion, such a result would yield an absurd and unworkable result, and would render the assault in the second degree statute, in this regard, superfluous. We must strive in our interpretation of the statutes to avoid such a result.

The state also argues that the specific inclusion of a dog, under certain circumstances, within the statutory definition of a dangerous instrument supports its argument that the definition of "instrument" cannot be limited to inanimate objects, because, clearly, a dog is not an inanimate object. In response to this contention, the defendant makes several observations with which we agree. The defendant points out that if the term instrument was limited to inanimate items, then the legislature would not have deemed it necessary to specify that a dog ordered to attack can be a dangerous instrument. Further, the defendant argues that the state's definition of instrument would render the legislature's inclusion of both "motor vehicle" and "dog" superfluous, as anything and everything would fit the definition of instrument as a "means whereby something is achieved

. . . .” Merriam-Webster’s Collegiate Dictionary, supra. Such a broad definition would also render the statutory references to “articles” and “substances” meaningless and redundant, as these would be subsumed by the broad definition of “instrument.” By contrast, the defendant argues, the usage of “motor vehicle,” “dog,” “article” and “substance” in the definition of dangerous instrument is consistent with our construction of an “instrument” as being a tool or implement that is external to, and separate and apart from, the perpetrator’s body.

The state also relies on the Appellate Court’s adoption of the broad definition of “instrument” in *State* v. *McColl*, supra, 74 Conn. App. 554, in which that court held that “ ‘feet and footwear’ ” may be dangerous instruments under some circumstances. *McColl*, however, provides neither a controlling authority nor a persuasive argument contrary to our holding today. Moreover, we note that the Appellate Court’s holding is consistent with our opinion to the extent that footwear—forcefully wielded by a foot and leg in the same manner as a club wielded by a hand and arm—may survive scrutiny under the narrower definition.

Indeed, although the question of whether “fists can constitute a dangerous instrument under §§ 53a-3 (7) and 53a-59 (a) (1) . . . [is] an issue of first impression in this state”; *State* v. *Millan*, 290 Conn. 816, 824, 966 A.2d 699 (2009) (resolving case without deciding that issue); at least one of our cases suggests a long-standing recognition that body parts cannot be dangerous weapons under § 53a-3 (7). In *State* v. *Joyner*, 225 Conn. 450, 455–56, 625 A.2d 791 (1993), the defendant had argued that there was insufficient evidence to show that the cause of serious physical injury was a stick rather than his fists. Although we rejected that claim, it is implicit in our holding that the distinction was relevant.[18] None of our cases suggest otherwise.

If the legislature had intended that absolutely any means whereby something is achieved, performed or furthered, including a part of the human body, would constitute a dangerous instrument, it readily could have used such language in the statute. See *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 729, 6 A.3d 763 (2010). Clearly, the use of the phrase “instrument, article or substance” conveys the legislative intent that the object used in the assault be in some subset of the entire universe of things. Of all things to exclude from the definition of an aggravating factor in a criminal statute, a natural body part of the defendant seems the most obvious, because a person cannot commit a crime without their body. The use of “dog that has been commanded to attack” as a specific example in § 53a-3 (7) further supports our conclusion that the legislature knows how to convey its intent expressly when a dangerous instrument is not unambig-

uously covered by the terms "instrument, article or substance . . . ." Indeed, if the legislature wished to include parts of the defendant's body in the definition of "dangerous instrument" it certainly could have done so in the same manner that it included the use of the words "dog" or "motor vehicle," just as some other states have done.[19] The absence of any reference to an accused's body parts in the statute, and the coherent construction yielded under our criminal statutes by applying a narrower reading to the terms actually included, compel us to conclude that the legislative intent is clear and unambiguous. Because we do not find the legislature's intent ambiguous in this regard, we are unable to follow the example of our sister state of Kentucky in *Roney* v. *Commonwealth*, supra, 695 S.W.2d 864, and consider whether to apply the rule of lenity in a construction of the statute.

Accordingly, we conclude that the meaning of the term "dangerous instrument" in § 53a-59 (a) (1) is not ambiguous. The statutory definition set forth in § 53a-3 (7) and the usage of that same term in other statutes clearly indicates that the legislature intended the term "dangerous instrument" to mean a tool, implement or device that is external to, and separate and apart from, the perpetrator's body. Therefore, we further conclude that the defendant's conviction of assault in the first degree in the Hazard case must be reversed on the ground that the trial court improperly instructed the jury that "[a] fist can be a dangerous instrument" within the meaning of § 53a-59 (a) (1).

II

We next turn to the defendant's second claim. The defendant contends that, in the event he prevails on his instructional claim, this court should reverse his conviction of assault in the first degree and remand the matter to the trial court with direction to render judgment of acquittal as to that charge. The defendant claims that, because a fist is not a dangerous instrument under § 53a-59 (a) (1), it follows that the state presented insufficient evidence to prove beyond a reasonable doubt that he committed assault in the first degree. We agree.

The state's information alleged that the defendant's "fists, which under the circumstances in which his fists were used, constituted a dangerous instrument . . . ." Although there was evidence offered at trial that the defendant kicked Hazard in the abdomen, the only assault alleged in the information and articulated in the jury instructions was the defendant's act of punching Hazard repeatedly in the face with his fists. Accordingly, in view of our conclusion that, as a matter of law, a fist is not a dangerous instrument under our statutory scheme, a rational fact finder could not have reasonably concluded that the defendant intentionally caused Hazard to suffer serious physical injury "by means of a . . .

dangerous instrument . . . .” General Statutes § 53a-59 (a) (1). In other words, because the evidence showed that the defendant’s fists caused Hazard’s facial fractures, and because a fist is not, as a matter of law, a dangerous instrument, the jury improperly convicted the defendant of assault in the first degree under § 53a-59 (a) (1).

The state argues that, if we were to conclude that a fist is not a dangerous instrument, it would be appropriate for this court to modify the judgment to reflect a conviction on the lesser included offense[20] of assault in the second degree under § 53a-60 (a) (1). We note, however, that the state did not request the court to charge the jury on a lesser included charge in the present case, so the jury could not have convicted the defendant of assault in the second degree. The state asserts, however, that the jury necessarily found that the defendant had committed assault in the second degree by virtue of its finding that the defendant had committed all the elements of the greater offense of assault in the first degree. In support of its position, the state relies[21] upon *State* v. *Sanseverino*, 291 Conn. 574, 590–98, 969 A.2d 710 (2009), a kidnapping case in which the state did not request a charge on unlawful restraint, a lesser included charge of kidnapping in the first degree. In *Sanseverino*, however, this court disagreed with the state’s claim that “whether, and if so, when, an appellate court may order the modification of a judgment in the manner requested in the present case, is settled in this state.” Id., 593. Specifically, this court noted a “split of authority on this question among both state and federal courts” regarding the modification of judgments in cases where the jury was not charged on a lesser included offense. Id. This court recognized that some courts have found it appropriate to order modification of a judgment “when it is not unfair to the defendant to do so”; id.; while “[o]ther courts have barred such a modification unless the jury has been instructed on the lesser included offense.” Id., 594. A review of these cases demonstrates that those courts that order modification of a judgment require a showing that it would not be unfair to the defendant to do so. In light of this split of authority, in *Sanseverino*, this court concluded that, “[u]nder the unique circumstances” of that case, the state was entitled to the modification of the judgment that it sought, because it was not unfair to the defendant to do so. Id., 595. We explained our holding as follows: “We reach this conclusion for several reasons, each of which is integral to our decision. First, there is no reason to believe that the state opted against seeking a jury instruction on the lesser offense of unlawful restraint in the second degree for strategic purposes. As the state has asserted, prior to our decision in [*State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)]—a decision that the state reasonably could not have expected in view of the long

line of contrary cases that preceded it—the state had every reason to believe that, if the jury credited the state's evidence, the defendant would be found guilty of the kidnapping charge. In other words, prior to the unforeseeable change in the law following the defendant's trial, the state had no reason to seek a lesser included offense instruction, and, consequently, the state's failure to do so cannot possibly have been the product of a strategic decision. Second, the defendant has benefited from our holding in *Salamon* even though he did not raise the claim that the defendant in *Salamon* raised in his appeal. Third, the defendant has not filed an objection to the state's request for a modification of the judgment. . . . Finally, we can conceive of no reason why it would be unfair to the defendant to impose a conviction of unlawful restraint in the second degree. In light of all of these circumstances, we believe that it is appropriate to order that the judgment be modified, as the state requests, if the state elects not to retry the defendant for kidnapping." (Citation omitted.) *State* v. *Sanseverino*, supra, 595–96. Accordingly, although in *Sanseverino* this court concluded that it was proper to order modification when it is not unfair to the defendant to do so, we have not articulated any precise standard for appellate assessment of the fairness of a modification. See id., 596 n.18 ("[w]e emphasize that we intimate no view as to whether the state would be entitled to such a modification in the absence of any one of the factors that are present in this case").

The state argues that, in the present matter, it would not be unfair to the defendant to impose a conviction of assault in the second degree under § 53a-60 (a) (1) for several reasons. Primarily, the state claims that if we hold that a bare fist cannot constitute a dangerous instrument under § 53a-3 (7), it would represent a substantive change to the law as it existed at the time of trial, changing a question of fact for the jury to an exclusion as a matter of law. Second, the state contends that modification is proper where "(1) . . . the evidence adduced at trial fails to support one or more elements of the crime of which [the defendant] was convicted, (2) . . . such evidence sufficiently sustains all of the elements of another offense, (3) . . . the latter is a lesser included offense of the former, and (4) . . . no undue prejudice will result to the [defendant]." (Internal quotation marks omitted.) Id., 592. Finally, the state claims that a jury charge on a lesser included offense is implicit in the charge on the greater offense and, thus, the jury necessarily found the defendant guilty of assault in the second degree under § 53a-60 (a) (1) before it could convict the defendant of assault in the first degree under § 53a-59 (a) (1). The state contends that such a finding justifies modification rather than acquittal pursuant to our holding in *State* v. *Greene*, 274 Conn. 134, 160–62, 874 A.2d 750 (2005) (modification to uninstructed lesser offense proper

when record established that jury necessarily found all elements), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). Accordingly, the state claims that the proper remedy would be a remand to the trial court to, first, render a judgment of guilty of assault in the second degree under § 53a-60 (a) (1), in lieu of the conviction of assault in the first degree, second, vacate the judgment of conviction as a persistent dangerous felony offender under § 53a-40 (a) (1) (A), as sentence enhancement as such is improper because the defendant no longer meets the statutory definition,[22] and third, resentence the defendant accordingly. We disagree.

The origin of the four-prong test mentioned in *Sanseverino* and cited with approval by the state is *Allison* v. *United States*, 409 F.2d 445, 450–52 (D.C. Cir. 1969).[23] In *Allison*, in connection with a single incident, the defendant "was charged in a two count indictment with (1) assault with intent to commit carnal knowledge and (2) taking indecent liberties with a minor child." Id., 447. The jury was instructed not to consider the second count if it found the defendant guilty of the first count as "the crime of taking indecent liberties is a lesser included offense of assault with intent to commit carnal knowledge." Id., 451–52. The jury convicted the defendant on the first count, the defendant appealed, and the Court of Appeals for the District of Columbia determined that there was insufficient evidence to sustain a conviction on the first count. Id., 447–48. Therefore, the test set forth in *Allison*[24] is fairly characterized as one used to determine whether a federal appellate court may modify an improper conviction by reducing it to a *charged* lesser included offense. Accordingly, the test set forth in *Allison* and its progeny is inapposite to the present case.

Further, a complete reading of *Allison* suggests a concern that modification of a conviction even to a *charged* lesser included offense may be unfair if there is any "indication that defense presentation would have been altered had the assault with intent charge been dismissed at the close of the [g]overnment's case." Id., 451. Recognizing the limits of an appellate court to discern how modification of a conviction to a charged lesser included offense may prejudice a defendant, rather than simply require modification to the charged lesser included offense, the court in *Allison* authorized the trial judge "to grant a new trial if he deems it to be in the best interest of justice." Id., 451–52.

Similarly, the state's reliance on our holding in *State* v. *Greene*, supra, 274 Conn. 160–62, is misplaced. In *Sanseverino*, we acknowledge our holding in *Greene*, but rejected the suggestion that *Greene* decided the broader issue we considered in *Sanseverino* or in the present case. *State* v. *Sanseverino*, supra, 291 Conn. 593 ("We disagree with the state that the broad issue

presented . . . that is, whether, and if so, when, an appellate court may order the modification of a judgment in the manner requested in the present case, is settled in this state. Indeed, this court never has addressed the issue directly.").[25]

Our analysis of the reasons that persuaded this court, under the circumstances presented in *Sanseverino*, that it was not unfair to the defendant therein to remand the case to the trial court to render a judgment of conviction on the uncharged lesser included offense, suggests that a remand for modification would be unfair in the present case. First, our decision today cannot fairly be characterized as a change in the law. Rather, as we previously have explained, the present case raises a known question of first impression for this court. The fact that the issue had not been decided should have been very clear to all of the parties. *State* v. *Millan*, supra, 290 Conn. 824, was decided three months before the instruction at issue in the present case. In that case, we noted that the question of whether "multiple fists can constitute a dangerous instrument under §§ 53a-3 (7) and 53a-59 (a) (1) . . . [is] an issue of first impression in this state," but left analysis and resolution of the issue to a future case in which it was squarely presented. Id. Thus, where *Sanseverino* involved an unforeseeable change in the law following the defendant's trial, the present matter involves a known issue of first impression, explicitly identified as such by this court before the defendant's trial.

Second, unlike *Sanseverino*, we have good reason to suspect that the state in the present case opted against a jury instruction on the lesser included offense of assault in the second degree as a strategic decision. The state had submitted part B of the information that required a conviction of assault in the first degree as an essential element of the persistent dangerous felony offender charge under § 53a-40 (a) (1) (A).[26] When the state did not request the lesser included offense instruction, it eliminated the prospect that the jury would return a verdict of guilty of assault in the second degree under § 53a-60 (a) (1). If the defendant had been convicted of assault in the second degree, the state would have lost the opportunity to request that the defendant be sentenced as a persistent dangerous felony offender with the attendant additional penalties of that statute. To remand the case to the trial court for sentencing on an uncharged lesser included offense despite the state's responsibility to charge the defendant for an offense would bestow an unfair strategic advantage upon the state, because such a practice could prompt the state to avoid requesting or agreeing to submit a lesser included offense to the jury.

Third, in *Sanseverino* we held that the state was entitled to the modification because the defendant, who had taken his appeal on unrelated grounds, was the

fortuitous beneficiary of this court's decision in *Salamon*. *State* v. *Sanseverino*, supra, 291 Conn. 595. In the present case, the defendant raised a relevant claim of error pertaining to a known issue of first impression. To the extent the fortuity noted in *Sanseverino* suggests fairness in the modification of that judgment, the diligence of the defendant in the present case suggests the converse. The state argues that the defendant is the fortuitous beneficiary of our holding today, and thereby benefits from modification by having his class B felony conviction, for which the maximum sentence is twenty years, reduced to a class D felony, for which the maximum sentence is five years. To claim that the defendant, having prevailed in a contest of an acknowledged issue of first impression, is a fortuitous beneficiary is to understate the quantum of fortuity we found persuasive in *Sanseverino*. Further, because a lesser included offense is by definition "lesser," if this level of fortuity was sufficient to show a lack of prejudice to the defendant, it would create a bright line rule that under these circumstances our appellate courts would always remand for modification of the judgment of conviction to reflect the uncharged lesser included offense. As we noted in *Sanseverino*, the courts are divided between those that have a bright line rule precluding modification, and those that make a case-by-case determination based upon fairness.[27] Id., 593–95.[28]

Further, unlike the defendant in *Sanseverino*, the defendant in the present case has objected to the state's position that it would be appropriate for us to modify the judgment in this case to reflect a conviction on the lesser included offense. In *Sanseverino*, we found the defendant's failure to object to modification to be tantamount to a concession that modification would be fair. Id., 595. This issue has often been dispositive in similar cases. For example, in *United States* v. *Hunt*, 129 F.3d 739, 746 (5th Cir. 1997), the court concluded that it could remand with direction to render a judgment on an uncharged lesser included offense because the defendant agreed it was not unfair to do so. The court in *Hunt*, however, qualified this conclusion, stating: "We pause . . . to question whether we can direct the entry of judgment on a lesser included offense when the district court did not instruct the jury that it could find the defendant guilty of that lesser included offense. Although [*United States* v. *Skipper*, 74 F.3d 608 (5th Cir. 1996)] does not mention whether the jury was instructed that it could find the defendant guilty of the lesser included offense, it does not explicitly require that the jury be so instructed. In *United States* v. *Mitcheltree*, [940 F.2d 1329 (10th Cir. 1991)] the Tenth Circuit noted that cases in which courts had remanded for entry of judgment on the lesser included offense involved either an instruction or some type of concession. See [Id., 1352 and n.17] (declining to enter misdemeanor convictions on two counts and instead

remanding for new trial because no lesser included offense instructions were given and neither party made any concessions on the issues in dispute). Applying *Mitcheltree*'s approach to this case, we find that the lack of instruction on the lesser included offense was not unduly prejudicial to [the defendant] as she has conceded the element of possession. Furthermore, we note that [the defendant] did not challenge our power to reduce her conviction despite the lack of instruction. We therefore remand the case with instructions to enter a judgment of guilt of [the uncharged lesser included offense] and to sentence [the defendant] for that offense." *United States* v. *Hunt*, supra, 745–46. Therefore, absent a concession by the defendant that resentencing is not unfair, *Hunt* does not stand for the proposition that resentencing to an uncharged lesser included offense is fair.[29]

Finally, we cannot be sure that the defendant in the present case did not forgo a particular trial strategy due to the lack of a lesser included offense charge. Regardless of whether the defense challenged the state's claims as to elements of the lesser included charge, trial strategy and jury deliberation are inevitably colored by the inclusion of a lesser included charge to the jury. See, e.g., *State* v. *Sanseverino*, supra, 291 Conn. 599–601 (*Rogers*, *C. J.*, concurring).

We conclude that the reasons we found modification to be not unfair to the defendant in *Sanseverino* are absent in the present matter. We further conclude that the absence of these factors from the present case suggests that it would not be appropriate for us to exercise our discretion to modify the judgment to reflect a conviction on the lesser included offense. Simply put, the state, knowing that the issue had never been decided by this court, strategically decided to seek a conviction of assault in the first degree without providing the jury with the option of conviction of the lesser included offense. As we noted in *Sanseverino*, in the absence of the factors which favored modification in that case, there are several reasons why appellate courts should not modify a sentence when the state did not request a charge on the lesser included offense. *State* v. *Sanseverino*, supra, 291 Conn. 594 n.16.[30] Therefore, because we have not determined that, under the unique circumstances of the present matter, it would be fair to the defendant to modify the judgment of conviction, we must reverse the defendant's conviction of assault in the first degree in the Hazard case, as well as the other convictions that depend on that conviction, including the conviction of violation of the conditions of release and the conviction of being a persistent dangerous felony offender, and remand that case to the trial court with direction to render judgment of acquittal on these charges.

III

We next consider the defendant's claim that he was denied his right to a fair trial under the due process clause of the federal constitution by the joinder of the Hazard case with the Washington case at trial.[31] U.S. Const., amend XIV, § 1. Relying on the second prong of the joinder test that this court articulated in *State* v. *Boscarino*, supra, 204 Conn. 723, the defendant claims that the assault in the Hazard case involved evidence of brutal or shocking conduct that inflamed the jury's passions and so prejudiced the defendant as to render ineffective the trial court's instructions seeking to cure the risk of substantial prejudice to the defendant resulting from joinder of the Hazard case and the Washington case. The state responds, inter alia, that, because the defendant's alleged conduct was the same in both cases—i.e., punching young women in the face—the second prong of the test we articulated in *Boscarino* is satisfied. Id. We agree with the state and, therefore, affirm the convictions in the Washington case.

This court recently revisited the principles that govern our review of a trial court's ruling on a motion for joinder. As we clarified in *State* v. *Payne*, 303 Conn. 538, 547, A.3d (2012), a trial court's ruling on a motion for joinder of multiple informations for trial implicates Practice Book § 41-19, not General Statutes § 54-57.[32] Practice Book § 41-19 provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." A long line of cases establishes that the paramount concern is whether the defendant's right to a fair trial will be impaired. Therefore, in considering whether joinder is proper, this court has recognized that, where evidence of one incident would be admissible at the trial of the other incident, "separate trials would provide the defendant no significant benefit." *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987). Under such circumstances, "the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial." Id. Accordingly, we have found joinder to be proper where "the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials." *State* v. *Sanseverino*, 287 Conn. 608, 628–29, 949 A.2s 1156 (2008). Where evidence is cross admissible, therefore, our inquiry ends.

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against

him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all. . . .

"[Accordingly, the] court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24] we have identified several factors that a trial court should consider in deciding whether a severance [or denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *Davis*, 286 Conn. 17, 28–29, 942 A.2d 373 (2008). In the present case, the defendant relies solely on the second factor as precluding joinder of the two cases, and, therefore, we will not discuss the first and third factors in our analysis.

Although, under an established line of cases, trial courts had been directed to apply a presumption in favor of joinder and to place the burden on the defendant to prove that joinder is improper, in *Payne*, which was decided after the trial in the present case, we determined that this blanket presumption was improper and that a different allocation of proof should be applied: "[W]hen charges are set forth in separate informations, presumably because they are not of the same character, and the state has moved in the trial court to join the multiple informations for trial, the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, either that the evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors." *State* v. *Payne*, supra, 303 Conn. 549–50. We reasoned that "the presentation of evidence of a defendant's previous crimes or misconduct is inherently prejudicial unless that evidence would be legally relevant to the case on some other basis. . . . [T]he interest in judicial economy weighs differently,

depending upon whether the evidence in the cases joined for trial is cross admissible. . . . The argument for joinder is most persuasive when the offenses are based upon the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when the cases are not of the same character, the argument for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[ing] any real savings in time or efficiency which might otherwise be provided by a single trial." (Citations omitted; internal quotation marks omitted.) Id., 548–49.

We further explained in *Payne* that: "Despite our reallocation of the burden when the trial court is faced with the question of joinder of cases for trial, the defendant's burden of proving error on appeal when we review the trial court's order of joinder remains the same. . . . [I]t is the defendant's burden on appeal to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . . ." (Citation omitted; internal quotation marks omitted.) Id., 550 n.11. It is important to note that, although we have shifted the burden of proof to the state in the trial court, that even after *Payne*, our appellate standard of review remains intact. Accordingly, "[i]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb." (Internal quotation marks omitted.) Id., 544.

In the present case, when it granted the motion for joinder, the trial court applied the following standard and considerations in concluding that joinder was proper. The court stated that § 54-57 permits joinder of cases that are pending at the same time against the same party in the same court, for offenses of the same character. Further, the trial court stated that there is a clear presumption in favor of joinder for purposes of judicial economy. The court considered the alleged conduct of the defendant in these cases in light of the second *Boscarino* factor and stated that it would "not at all quantify these as shocking." The court also stated that there was some cross admissibility of evidence between the two cases with respect to the nonassault offenses, and that proper jury instructions would alleviate any potential prejudice with respect to the joinder of the assault offenses. Later, at the close of trial, the trial court instructed the jury that the two cases were joined at trial for purposes of judicial economy, that each case and each count must be considered separately, and that the jury was not to draw any negative inferences from the joinder of the two cases. The trial court further explained one exception to that instruction where the evidence was cross admissible, specifically, the evidence that the state claimed established

that the defendant had violated a protective order, as alleged in counts two, three or four of the Washington case, which also was evidence being used by the state to establish the crime of violation of the conditions of release in the first degree, as alleged in count two of the Hazard case.

It is clear that, in light of *Payne*, the trial court should not have applied a presumption in favor of joinder. *State* v. *Payne*, supra, 303 Conn 547–49. That impropriety is not dispositive, however, in light of the trial court's determination that none of the *Boscarino* factors were present. Despite our clarification in *Payne*, the appellate standard of review—abuse of discretion—continues to grant the trial court substantial leeway to make alternative rulings in a variety of factual circumstances. On appeal, a defendant still "bears a heavy burden of showing that the denial of severance resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 286 Conn. 28. For the reasons set forth subsequently in this opinion, our review of the record persuades us that neither the burden allocation nor the presumption we have since disavowed made a difference in this case. Because we find no abuse of discretion in the trial court's decision to grant the state's motion for joinder on the ground that the evidence was cross admissible and, therefore, complied with the second prong of *Boscarino*, we determine that joinder of the Hazard and Washington cases was proper.[33]

"Whether one or more offenses involve brutal or shocking conduct likely to arouse the passions of the jurors must be ascertained by comparing the relative levels of violence used to perpetrate the offenses charged in each information." Id., 29–30. The defendant claims that a comparison of the alleged assault in the Washington case with the alleged assault in the Hazard case demonstrates that, contrary to the trial court's conclusion, the violence or conduct underlying the assault in the first degree charge in the Hazard case was brutal or shocking in nature and very likely inflamed the passions of the jurors. He argues that the conduct alleged in the assault in the first degree count in the Hazard case showed that the assailant, without provocation, punched Hazard in the face with his fists numerous times using "substantial force . . . ." The state alleged that Hazard was punched between twenty to thirty times in the face. The defendant further argues that the charge of assault in the third degree in the Washington case concerned an allegation that the defendant delivered a single punch to the right side of Washington's head, where Washington had a bump. The state, however, counters that the defendant's physical assaults of each of the victims were of a violent nature—he punched young, defenseless women in the face with a closed fist. Thus, the state argues, the offenses were

"of the same character." Similarity of character aside, the mere fact that the defendant's alleged conduct in the Hazard assault produced more serious injuries than did his alleged conduct in the Washington assault does not render the conduct in the assault on Hazard so shocking or brutal as to preclude joinder. The second factor in *Boscarino* permits joinder if, when comparing the defendant's conduct in separate incidents, his alleged conduct in one incident is not so shocking or brutal that the jury's ability to consider fairly and objectively the remainder of the charges is compromised. See *State* v. *Payne*, supra, 303 Conn. 551. We agree with the state that the conduct alleged in the Hazard assault was not so shocking or brutal that the trial court abused its discretion in ruling that the jury's ability to provide the defendant with a fair trial in the Washington case was not compromised by joinder.

In support of his argument, the defendant places great reliance upon *State* v. *Ellis*, 270 Conn. 337, 376–77, 852 A.2d 676 (2004). *Ellis*, however, is distinguishable from the present situation. In *Ellis*, we held that the trial court had erred in its joinder of three sexual assault cases. Id. One case involved convictions of attempted sexual assault in the first degree, three counts of sexual assault in the fourth degree, two counts of risk of injury, three counts of risk of injury to a child, and one count of harassment in the second degree. Id., 339–40. In the second case, the defendant was convicted of one count of sexual assault in the fourth degree and two counts of risk of injury to a child. Id., 341. With respect to the third case, the defendant was convicted of two counts of sexual assault in the fourth degree and two counts of risk of injury to a child. Id. We held that joinder was improper because the defendant's alleged conduct in the first case was substantially more egregious than his abuse of the other two minor girls, in that the sexual assault in the first case was far more frequent and severe. Id., 378. Moreover, unlike in *Ellis*, where the defendant had performed different acts of sexual assault on one particular victim, when compared to the other two victims, in the present case, the defendant performed the same act on both victims, namely, striking young women in the face with a closed fist, although he repeated this act several times in the Hazard case.[34] Thus, the defendant's reliance upon *Ellis* is misplaced.

The defendant also argues that *State* v. *Horne*, 215 Conn. 538, 549, 577 A.2d 694 (1990), applies. We disagree. In *Horne*, the trial court had joined three informations involving robbery in the first degree with another information regarding sexual assault in the first degree, sexual assault in the first degree with a deadly weapon and robbery in the first degree. Id., 542. We held that the cases should not have been joined because "[t]he brutality with which the assailant carried out the robbery and sexual assault in [one of the cases] was very likely to have so aroused the passions of the jury that

it interfered with their fair consideration of the other three [robbery in the first degree] cases. We have acknowledged that evidence of a defendant's brutal or shocking conduct in one case may compromise the jury's ability to consider fairly the charges against him in other unrelated, but jointly tried cases." (Internal quotation marks omitted.) Id., 549. We did note, however, that the trial court, on remand, could exercise its discretion and join the other three robbery in the first degree cases. Id., 553. *Horne* is inapposite to the present case because of the shocking and brutal nature of the sexual assault committed in the course of one of the robberies. The other three robberies in *Horne*, like the alleged conduct involved in the assaults in the present case, however, were similar enough to justify joinder.

To be sure, the act of striking another with a closed fist is a violent and brutal act, but in *State* v. *Jennings*, 216 Conn. 647, 659, 583 A.2d 915 (1990), we noted that "while any murder involves violent, upsetting circumstances, it would be unrealistic to assume that any and all deaths are inevitably so 'brutal and shocking' that a jury, with proper instructions to treat each killing separately, would be prejudiced by a joint trial . . . ." The trial court found that, although the punching was repeated many times in the Hazard case, the defendant's conduct was "not at all . . . shocking." Our review of the record reveals no basis to conclude that the trial court could not reasonably so find, and therefore we can find no basis to conclude that the trial court's finding was an abuse of discretion. Therefore, the decision to join the cases was not improper.[35] Accordingly, we affirm the judgment of trial court with respect to the Washington case.

IV

Although we have concluded that the judgment in the Washington case should be affirmed, our reversal of the defendant's convictions in the Hazard case affects the sentencing in the Washington case. In the Washington case, the defendant was sentenced to one year on the assault in the third degree charge (count one) and five years each on two separate counts of violating a protective order (counts two and four). Count two was to run concurrently with count one. Count four was to run concurrently with counts one and two. All of the sentences were to run concurrently with the twenty-five year sentence, suspended after eighteen years, received in connection with the persistent dangerous felony offender conviction. In view of the fact that we are reversing the assault in the first degree conviction and, consequently, the convictions of being a persistent dangerous felony offender and violating conditions of release in the first degree, and the fact that we are directing the trial court to render judgment of acquittal on those charges, we must remand convictions reached in connection with the Washington case for resentenc-

ing. This court has "endorsed the Appellate Court's adoption of the 'aggregate package' theory of sentencing. See *State* v. *Raucci*, 21 Conn. App. 557, 563, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990). Pursuant to that theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact. . . . Thus, we must remand this case for resentencing on the sole count[s] on which the defendant stands convicted." (Citation omitted.) *State* v. *Miranda*, 274 Conn. 727, 735 n.5, 878 A.2d 1118 (2005).

The judgment in the Hazard case is reversed and the case is remanded with direction to render judgment of acquittal on all counts in that case. The judgment in the Washington case is affirmed, but the sentence is vacated and the case is remanded with direction to resentence the defendant in accordance with this opinion.

In this opinion ROGERS, C. J., and HARPER and VERTEFEUILLE, 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] General Statutes § 53a-61 (a) provides: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon."

[2] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

[3] General Statutes § 53a-222 provides in relevant part: "(a) A person is guilty of violation of conditions of release in the first degree when, while charged with the commission of a felony, such person is released pursuant to subsection (b) of section 54-63c, subsection (c) of section 54-63d or subsection (c) of section 54-64a, and intentionally violates one or more of the imposed conditions of release. . . ."

[4] General Statutes (Rev. to 2007) § 53a-40 provides in relevant part: "(a) A persistent dangerous felony offender is a person who:

"(1) (A) Stands convicted of manslaughter, arson, kidnapping, robbery in the first or second degree, or assault in the first degree, and (B) has been, prior to the commission of the present crime, convicted of and imprisoned under a sentence to a term of imprisonment of more than one year or of death, in this state or in any other state or in a federal correctional institution, for any of the following crimes: (i) The crimes enumerated in subparagraph (A) of this subdivision or an attempt to commit any of said crimes . . . ."

The defendant's conviction of assault in the first degree in the present case, along with his conviction of robbery in the first degree in 1998, provided the factual predicate for the persistent dangerous felony offender charge contained within in the second part of the information in the Hazard case.

[5] The trial court rendered judgment sentencing the defendant to a total effective sentence of twenty-five years, execution suspended after eighteen years, and five years probation. Although he was statutorily entitled to appeal directly to this court under General Statutes § 51-199 (b) (3), the defendant appealed from the judgment of the trial court to the Appellate Court. Thereafter, pursuant to the defendant's motion, we transferred the appeal to this court pursuant to § 51-199 (c) and Practice Book § 65-2.

[6] We note that the information for the charge of assault in the first degree

alleged that the defendant intended to cause serious physical injury and did cause such injury by "punching [Hazard] repeatedly in the face with his fists" but did not reference kicking, with a shod foot or otherwise. Accordingly, we do not determine whether a shod foot is a "dangerous instrument" for purposes of a charge of assault in the first degree.

[7] General Statutes § 53a-3 provides in relevant part: "(7) 'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury, and includes a 'vehicle' as that term is defined in this section and includes a dog that has been commanded to attack, except a dog owned by a law enforcement agency of the state or any political subdivision thereof or of the federal government when such dog is in the performance of its duties under the direct supervision, care and control of an assigned law enforcement officer . . . ."

[8] See footnote 7 of this opinion.

[9] Should we determine that the text of § 53a-3 (7) and its relationship to other statutes does not clearly and unambiguously support his construction of the word "instrument" in § 53a-3 (7), the defendant maintains that the state's construction would make apparent distinctions between several criminal statutes meaningless, thus leading to unworkable and absurd results. Accordingly, should we employ extratextual sources to determine the intent of the legislature, the defendant argues that traditional canons of statutory construction favor his construction of the word "instrument," as well. First, the defendant contends that the state's construction would be contrary to the rule that criminal statutes are to be strictly construed. Second, he contends that the state's construction would be contrary to the rule of lenity. The rule of lenity commands a court to resolve any ambiguity in a criminal statute in favor of the defendant. See, e.g., *McNally* v. *United States*, 483 U.S. 350, 375, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987); *State* v. *Sostre*, 261 Conn. 111, 120, 802 A.2d 754 (2002).

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

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

[12] General Statutes § 53a-3 provides in relevant part: "(3) 'Physical injury' means impairment of physical condition or pain;

"(4) 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ."

[13] General Statutes § 53a-3 provides in relevant part: "(6) 'Deadly weapon' means any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles. The definition of 'deadly weapon' in this subdivision shall be deemed not to apply to section 29-38 or 53-206 . . . ."

[14] General Statutes § 53a-133 provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

[15] Noscitur a sociis translates from Latin, "it is known by its associates . . . ." (Citations omitted; internal quotation marks omitted.) *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, U.S. , 130 S. Ct. 1396, 1402, 176 L. Ed. 2d 225 (2010).

[16] "[Ky. Rev. Stat. Ann. §] 508.010 provides that a person is guilty of first-degree assault when he intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

"[Ky. Rev. Stat. Ann. §] 500.080 (3) defines 'dangerous instrument' to mean any instrument, article or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." *Roney* v. *Commonwealth*, supra, 695 S.W.2d 864.

Five years after *Roney* was decided, Kentucky's legislature amended Ky. Rev. Stat. Ann. § 508.080 (3) (Michie 1990), to define " '[d]angerous instrument' " to mean "any instrument, *including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body*, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury . . . ." (Emphasis added.) We note that this amendment does not cause the statutory merger problems we note under the broad definition, because it permits a jury to find that, in causing a serious physical injury, the body part *indirectly* caused serious physical injury, thereby taking the crime out of the realm of assault in the first degree.

[17] General Statutes § 53a-18 (6) provides in relevant part: "A teacher or other person entrusted with the care and supervision of a minor for school purposes may use reasonable physical force upon such minor when and to the extent he reasonably believes such to be necessary to . . . (B) obtain possession of a dangerous instrument or controlled substance . . . upon or within the control of such minor . . . ."

[18] This court's reasoning was as follows: "When the evidence supports a finding that a beating with fists and with a stick, in combination, caused such serious impairment to the health of a victim as to render her unconscious, it is not necessary for the victim to be able to recall with precision what blows caused her injuries. Although the victim could not remember how often the defendant had hit her with the stick, she did recall that he had hit her with the stick at least once. She also testified that the defendant had stood over her, stick in hand, while she was lying on her back, before she lost consciousness. The jury could infer from this testimony, in conjunction with its examination of the stick, which was in evidence, that the state had proved assault in the first degree beyond a reasonable doubt." *State* v. *Joyner*, supra, 225 Conn. 456.

[19] Although a substantial minority of our sister states permits fists, feet, teeth and other body parts to constitute dangerous instruments, a larger number preclude body parts from being considered as a dangerous instrument. In five of the fifteen jurisdictions that permit body parts to constitute dangerous instruments, the statutory language is completely different. In Kentucky, the statute was amended five years after *Roney* v. *Commonwealth*, supra, 695 S.W.2d 863, to expressly include "parts of the human body . . . ." Ky. Rev. Stat. Ann. § 500.080 (3). In Colorado, the statute refers to "animate" or "inanimate" instruments; Colo. Rev. Stat. § 18-1-901 (3) (e) (iv) (2011); and three other states provide for a "use oriented" test by providing "anything that, under the circumstances in which it is used, attempted to be used or threatened to be used, is capable or causing death or serious physical injury" or similar wording. Alaska Stat. § 11.81.900 (15) (2010); N.M. Stat. § 30-1-12 (B) (2004); Tex. Penal Code Ann. § 1.07 (17) (B) (Vernon 2011). Our decision in the present case, while buttressed by similar holdings in seventeen states including New York, upon whose Penal Code ours is based, is nonetheless compelled by the clear and unambiguous meaning of dangerous instrument contained in our statute as illuminated by the term's relationship to our other criminal statutes.

We further reject the state's argument that the definition of dangerous instrument should be left for individual juries to decide on the basis of the facts presented in each case. The interpretation of a statute is a question of law for us to decide in light of both the statutory language and the relationship of the definition to the statutory scheme.

[20] The test used for determining whether one crime is a lesser included offense of another crime is "whether it is not possible to commit the greater offense, in the manner described in the information . . . without having first committed the lesser . . . . This . . . test is satisfied if the lesser offense does not require any element which is not needed to commit the greater offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Greco*, 216 Conn. 282, 292, 579 A.2d 84 (1990).

[21] Although the dissent claims that our analysis is flawed because of "its reliance on the methodology that we used in [*Sanseverino*] to resolve the issue of whether, under the highly unusual facts and procedural posture of that case, the state was entitled to imposition of a conviction of a lesser

included offense despite the fact that the jury had not been instructed on that offense," we note that the position taken by the dissent was not raised by either the state or the defendant. Neither party contended that the state's failure to request a lesser included charge was irrelevant to the propriety of modifying the defendant's conviction or that the analysis we undertook in *Sanseverino* could not be applied to the present case.

[22] See footnote 4 of this opinion.

[23] In *Sanseverino*, we acknowledge that the United States Supreme Court noted the *Allison* test with approval in *Rutledge* v. *United States*, 517 U.S. 292, 305 n.15, 306, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). *State* v. *Sanseverino*, supra, 291 Conn. 592. In *Rutledge*, however, the issue was whether a defendant could be concurrently punished for the same offense under multiple criminal statutes. The *Rutledge* court concluded that multiple punishments were not necessary because, inter alia, "[a] jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense." *Rutledge* v. *United States*, supra, 306 n.16. Accordingly, *Rutledge* cannot be fairly characterized as standing for the proposition that the test set forth in *Allison* may be applied where the lesser included offense is not charged to the jury.

[24] Neither is the test itself as straightforward as the state has suggested. "In *Austin* [v. *United States*, 382 F.2d 129 (D.C. Cir. 1967)], we construed 28 U.S.C. § 2106 (1964) [which provides in relevant part: 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court . . . and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances'] as authorizing federal appellate courts to modify a criminal judgment by reducing the conviction to that of a lesser included offense. We emphasized, however, that the circumstances in which such authority may be exercised are limited. It must be clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which [the] appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused." *Allison* v. *United States*, supra, 409 F.2d 450–51. First, the authority to modify the conviction in *Allison* was grounded in a federal statute; id.; to which, in the present case, the state has not cited any applicable analog. Second, the court emphasized that such authority may only be exercised in limited circumstances. Id. Third, "[i]t must be clear" that all four prongs are satisfied.

[25] The dissent's reliance upon *Greene* is similarly misplaced, given our treatment of that case in *Sanseverino*.

[26] See footnote 4 of this opinion.

[27] "[T]here is a distinct split of authority on this question among both state and federal courts. Some courts have held that it is appropriate for an appellate court to order the modification of a judgment to reflect a conviction of a lesser included offense, even in the absence of a jury instruction on that lesser offense, when it is not unfair to the defendant to do so. See, e.g., *United States* v. *Hunt*, 129 F.3d 739, 745–46 (5th Cir. 1997) (modification of judgment permissible despite fact that trial court did not instruct jury on lesser included offense if, inter alia, such modification would not result in undue prejudice to defendant); *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (same); *Allison* v. *United States*, supra, 409 F.2d 451 (same); *Shields* v. *State*, 722 So. 2d 584, 586–87 (Miss. 1998) (same); see also *People* v. *Patterson*, 187 Colo. 431, 437, 532 P.2d 342 (1975) (modification of judgment appropriate because, '[e]ven though the jury was not instructed as to the lesser included offense, the defendant [was] given his day in court,' '[a]ll of the elements of the lesser included offense [were] included in the more serious offense,' and '[h]is guilt of the lesser included offense [was] implicit and part of the jury's verdict'); *State* v. *Farrad*, 164 N.J. 247, 266, 753 A.2d 648 (2000) ('[a] guilty verdict may be molded to convict on a lesser-included offense . . . if [1] [the] defendant has been given his day in court, [2] all the elements of the lesser included offense are contained in the more serious offense and [3] [the] defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict' . . .). Other courts have barred such a modification unless the jury has been instructed on the lesser included offense. See, e.g., *United States* v. *Dhinsa*, 243 F.3d 635, 675–76 (2d Cir.) (remand for modification of judgment to reflect lesser included offense permissible only if jury had been instructed on that offense), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001); *United States* v.

*Vasquez-Chan*, 978 F.2d 546, 554 (9th Cir. 1992) (same); *Ex parte Roberts*, 662 So. 2d 229, 232 (Ala. 1995) (same); *State* v. *Villa*, 136 N.M. 367, 371, 98 P.3d 1017 (2004) (same); *State* v. *Brown*, 360 S.C. 581, 594, 602 S.E.2d 392 (2004) (same)." *State* v. *Sanseverino*, supra, 291 Conn. 593–95; see also *United States* v. *Spinney*, 65 F.3d 231, 235 n.3 (1st Cir. 1995) (suggesting lesser included offense instruction is prerequisite to reduction of conviction to lesser included offense); *United States* v. *Dinkane*, 17 F.3d 1192, 1198 (9th Cir. 1994) (requiring showing trial court explicitly instructed jury it could convict defendant of lesser included offense and an instruction setting forth the elements of the lesser-included offense); *United States* v. *Mitcheltree*, 940 F.2d 1329, 1352 n.17 (10th Cir. 1991) (suggesting remand with order to enter judgment on lesser included offense is appropriate only when lesser-included offense was proper); *United States* v. *Powell*, 220 Fed. Appx. 805, 813 (10th Cir. 2007) (following *Mitcheltree*).

[28] As previously explained, many of those courts that make a case-by-case determination based upon fairness do so by applying the test first articulated in *Allison* v. *United States*, supra, 409 F.2d 451. See, e.g., *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993). It is unsurprising that courts applying a test articulated in a case of a *charged* lesser included offense tend to conclude that resentencing is not unfair.

[29] Other states have similarly overlooked the importance of the defendant's concession in *Hunt*. See, e.g., *Shields* v. *State*, 722 So. 2d 584, 587 (Miss. 1998) ("the [court in *Hunt*] held that although the fact that no instruction was before the jury was certainly relevant [to the question of prejudice under] *Allison*, it was not a separate requirement, nor was it a condition precedent to the application of the direct remand rule").

[30] In *State* v. *Sanseverino*, supra, 291 Conn. 594 n.16, we quoted a case from our sister state of South Carolina, *State* v. *Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004), that provides a comprehensive statement of reasons in support of its conclusion that a jury instruction on the lesser included offense is a necessary prerequisite to the modification of a judgment of conviction. Those reasons bear repeating today: "First, an appellate court does not sit as a [fact finder] in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box. . . .

"Second . . . this view preserves the important distinction between an appellate determination [that] the record contains sufficient evidence to support a guilty verdict and a jury determination [that] the [s]tate proved its case beyond a reasonable doubt. . . .

"Third, when [a jury instruction on the lesser offense has been given] . . . it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law . . . and . . . that the appellate court is simply passing on the sufficiency of the implied verdict. When, however, no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative. . . .

"Fourth, when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense. . . .

"Fifth, adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the [s]tate to avoid requesting or agreeing to submit a lesser included offense to the jury. . . .

"Sixth, the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an all or nothing approach at trial, but then on appeal, perhaps recognizing [that] the evidence will not support a conviction on the greater offense, is allowed to abandon its trial position and essentially concede [that] the lesser included offense should have been submitted to the jury. . . .

"Seventh . . . [t]he defendant may well have [forgone] a particular defense or strategy due to the trial [court's] rejection of a lesser included offense." (Citations omitted; internal quotation marks omitted.) Id., 594–97.

The reasons cited by South Carolina for its adoption of the bright line rule against such modifications suggest that it concluded that it is always unfair to the defendant to do so. While we declined, in *Sanseverino*, to adopt either the bright line rule or even to specify an exclusive list of factors we will consider in an analysis of the fairness of the modification of a judgment of conviction where the lesser included offense was never charged, the application of the rationales noted in *Brown*, in particular those expli-

cated by Chief Justice Rogers in her concurrence; *State* v. *Sanseverino*, supra, 291 Conn. 598–604; to the circumstances of any particular matter before us are, at a minimum, relevant to our determination of the fairness of a requested modification. We decline, however, to adopt these factors as an exclusive list of what we will consider in an analysis of fairness.

Further, we remain unconvinced by Justice Katz' analysis of this issue in *Sanseverino*, echoed in the opinion of the dissent in the present case, that would effectively create a bright line rule permitting appellate modification in this type of case and place a heavy burden on a defendant to demonstrate prejudice. Id., 604–17 (*Katz*, *J.*, concurring in part and dissenting in part). Justice Katz' dissent in *Sanseverino* builds on the majority's conclusion that modification may be proper in the absence of a showing of unfairness to the defendant by analyzing our lesser included offense jurisprudence to determine where, as a general matter, prejudice may be found. Justice Katz' analysis, which is substantially based upon our cases where the jury *was* charged with a lesser included offense, suggests that in the absence of a fair trial and proper jury instructions on the elements of the lesser included offense, modification cannot result in prejudice because a defendant is on notice of the possibility of lesser included offense charges simply by virtue of the greater charge. Id., 616–17 n.6. This analysis "ignores several important factors" in the majority's holding in *Sanseverino*; id., 597 n.18; and fails to credit the reasons why many courts have concluded that the state's failure to seek a lesser included offense charge in these circumstances matters, and therefore that either it is never proper for an appellate court to remand to the trial court with direction to modify the judgment of conviction to reflect a conviction of an uncharged lesser included offense, or it is only proper in limited circumstances, such as were present in *Sanseverino*. The dissent in the present case renews Justice Katz' analysis, similarly relying primarily upon cases where the jury was charged with the lesser included offense or applying the *Allison* test. For example, the dissent claims support from Justice Katz' observation in *Sanseverino* that "[i]n *State* v. *Grant*, [177 Conn. 140, 147, 411 A.2d 917 (1979)], and *State* v. *Saracino*, [178 Conn. 416, 421, 423 A.2d 102 (1979)], we held that even the trial evidence did not support the defendant's conviction of the offense charged, we were free to modify the judgment to reflect a conviction of a lesser crime. We came to this conclusion because the evidence was sufficient to support a conviction of a lesser included offense *on which the jury properly had been charged* and the jury's verdict necessarily included a finding that the defendant was guilty of that lesser offense." (Emphasis added.) *State* v. *Sanseverino*, supra, 291 Conn. 607. We affirm our holding in *Sanseverino* that whether a jury is charged with a lesser included offense matters.

[31] We note that this issue was properly preserved for appellate review. The defendant filed an objection to the state's motion to join the Hazard and Washington cases. After hearing argument on the issue, the trial court granted the state's motion to join the Hazard case and the Washington case.

[32] General Statutes § 54-57 provides: "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise." We have explained that "[§] 54-57 is directed at prosecutors, and governs the circumstances under which they may join multiple charges in a single information." *State* v. *Payne*, supra, 303 Conn. 547.

[33] Although the trial court found some cross admissibility of evidence between the charges of violations of conditions of release in the Hazard case and violations of a protective order in the Washington case, that court did not find cross admissibility of any evidence in regard to the assault charges in each case. It was the joinder of the two assault charges that the defendant objected to at trial and again on appeal. Therefore, the finding of some cross admissibility of evidence does not end our inquiry. Because the evidence in the assault charges was not cross admissible, the trial court was obliged to consider the presence of the *Boscarino* factors in determining if substantial prejudice could result from joinder.

[34] Moreover, we noted in *Ellis* that improper joinder was not harmless because "the court instructed the jury that it could consider the significantly more egregious evidence of abuse in the case of [one victim] to convict the defendant in the cases of [the two other victims]." *State* v. *Ellis*, supra, 270 Conn. 379. In the present case, even if we found joinder was improper, the trial court repeatedly advised the jurors that they must consider both cases, indeed each count in each case, separately.

[35] Only when an appellate court determines that it was an abuse of the

trial court's discretion to join cases for trial, does the appellate court turn to a review of the trial record to determine if the improper joinder was harmless. *State* v. *Payne*, supra, 303 Conn. 538 n.11.